



Environment and Heritage Legislation Amendment Bill (No.1) 2006

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Law and Bills Digest Section

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Environment and Heritage Legislation Amendment Bill (No.1) 2006

Date introduced: 12 October 2006

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: The vast majority of the Bill commences on a day to be fixed by Proclamation, or six months after Royal Assent, whichever is the sooner. Some transitional items relating to the Register of the National Estate do not commence for at least five years.

Purpose

To introduce significant changes to the *Environment Protection and Biodiversity Conversation Act 1999*.

Background

The *Environment Protection and Biodiversity Conversation Act 1999* (the EPBCA) is the major piece of Commonwealth environment legislation. When first enacted, it effectively replaced several Commonwealth Acts and brought their subject matter into the EPBCA. This ‘centralisation’ process has continued since with several amendments bringing the EPBCA to well over 700 pages.

Whilst the EPBCA covers many issues, there are probably three key components:

- provisions requiring the approval of the Commonwealth Minister for Environment and Heritage (the Minister) for actions that may have significant impacts on, amongst other things, ‘matters on national environmental significance’
- provisions dealing with biodiversity conservation, including endangered flora and fauna, migratory and other protected species, international trade and movement of wildlife specimens, and
- provisions dealing with protected areas, particularly World, National and Commonwealth Heritage places, and Commonwealth reserves.

In 2002-03, the ‘referrals, assessments and approvals’ aspects of the EPBCA (essentially the provisions mentioned in the first dot point above) were the subject of a performance audit by the Australian National Audit Office (the ANAO). At that stage the EPBCA had only operated for two years. The relevant [report](#) made only six recommendations, to which

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the Department of Environment and Heritage (DEH) agreed to all. Arguably the most important recommendations were to strengthen compliance and enforcement procedures.

The ANAO is currently undertaking another performance audit, this time on the 'Protection of Critical Habitat and Listed Threatened Species' provisions (which are encompassed within the second dot point). This ANAO report is expected to be tabled late this year, or possibly early in 2007.

According to the government, the changes to the EPBC Act will:¹

- ensure matters of national environmental significance continue to receive the highest possible level of protection
- cut red tape and enable quicker and more strategic action to be taken on emerging environmental issues
- provide greater certainty for industry
- make environmental decision-making more efficient and cost-effective
- strengthen the enforcement provisions of the Act
- encourage the use of regional plans to create more certainty about the outcomes of environmental decisions, and
- increase the general understanding of the processes and mechanisms of the EPBC Act.

The Government has been criticised by a number of witnesses giving evidence to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts (the Senate Committee) inquiry into the Bill over a perceived lack of time to review the Bill.² Government Members in the Committee have considered the Bill is partly the result of ongoing consultation with various stakeholders, including environment NGOs.³ The Explanatory Memorandum suggests that as the Bill 'does not impose new regulatory requirements' previous consultation with stakeholders on the EPBCA is 'adequate and sufficient'.⁴ However, given the length and complexity of the Bill, it is certainly arguable that it could have been released as an exposure draft Bill, or alternatively a longer period could have been allowed for submissions to the Senate inquiry process.

There is no doubt that the Bill gives the Minister more discretion about priorities for protecting biodiversity and heritage matters. In some cases this involves deleting certain existing obligations and replacing them with optional provisions or making it more difficult to seek review of some decisions made under the EPBCA. Some witnesses providing evidence to the Senate Committee have considered this as an increased 'politicisation' of statutory processes⁵ although some saw such decisions 'by [their] nature political'.⁶ Others suggested that a lack of government resources available to implement the EPBCA is at least partly behind these changes.⁷ By contrast, the Government has generally characterised these amendments as resulting in resources being allocated where they can have most environmental benefit.

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Another area of contention is the expansion of ways in which agreements or planning instruments may allow some proposals to avoid the need for specific Ministerial approval under Part 9 of the EPBCA. Critics suggest this will reduce scrutiny of proposals.⁸ By comparison, the government has said that larger-scale planning and assessments are needed and there are sufficient safeguards to minimise the possibility of inappropriate proposals going ahead.⁹

The Bill was also the subject of a report by the Senate Scrutiny of Bills Committee. The relevant [Alert Digest](#) (No.12 of 2006) expressed concern about the lack of explanation or justification in the Explanatory Memorandum for some amendments, including those creating strict liability offences. The Digest also expressed concerns about the detention, search and seizure provisions introduced by **item 835**.

Given the length of the Bill, at over 400 pages, the description and analysis of the more significant changes have been grouped together in the Main Provisions section of this Digest under a number of loose 'themes' rather than in numerical order. The themes are:

- Matters of national environmental significance - environmental assessment and Ministerial approval
- Biodiversity Conservation
- National and Commonwealth Heritage
- Encouraging the take-up of Strategic Planning, Conservation Agreements etc
- Extending or restricting liability for the actions of others
- Enforcement , and
- Miscellaneous

This Digest does not discuss the application, saving and transitional provisions contained in Schedule 2 of the Bill. However, it is worth noting that items relating to the Register of the National Estate do not commence for five years after the main part of the Bill comes into force. Also, given that the assessment and decision-making processes relating to Part 9 approvals can take some time to complete, Part 2 of Schedule 2 sets out how the commencement of the Bill is to apply to incomplete processes. In some instances, the Minister may have discretion in this regard (see **item 4** of Schedule 2).

Financial implications

The Explanatory Memorandum notes that implementation of the amendments will incur some administrative costs, but no estimate of this is provided.¹⁰

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Main provisions

Matters of national environmental significance - environmental assessment and Ministerial approval

In Part 3 of the EPBCA, a range of matters (including matters of national environmental significance, or MNES) are protected by generally requiring the Minister to give approval under Part 9 before actions can be taken that significantly impact on these. Examples of MNES include World and National Heritage properties, Ramsar wetlands, Commonwealth list threatened species and ecological communities and certain nuclear-related actions such as research reactors, uranium mining or milling and waste disposal or storage facilities. Actions by the Commonwealth that may have environmentally significant impacts also generally require Ministerial approval under Part 9. In certain cases, where the particular place where the proposed action is has been subject to some previous assessment or planning process, or is covered by some other agreement, Ministerial approval may not be required.

There are three key stages in the usual Part 9 approval process. First, determining whether Ministerial approval is actually required for the proposed action - if so, the proposal is called a 'controlled action'. The second stage is determining what environmental assessment approach is appropriate for the proposal. Finally, the Minister must obviously make a decision whether to approve the proposal once the assessment has been received, and if so, under what conditions.

The amendments contained in the Bill affect all three of these stages. Some are relatively significant in affecting the way the EPBCA might operate in relation to particular types of proposals. Others introduce some more administrative flexibility into the process.

Item 322 inserts **new section 158A** so that that 'listing events' (new or changes to status of listed threatened species, World or National Heritage properties etc.) do not affect the question of whether an action is a controlled action (and thus generally requiring Ministerial approval under Part 9) once the Minister has made a decision whether it is a controlled action. For example, if the Minister decides that a proposal is not a controlled action on March 1, and then the area in which the proposal was to take place was put on the National Heritage list on March 2, the listing would not affect the legal validity of the Minister's decision. The Explanatory Memorandum suggests that the amendment just removes any legal uncertainty on the issue rather than changing the operation of the EPBCA.¹¹

Item 783 inserts **new section 527E** to define what is an 'impact'. The Explanatory Memorandum comments:¹²

The purpose of the amendment is to clarify the extent to which impacts [that are the]... *indirect consequences of actions* must be considered or dealt with under the Act. [emphasis added]

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This amendment is concerned with the major issues that arose in the 2003 Federal Court case of *Queensland Conservation Council Inc v Minister for the Environment and Heritage* (The Nathan Dam case).¹³ In that instance, the Minister was asked to approve the construction of a dam and in doing so he only considered the impacts of the construction and operation of the dam. The Court ruled that the Minister should have also considered the environmental impacts resulting from the actions of certain third parties (in that case, pesticide run-off from irrigated properties) that would use water from the dam.

Whilst the legal test regarding indirect impacts in the new section 527E is complex, it can be paraphrased as:

Where a primary action significantly facilitates a secondary action, and that facilitation is reasonably foreseeable, and the environmental impacts of the secondary action are also reasonably foreseeable, then those impacts are taken to be impacts of the primary action.

This means the environmental impacts of the secondary action would have to be taken into account, for example, in assessing whether a primary action was a controlled action and thus probably requiring Ministerial approval under Part 9 of the EPBCA. **New section 527E** is broadly consistent with the Federal Courts decision in the Nathan Dam case. However, the impact of the amendment is affected by **items 68 and 84** discussed later in this digest.

Item 189 inserts **new subsections 75(2A) and (2B)** which are designed to restrict, in certain limited circumstances, the sort of adverse impacts the Minister can consider in deciding whether an action is a controlled action.

In particular, under **new subsection 75(2B)** if the proposed action is, for example, for a factory that uses timber sourced from a forestry operation that is covered by a Regional Forestry Agreement (RFA), the adverse impacts of the forestry operation cannot be considered by the Minister in making a decision as to whether the proposal is a controlled action.

Item 178 allows the proponent to include a range of alternative actions when referring a proposal to the Minister for a decision as to whether any or all of these alternatives are controlled actions.

After receiving a referral of a possible controlled action, existing section 74 requires the Minister to seek comments on various matters from a range of sources depending on the location, nature and possible environmental impacts of the proposal. **Items 179-180** increase the obligations of the Minister in this regard.

Currently, the Minister can, under limited circumstances, reconsider (and potentially change or vary) his or her decision about whether a proposal is a controlled action. This can be done on the Minister's own initiative, or at the request of the State or Territory

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government in which the proposal is located. **Item 198** inserts **new section 78A** which enables other persons (such as a member of the public or the proponent) to request a reconsideration. The Minister must invite interested persons (such as the proponent and relevant State, Territory or Commonwealth Ministers) to comment within 10 business days before reconsidering the original decision. The actual grounds on which the Minister may change or vary his or her decision have been amended by **item 195**, but they do not appear to be major changes.

Item 217 introduces some relatively significant amendments to the environmental assessment provisions in the Part 8 of the EPBCA.

There are currently four methods ('approaches' in the language of the EPBCA) by which a controlled action may be assessed in Part 8. At the low (less complex) end of the spectrum, there is 'assessment on preliminary information'. **Item 217** adds a new approach that will now fall at the lowest end of the spectrum – 'assessment on referral information'. According to the Explanatory Memorandum:¹⁴

the purpose of this amendment is to increase the efficiency and flexibility of the Act by establishing a new level of assessment...and refining the processes for assessment on preliminary documentation.

It appears, depending on the circumstances, it may be that the information on which the Minister's decision whether to approve a proposal is the same in both 'assessment on preliminary information' and 'assessment on referral information'. This information is that supplied by the proponent in order for the Minister to make a decision as to whether the proposal is a controlled action. However, under the 'assessment on preliminary information' approach, the Minister may also request more information if he or she considers this necessary to properly assess the impacts of the action and how the proponent intends to mitigate them: **new section 95A**.

Item 210 provides that the Minister may only opt for 'assessment on referral information' if the proposal meets criteria set out in regulations. The public will still have an opportunity to comment on a proposal (actually it will be the DEH Secretary's recommendation report on the proposal) under this new level of assessment, but these comments must be received within 10 business days.

In the case of assessment on preliminary information, **item 217** now requires the proponent to publish a revised copy of the proposal that takes into account public comments¹⁵ (currently the proponent just gives the revised copy to the Minister).

Item 230 amends existing section 99 by requiring that the finalised Public Environment Report¹⁶ given to the Minister must contain a summary of public comments received during consultation on the draft report and how they have been taken into account in the report. **Item 243** makes similar amendments in relation to the provision governing Environmental Impact Statements.¹⁷

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Item 185 provides for a situation in which the Minister decides that a referred proposal would clearly have ‘unacceptable impacts’ on a matter protected by Part 3 of the EPBCA. As the Explanatory Memorandum states, the amendment:¹⁸

allows the Minister to make a prompt refusal...[and so] avoids the expense and time involved in conducting the full assessment and approval process.

The Minister can be requested by the proponent to reconsider the decision, in which case they must go through a process laid out in **new section 74D**.

Item 321 inserts a **new section 156A** and allows an action that has been referred for assessment to be varied without the need for resubmission. The Minister can only accept the variation if it does not significantly change the character of the original proposal, including the issue of whether there will be increase or change in the adverse impacts of the action on matters protected under Part 3. Under certain circumstances, the variation can be made right up to before the final decision of the Minister whether to approve the project or not. There is no additional public comment phase. If the Minister accepts the variation, he or she must publish a notice of this fact.

Where the Minister is deciding whether to approve a controlled action that involves a potentially significant impact on threatened species or ecological communities, **item 288** requires the Minister to have regard to ‘approved conservation advice’. See **item 469 later in this Digest** for the discussion of such advice.

Item 251 inserts **new sections 131AA and 131A**.

New section 131AA provides proponents with a ‘last minute’ opportunity to provide input into the Minister’s final decision under Part 9. In particular, if the Minister is intending not to approve the proposal, the proponent *must* be given the various documentation and other considerations on which the Minister is intending to rely. The Minister must take into account any comments provided by the proponent within 10 business days. The amendment appears to be a response to the ‘natural justice’ issues that were raised in appeals against the Minister’s decision to refuse the Bald Hills windfarm proposal in 2006. The Minister *may* also publish the intended decision (and any attaching conditions) on the internet and invite public comment within 10 business days: **new section 132A**. There is no explicit obligation to take into account any section 132A public comment.

Item 313 allows the Minister to consider applications to extend the period of Part 9 approval. It can only be extended if the Minister is satisfied that there will be no substantial increase or change in the adverse impacts of the action on matters protected. There is no explicit requirement for public notification of the application or provision for public comment. However, if the approval period is extended, the Minister must publish this fact.

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Item 293 inserts **new paragraph 143(1)(ba)**. This will allow the Minister to revoke, vary or add conditions to a Part 9 approval where the relevant controlled action is having, or likely to have, ‘substantially greater’ impacts on a Part 3 matter than was ‘identified’ in the assessment process leading up to the Minister’s original approval.

Existing sections 159-164 require a Commonwealth agency to seek non-binding advice from the Minister in situations where the agency is considering authorising foreign aid, or specified aircraft operations or airport developments which may have a significant impact on the environment. Currently, once the referral for advice is made to the Minister, Part 8 (the environmental assessment provisions) is triggered. **Item 327** inserts a new section 161A into the Act with the effect that the Minister may decide, on the basis of the referral information, there will be no significant impact and therefore Part 8 and other parts of the EPBCA will not apply. There is no provision for any person to request reconsideration of a decision that there will be no significant impact, although of course the Minister’s decision could be challenged under the *Administrative Decisions (Judicial Review) Act 1977*.

Items 123 to 128 amend section 43A of the EPBCA. Section 43A provides that certain actions which were ‘specifically authorised under the law’ before the EPBCA came into force are not required to have Ministerial approval under Part 9. The amendments appear to seek to clear up any doubt about the meaning of the provision, which was considered in 2004 Federal Court case *Minister for Environment and Heritage vs Greentree*. The amendment confirms the limited nature of exemption in that, as explained by the Explanatory Memorandum:¹⁹

the action must have been authorised under a *specific* environmental authorisation which relates to that particular action (by reference to acts and matters uniquely associated with that action) and not types, groups, or classes of actions.

Biodiversity Conservation

Items 366 and 368 amend the process for listing threatened species and ecological communities, and key threatening processes²⁰, which is currently contained mainly in existing section 191. According to the Explanatory Memorandum:²¹

The intent of the amendment is to reform the listing procedures to enable the Minister to set strategic assessment directions and priorities, following advice from the Threatened Species Scientific Committee, based on an approach that listing is focused on those species and ecological communities in greatest need of protection. This will allow the Minister to direct resources towards matters which will achieve the greatest conservation benefit.

The key changes to the listing process include the ability for the Minister to determine conservation themes (see new section 194D), and the dedicated period in which nominations may be submitted.

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Ultimately it is up to the Minister to determine what themes (eg particular regions, particular species or groups of species) are to be given priority in considering listing. However, the Minister may, and presumably will, request advice from the existing statutory [Threatened Species Scientific Committee](#) (the Committee) and may have regard to that advice under the new process set out in **new section 194A**. A public invitation to submit nominations is then made and any duly nominated must be passed on to the Committee for consideration. The Committee then prepares a priority list for assessment, having regard to the Minister's themes as well as its own independent view of priorities. This list is then considered by the Minister, who may make changes (including deletions etc) on any grounds he or she considers appropriate. Public comment is then sought on the list and then assessments are done by the Committee. The Minister then makes the final decision on whether to list the item, having regard to the Committee's assessment, and public comments, and any other advice or information the Minister has from any source.

Item 468 inserts new **Subdivision AA** of Division 5 of Part 13 to require the Minister to ensure there is 'approved conservation advice' for each listed threatened species and ecological community. Conservation advice must include information on the appropriate action that could be taken (if any) to stop the decline/support the recovery of the species or community. The Minister must consult with the Committee before adopting a document as approved conservation advice, but there is no explicit requirement to have regard to this advice. The Minister must have regard to approved conservation advice when making decisions relevant to a threatened species or ecological community – see **items 288, 384 and 443**.

Existing section 184 allows the Minister to amend the lists of threatened species and ecological communities and the list of key threatening processes. Currently amendments to these lists are disallowable by either house of Parliament. **Item 358** makes such amendments no longer disallowable.

Under existing section 184, when amending the list of various categories of threatened species, the Minister must not consider 'any matter that does not relate to the survival of the species concerned'. **Item 360** alters this restriction so that the Minister may [only consider] 'the effect that including the native species in that category could have on the survival of the native species'. Accordingly, if the Minister considers that the listing would not benefit the species, the Minister may decline to list it. **Item 361** makes the same amendment in respect of amending the list of ecological communities.

Item 471 inserts **new section 269AA** with the effect that it is no longer compulsory to have a recovery plan for a threatened species or ecological community. The Minister must have regard to the recommendation of the Scientific Committee in making this decision, which must be made within 90 days of listing.

If the Minister decides to develop a plan, but at some later stage is considering not to proceed with its development, or repeal a plan after one is made, the Minister must again have regard to the advice of the Committee and also any public comments received in

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response to a published notice inviting such comments. A recovery plan must normally be made within three years of the decision to make one, although the Minister may extend this deadline for another three years: **item 482**. The Explanatory Memorandum comments:²²

This amendment is to allow the Minister greater flexibility to respond to changing conservation needs of threatened species and ecological communities, but requires the Minister to make a timely initial decision on a species' or ecological community's recovery planning needs.

Item 486 inserts **new section 300B** so as to allow the Minister to request advice or information from the Committee for the purpose of assisting the Minister in making decisions under sections 266B, 269AA or 270A (these sections deal with conservation advice, recovery plans and threat abatement plans respectively).

Item 349 replaces the Minister's current *obligations* regarding surveys and inventories of threatened species and ecological communities on Commonwealth land and marine areas with a discretionary option if the Minister considers there is a particular need for these based on criteria set out in **new subsection 172(1)**.

Item 330 repeals section 165. Currently, if a person applies for a permit to take, import, export etc a cetacean, a Part 8 environmental assessment is required before the Minister can make a decision on the permit. Item 330 deletes this requirement and thus the permitting process will be similar to that applying to other species under Part 13. The Explanatory Memorandum comments that the current requirements have:²³

proved to be an over regulatory approach that has not delivered any additional measures in relation to the protection of cetacean species and placed added burden on permit applicants.

Government decisions on permits (and conditions attaching) for killing, injuring, taking etc threatened species and communities are currently subject to review by the Administrative Appeals Tribunal (AAT). **Items 386-88** remove this avenue of review where the relevant decision has been made personally by the Minister. The Explanatory Memorandum comments:²⁴

This leaves the merits of these important decisions to be dealt with by the Government.

Decisions made by a delegate of the Minister can still be reviewed by the AAT. Similar restrictions on AAT review are made by items **415, 448, 463-5, and 530**. Ministerial decisions could still be challenged under the *Administrative Decisions (Judicial Review) Act 1977*, but the challenges would be more on grounds of legal procedure – for example the Minister took impermissible factors into account in making the decision.

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Item 467 repeals section 266A of the Act which currently provides for a register of persons that are automatically notified when applications are made to the Minister for certain classes of Part 13 permits (say one that permitted the taking of a listed migratory species). Persons interested in commenting on such applications will now have to monitor the DEH's public notice website rather than relying on the Department to give them notice.

National and Commonwealth Heritage

Item 550 makes some significant changes to the nomination and listing process for the National Heritage List resulting in a more structured process. As expressed by the Explanatory Memorandum:²⁵

The new process enables the Minister to set themes, following advice from the Australian Heritage Council, based on an approach that listing is focussed on those places of potential National Heritage value, rather than being driven by the order in which nominations are received.

These themes will have priority during a 12-month assessment period. The Minister may request advice from the [Australian Heritage Council](#) (the Council) on possible themes, but is not required to have regard to it.

Under the proposed new process, a public notice for nominations is issued every year, with nominations open for at least 40 business days. Nominations must (subject to some exceptions) be given to the Council for assessment. The Council may also directly nominate properties. The Council then gives the advice to the Minister on which nominations should have priority for assessment, having regard to the Minister's themes as well as its own independent view of priorities and any other matters it thinks appropriate. The Minister may alter the list, having regard to any matters the Minister considers appropriate.

Once the priority list is finalised by the Minister, the list is published and public comment invited. The Council then assesses the nominations on the list, taking into account public comments. The Council must also take all reasonable steps to identify the owners or occupiers of the place, and if the place may have indigenous heritage values, indigenous persons that may have rights or interests, and give these people an opportunity to comment. The assessments are then given to the Minister for decision.

The Minister must have regard to the Council's assessment and any comments from the public and owners, occupiers and indigenous persons with interests or rights in the relevant place. The Minister may also seek advice or use any information from any source in making the decision. If the Minister decides to include the place on the National Heritage List, the owners/occupiers must be advised of the listing.

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The process for Commonwealth Heritage places is the same, except there is no provision for priority themes.

Places may be included on an interim basis on both the Commonwealth and National Heritage List under an emergency listing process. The process for these is broadly the same as the current process with some exceptions. For example, the threshold to qualify for the process is higher: the Minister must believe that the possible heritage values are under a 'likely and imminent' threat of significant adverse impact (currently they only have to be 'under threat'). Also, where the Minister is requested by another person to place a property on the emergency list and he or she decides against this, there is no requirement to notify the person or any give reasons for the decision.

Item 546 repeals section 324B so that overseas places cannot be placed on the National Heritage List. Instead, there will be a List of Overseas Places of Historic Significance to Australia (new Chapter 5A), inserted by **item 605**. The process for putting a place on the new list is very simple, reflecting the fact there are no legal implications from doing so – as the Explanatory Memorandum comments, the new list 'provides for symbolic recognition'.²⁶

Item 607 deletes the Minister's obligation to consider information in the Register of the National Estate in making decisions under the EPBCA. However, this item only comes into force five years after the majority of the Bill commences. Several other items in Part 2 of Schedule 1 of the Bill effectively repeal the current statutory recognition of the Register in the *Australian Heritage Council Act 2003*, but again there is a delay of five years before this come into force. The intent in the delay is to provide an ample time for items in the Register to be incorporated into State and Territory heritage regimes, although this is of course a decision for the respective jurisdictions.

Encouraging the take-up of strategic planning, Conservation Agreements etc

In introducing the Bill, the Hon. Greg Hunt MP stated that it was intended to:

provide greater incentives for authorities and proponents to engage in strategic assessments, bioregional planning and conservation agreements under the EPBC Act. While the EPBC Act currently provides for such strategic approaches, the take-up to date has been poor. Changes will make it easier for developments to be considered earlier in the planning process and in strategic and regional contexts. As these approaches are also likely to take state, territory and local government and regional natural resource management plans into account, they will provide a stronger and more strategic framework for environment and heritage protection.²⁷

Items 96-114 amend various parts of section 33 to substitute the terms 'accredited management arrangement' and 'accredited authorisation process' for the existing 'accredited management plan.' The importance of these provisions is that the Minister could declare that actions approved by the Commonwealth or a particular Commonwealth

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agency, in accordance with an accredited authorisation process or accredited management plan, do not require the Minister's approval under Part 9 of the EPCAA and thus don't need to go through a Part 8 assessment. To date, the only section 33 declarations that have been made relate to Commonwealth fisheries, and these only provide partial exemption from the need for Part 9 approval.²⁸

Obviously, these amendments will allow a broader range of instruments to be accredited than now possible. The conditions for accreditation remain essentially the same. In particular, they met the criteria set down by regulations²⁹, they must be tabled in Parliament before accreditation and are subject to Parliamentary disallowance in the usual way. In addition, the Minister may only accredit an arrangement or process if, amongst other things, he or she is satisfied that:

- there has been or will be adequate assessment of the impacts that actions approved in accordance with the arrangement or process might have on relevant Part 3 matters, and
- actions approved or taken in accordance with the arrangement or process will not have unacceptable or unsustainable impacts on relevant Part 3 matters

Even once an arrangement or process is accredited, a declaration by the Minister under existing section 33 that a Part 9 Ministerial approval is not required is subject to further conditions – these are set out in existing sections 34A-34F. The Bill makes an amendment at **items 116-117** to a particular condition that applies to declarations relating to listed threatened species and ecological communities – that the Minister must have 'regard to any approved conservation advice'. Declarations themselves are not disallowable by Parliament.

It will be the responsibility of the agency approving the individual actions to place particular conditions on that approval and they will presumably have primary responsibility to enforce compliance with them under whatever legislative powers that agency has. Should those conditions prove inadequate to mitigate any relevant environment impacts, the agency will have to rely on its own legislation to alter those conditions or revoke the approval. The powers that exist under the EPBCA to alter conditions etc will not be relevant as they only apply to Part 9 approvals. Section 33 declarations may be revoked, but if an action has already been approved under the relevant arrangement or process, the declaration has no effect on that action and thus no new Part 9 approval would be required.

Item 122 allows for the making of Ministerial declarations under **new section 37A** such that specified actions³⁰ taken 'in accordance' with bioregional plans do not require the Minister's approval under Part 9. as declarations are made via legislative instrument, they would be disallowable. Bioregional plans are provided for under existing section 176 and may be developed for both areas within or partly or wholly outside Commonwealth areas.³¹ Bioregional plans are not disallowable by Parliament, a fact that is confirmed through the introduction of **item 352**. The scope of bioregional plans is very broad. Thus depending on how the plan is drafted, there may be a very wide variety of actions that

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could conceivably be 'in accordance' with the plan. Section 176 does require public consultation in development of bioregional plans.

The conditions which must be met for the Minister to make a declaration are quite extensive: the general matters are set down in **new sections 37B-C**, and include that the declaration must meet any requirements set down by regulations. There are also conditions in **new sections 37D-H** that apply to specific Part 3 matters (eg World Heritage, endangered species), and are essentially the same as those applying in existing sections 34B-34F.

Declarations relating to actions taken under bioregional plans cannot be made in relation to the following nuclear installations:

- a nuclear fuel fabrication plant
- a nuclear power plant
- an enrichment facility, and
- a reprocessing facility

Presumably if an action covered by a **new section 37A** was subsequently carried out in way that was not 'in accordance' with the relevant bioregional plan, an injunction could be obtained under Division 14 of Part 17.

Items 122 and 544 collectively also allow for specific actions listed in a Part 14 Conservation Agreement to be declared in the agreement such that they do not require the Minister's approval under Part 9. However, the Minister must be satisfied that the relevant actions will not have a significant impact on a matter protected by Part 3 (eg a listed threatened species) that is specified in the declaration. Under section 304, Conservation agreements are agreements 'whose primary object is to enhance the conservation of biodiversity, those heritage values or both of those things.' There appears to be no Parliamentary disallowance aspect for the Ministerial declaration.

Items 131 to 152 amend section 46 of the Act to substitute the terms 'bilaterally accredited management arrangement' and 'bilaterally accredited authorisation process' for the existing 'bilaterally accredited management plan.' Again, this expands the range of instruments to be accredited and thus not require the Minister's approval under Part 9 of the EPBCA. Whereas declarations under section 33 discussed above relate to the powers of approval of the Commonwealth and Commonwealth agencies, section 46 relates to approvals by State and Territory governments and their agencies. The various requirements regarding accreditation remain essentially unchanged, including Parliamentary disallowance.

Part 10 of the EPBCA provides for strategic assessments of actions that may be carried out under a proposed policy, program or plan. According to Department of Environment and Heritage, the intent is to.³²

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allow for the early assessment of the cumulative impacts of relevant actions under that policy, program or plan. The outcomes of a strategic assessment may be taken into account in deciding the appropriate assessment approach for a particular action. For example, if the relevant environmental impacts have been assessed during a strategic assessment, the Minister could decide that an individual action may be assessed on preliminary documentation rather than by environmental impact statement.

Item 318 inserts **new sections 146B-146M** that will effectively allow, following endorsement of a policy, program or plan that has been subject to a strategic assessment process, an action taken in accordance with the policy etc to proceed without need for a further Part 9 approval. The Explanatory Memorandum comments in relation to the proposed amendments:³³

[they] will provide an incentive for developers, States and Territories and Local Government to bring forward broad-scale development plans (such as industrial estates and coastal developments) early in the planning cycle.

There are two processes. The first is the existing process for undertaking the strategic assessment and Ministerial endorsement of the plan etc as a result. The second is the new provisions which involve approving actions that are taken in accordance with the endorsed plan etc. Whilst there is a public consultation process for the first, there is none for the second, although relevant Commonwealth Ministers must be consulted. The Minister cannot give an approval if this would be inconsistent with specified obligations under various international conventions or heritage principles. There appears to be no Parliamentary disallowance aspect in relation to the above amendments. The Minister cannot approve an action of the construction or operation of the following nuclear installations:

- a nuclear fuel fabrication plant
- a nuclear power plant
- an enrichment facility, and
- a reprocessing facility

Items 378 and 379 insert additional exemptions for the killing, injuring, taking etc listed threatened species and communities. Notably these exemptions include actions under bioregional plans, newly listed species, new subsection 517A(7) exempt actions, and actions under conservation agreements and Part 15 management plans. Similar amendments are made by **items 407-08, 430, and 457-8**.

Item 532 amends section 304 to expand the objects of Part 14 - conservation agreements. This item, and consequential amendments in **items 534-543**, gives explicit recognition that the protection and conservation of Ramsar wetlands, Commonwealth marine areas and Commonwealth land, and of the environment from the impact of nuclear actions are within the scope of such agreements. A conservation agreement may include the

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declaration that actions under the agreement do not need Part 9 approval, provided the Minister is satisfied that the actions are not likely to have a significant impact with the matter protected under Part 3.

Extending or restricting liability for the actions of others

Item 769 inserts **new Division 18A** into Part 17. Under certain circumstances, a landholder (including lessees and occupiers) may also be liable to a civil or criminal penalty for contraventions of the EPBCA by a third party, where it took place on their land. Amongst the required elements for liability to accrue to the landholder are:

- they were reckless as to whether the contravention would occur
- they were in position to influence the action of the third party, and
- they failed to take all reasonable steps to prevent the contravention.

In determining the last question, **new section 496D** provides that a court is to have regard to:

- whether the landholder attempted to ensure that the third party had an appropriate environmental management system in place, and
- what action, (if any), was taken by the landholder when they came aware that there was a substantial risk that that a contravention was occurring.

Items 68 and 84 are related to item 783 (indirect impacts) that was discussed earlier in this digest. The effect of these items is to prevent a person being liable to a criminal or civil sanction for significant environmental impacts resulting from the actions of third parties which are ‘consequential’ to the actions of the first person, provided the third parties actions are not taken at the direction or request of the first person. The impacts in question only relate to specified matters protected under Part 3. The first person would only be liable if, for example, they failed to comply with conditions set down under a Part 9 approval.³⁴

Where the Minister approves an action under Part 9, **item 264** requires the holder of the approval to take all reasonable steps to ensure that any third person that they authorise to undertake all or part of the action is made aware of any conditions attaching to the approval. The holder must take similar steps to ensure the third person complies with these conditions. Failure to do so makes them liable to the penalties under existing sections 142 and 142A. **Item 289** creates an associated provision, this time by providing a defence to a section 142 civil penalty for persons (such as contractors, employees etc) who are not holders of the approval, but who breach a condition of the approval in taking the relevant action. To qualify for the defence, they must not have been reasonably expected to be aware of the relevant condition.

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Item 175 inserts a **new section 68A** into the Act. According to the Explanatory Memorandum:³⁵

This amendment is to clarify that a contractor or another person who takes an action on behalf of a principal pursuant to a contract, agreement or arrangement, is not required and not permitted to make a referral under section 68. The purpose of this amendment is to prevent a principal from avoiding responsibilities under the Act by requiring a contractor or other person to refer the action instead of the principal.

However, the drafting of the key **subsection 68A(2)** could be read as permitting a lead contractor with overall management responsibility for a project to be a person that could refer the project. It could benefit from redrafting to remove any ambiguity regarding its meaning and legal effect.

Item 774 inserts a **new sections 498B**. It provides that corporations and some persons (such as employers) may be liable for actions taken on their behalf. As the Explanatory Memorandum notes, item 774 is based on section 64 of the *Great Barrier Reef Marine Park Act 1975* and section 84 of the *Trade Practices Act 1974*. The Explanatory Memorandum goes on to say:³⁶

These provisions are considered to provide an appropriate basis for liability in the case of environmental offences because, for large corporations, the relevant decisions are usually made by managers at the operational level, rather than by the directing minds of the body corporate. Those decisions result in significant and often irreversible impacts on matters of national environmental significance. It is important to create incentives for large corporations, principals and employers to take steps to ensure that the Act is complied with when such decisions are made. Therefore it is considered justified to depart from Part 2.5 of the Criminal Code in relation to corporate criminal responsibility.

The key provision is that, in most cases, the conduct of the directors, agents or employees will be deemed to be an act of the company or employer unless they can show they took reasonable precautions and exercised due diligence to prevent the conduct in question occurring. This requirement potentially makes it easier to prosecute corporations or other employers than is otherwise the case under the Part 2.5 Criminal Code provisions and therefore provides a particular incentive to these entities to improve their environment management systems and related corporate and operational procedures.

Also in relation to corporations, existing subsection 136(4) allows the Minister to take into account a person's or corporation's 'history in relation to environmental matters' when considering whether to approve an action. **Item 285** amends subsection 136(4) to allow the Minister to take into account the history of a corporation's executive officers and/or the corporation's parent body (if this is applicable). Similar amendments are made in relation to varying Part 9 conditions (**item 297**) and transferring a Part 9 approval to any person or entity (**item 312**).

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Enforcement

Some of the enforcement-related amendments are intended to make it easier to successfully prosecute for breaches of the EPBCA through, for example, introducing strict liability provisions for some elements of the offences. Other amendments seek to introduce alternatives to prosecutions in appropriate cases. Finally, some amendments deal with investigatory powers.

Items 4-8, 11-47, 49-53, 57-67, and 71-82 are designed to make it easier to prosecute a person for taking an unauthorised action that will have a significant environmental impact on the various matters (such as World Heritage properties, threatened species etc) that are protected under Part 3 of the EPBCA. Currently, the prosecution would have to prove that a person was reckless as to whether the environment being adversely impacted was (for example) a World Heritage property. The amendments remove this requirement by replacing it with a strict liability provision. However, the prosecution would still have to prove both that taking of the action was intentional and the person doing so was reckless as to the impact of the action.

The Commonwealth policy regarding the use of strict liability in framing offences states in part:³⁷

Application of strict or absolute liability to *all* physical elements of an offence has generally only been considered appropriate where *each* of the following considerations is applicable:

- The offence is not punishable by imprisonment and is punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate) in the case of strict liability or 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability. A higher maximum fine has been considered appropriate where the commission of the offence will pose a serious and immediate threat to public health, safety or the environment....

The amendments are not inconsistent with the above given not all of the physical elements are ones of strict liability. The existing maximum penalties for offences that are affected by some of the above amendments include imprisonment up to seven years and very heavy fines.

Item 291 introduces a strict liability offence in circumstances where a person contravenes a condition of Part 9 Ministerial approval. The offence carries a maximum penalty of 60 penalty units. The Explanatory Memorandum comments that:³⁸

the intent of this provision is to enable enforcement of breaches of approval conditions, in particular minor technical breaches such as the failure to prepare and submit for approval an environmental management plan, which are difficult to enforce under the civil penalty and criminal offence provisions in sections 142 and 142A.

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Existing section 354 contains a civil offence of doing various things (for example (kill, injure or take a member of native species, or undertake building or demolition works) in a Commonwealth terrestrial or marine reserve unless it is in accordance with the relevant management plan. **Item 591** effectively creates a criminal version of the same offence, carrying a maximum penalty imprisonment for 2 years or 1,000 penalty units or both. Some elements of the offences are ones of strict liability – principally the element regarding the fact that the action took place in a Commonwealth reserve. There are numerous exceptions where an action will not constitute a criminal offence – eg traditional use by indigenous persons under existing section 359A. Similar penalties are introduced in **item 595** with respect to mining operations in Commonwealth reserves that are not carried out in accordance with the relevant management plan.

Item 764 inserts **new Divisions 14A (remediation orders) and 14B (remediation determinations)** into Part 17.

New Division 14A provides the Federal Court with the power to require a person to repair or mitigate damage that has been or is likely to be caused to the environment by a contravention of the EPBCA or its Regulations. The Court already has power under existing subsections 475(3) and 476(3) to make such orders in conjunction with an injunction restraining a person from contravening the EPBCA. In considering whether to make the remediation order, the court may have regard to, amongst other things:

- the circumstances in which the contravention took place
- whether the person has previously been found by a court in proceedings under the EPBCA or regulations to have engaged in any similar conduct; and
- the cost of the remediation

Only the Commonwealth Minister can apply to the court for a remediation order.

New Division 14B gives the Minister the power to make a remediation determination. The grounds for making one are similar to the court order above except that the damage in question can only relate to a matter protected under Part 3 (World Heritage values for example) and the contravention in question was a Part 3 civil penalty (carrying a fine only). The person to whom it is directed may ask for a reconsideration of the Ministers determination: **new section 480J**. Alternatively, the person can apply to the Federal Court under **new section 480K** to have it set aside. The court *must* set it aside if, amongst other things, the remediation action ‘is not a reasonable measure to repair or mitigate [the relevant] damage...caused by the specified action to the matter protected by the specified civil penalty provision’.

Item 766 inserts **new Subdivision C** into Division 15 of Part 17 of the Act which provides for the Minister to accept financial undertakings in relation to contraventions of Part 3 civil penalty provisions. This provides another alternative to litigation. Once the

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undertaking has been entered into, it is enforceable by the Federal Court: **new section 486DB**.

Under **item 545**, conservation agreements will now be able to provide for measures to repair or mitigate damage in cases where Part 3 may have been violated. The Explanatory Memorandum comments:³⁹

It introduces a new enforcement option into the Act, as an alternative to costly and time-consuming civil penalty or criminal proceedings...the Minister may enter into a conservation agreement with the person that provides for the taking of measures to repair or mitigate damage to the Part 3 protected matter.

Item 767 inserts a **new Division 15A** into Part 17, which enables the Minister to issue a notice requiring a person to produce information and appear before officials to answer questions. Such notices cannot be issued to persons that are, or have been, the legal representatives or persons investigated for, or prevention of, a suspected offence or breach of a civil penalty provision. A person is *not* excused from answering questions or producing required information on the grounds of self-incrimination, or of exposure of the individual to a penalty. However, the answers or information, or anything obtained as a direct or indirect consequence of them, cannot be used in evidence against the individual in any civil proceedings, or any criminal proceedings except for failing to provide full information or giving false or misleading information. This restriction on the use of such information is a fairly standard provision in Commonwealth legislation.

Existing section 403 allows Commonwealth officials to board a ship or aircraft within Australian jurisdiction where the official suspects on reasonable grounds there is evidential material of an offence against the EPBCA aboard the ship or aircraft. Where they suspect the ship or aircraft has been involved in a commission of an offence under the EPBCA, they also may order it to go to an Australian port or airport. **New item 621** introduces penalties for failing to comply with these requirements, including imprisonment of up to six months in some cases. It also confirms the Commonwealth's power to lawfully restrain liberty of persons as a consequence of, for example, an order for a ship to go an Australian port. This last provision evolved from litigation in the wake of the 2001 *MV Tampa* incident and has been introduced in other legislation such as the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*.

Item 763 repeals section 478 of the Act which currently prevents the Federal Court from requiring applicants seeking an interim injunction in respect to an alleged contravention of the EPBCA to give an undertaking as to damages. The apparent rationale for this change is:⁴⁰

[to bring]...the Act into line with other Commonwealth legislation where the Federal Court has the discretion whether or not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.

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Additional information supplied by the Department of the Environment and Heritage noted that the other pieces of Commonwealth environment legislation that have the 'no undertaking as to damages' provision only relate when it is the Minister seeking an injunction.⁴¹

Item 763 has been opposed by a number of environment related NGOs on the basis that it would make it more difficult for them or members of the public to seek interim injunctions.⁴²

Interestingly, this provision was considered by the original Senate Committee inquiry into the (then) Environment Protection and Biodiversity Conservation Bill 1998. The [relevant part](#) of the majority (Government) report stated:

11.44 The requirement that there be an undertaking as to damages in the area of environmental protection has not been amenable to the public interest nature of bringing an action to prevent a breach against an environmental statute:

This rule has its origins in private litigation where the court needs to strike a balance between competing private interests, but once again it may be seen as anomalous in public interest litigation where the applicant is not seeking any personal advantage. Traditionally, refusal to give such an undertaking will generally result in the court's discretion being exercised against the plaintiff, especially where the complainant is a private individual rather than the Crown. ... if persons are deliberately encouraged by statutory provisions ... to assist in enforcement of public environmental law, restrictive common law rules which discourage such participation should be relaxed. ... public interest litigants are usually at a financial disadvantage from the outset in funding the costs of litigation without having to find extra funds for a bond. [G Bates, *Environmental Law in Australia*, p 510.]

The Committee considers that requiring undertakings as to damages would be an unnecessary hurdle to persons or organisations seeking to enforce provisions of the Bill in the public interest. As noted above, there are adequate safeguards against vexatious or unsupported applications [emphasis added].

Detention of suspected foreign offenders

Items 696 and 835 provides for the detention of persons that are not Australian citizens or residents who are 'reasonably suspected' of committing a criminal offence under the EPBCA that involves either a foreign vessel or takes place in Australia but outside the migration zone. Evidence by officials from the Department of Environment Heritage to the Senate inquiry was that:⁴³

The proposed mechanisms for tackling this issue already exist in Australian law. The proposed provisions for inclusion in the EPBC Act mirror existing provisions of the Fisheries Management Act 1991, which in turn are modelled on relevant sections of

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the Migration Act 1958. The proposed new provisions for the EPBC Act are required because currently the Migration Act 1958 does not allow non-citizens suspected of committing offences under the EPBC Act to be brought into Australia to face prosecution. This means that the only action open to the government under current law is to seize illegal fishermen's catch and gear and send them on their way. They cannot be detained. They simply re-equip and start their plunder again.

Provisions which allow for the searching, screening and identification of detainees, once again already in Australian law, are necessary for the orderly and safe operation of detention centres. It is essential that properly authorised officers are able to conduct basic searches of detainees to ensure the safety of detainees and other people and to ensure that illegal fishing offences can be fully investigated. Basic searches are subject to strict rules and limitations. The department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. They will not be commenced until all the arrangements have been settled.

Items 854 to 869 introduce associated amendments to the *Migration Act 1958* so that certain visa provisions will apply to persons suspected of committing a criminal offence under the EPBCA. These will allow these persons to be brought into Australia for investigation and enforcement purposes.

The amendments in the Bill are essentially the same as those most recently enacted under the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*. Readers are referred to the [Bills Digest](#) for that Act for discussion of the detention, search and seizure provisions.

Miscellaneous

A feature of the EPBCA is the requirement to publish information regarding proposals, assessments and decisions by the Minister (or their delegate) on the internet. This is intended to promote transparency of decision-making and facilitate the ability of the public and other stakeholders to provide input into the decision-making process.

Amendments in the Bill formalise the power of the Minister to withhold commercial in confidence (C-I-C) material in publishing various information. For example, existing section 74 requires the Minister to publish a referral on the internet as part of the requirement to seek initial public comment on whether it will require his/her approval under Part 9. **Item 182** will allow the Minister to omit from the publishing of the referral any information that the Minister is satisfied is C-I-C. It is up to the proponent to demonstrate that information is C-I-C based on criteria set out in **new subsection 74(3B)**. The EPBCA currently allows the Minister to omit C-I-C information from assessment reports and the like that are made publicly available.

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Item 346 inserts **new sections 170B and 170BA**. The former allows the Minister to prohibit the disclosure of information when notices inviting public comment on referrals, assessments etc are published if they consider that the relevant information is ‘critical to the protection’ of a matter of national environmental significance. **New section 170BA** enables a proponent of action to apply to the Minister for permission not to publish commercial-in-confidence information when publishing assessment documentation required under Part 8.

Items 505-507 relate to the requirement for assessments into the potential environmental impacts of amending the list of specimens considered suitable for live import. Currently these assessments are compulsory under existing section 303ED. According to the Explanatory Memorandum,⁴⁴

Biosecurity Australia coordinates a comprehensive process to assess the potential risks of importing new biological control agents into Australia which addresses environmental risk in which the Department of the Environment and Heritage is a stakeholder. The assessment of biological control agents under the Act duplicates Biosecurity Australia’s process without adding value.

The amendments in **items 506-7** effectively allow the Minister to rely on the Biosecurity Australia assessment in making a decision on whether the list should be amended. The Minister still has the option of doing a separate assessment report.

Item 597 makes it easier to carry out a wider variety of actions on Commonwealth reserves where there is no management plan in force. At present, the range of actions is substantially restricted by subsection 355(2). The power to approve the wider variety of actions will reside with the Director of National Parks in cases where these were being done lawfully before the reserve was declared, or if they were being done in accordance with a management plan that has since expired, or if the activity is a mining activity. In making a decision, the Director is still subject to section 357 which requires that a Commonwealth reserve must be managed in accordance with the relevant Australian IUCN reserve management principles. The Explanatory Memorandum comments that:⁴⁵

This item in particular clarifies that new oil and gas activities in Commonwealth reserves, such as the transition from exploration to production, may proceed with the appropriate approvals from the Director of National Parks, notwithstanding the absence of a management plan.

Concluding comments

Proposing significant changes to the Commonwealth’s most important piece of environment legislation is inevitably going to attract controversy. This is particularly so when some of those changes increase Ministerial discretion and create more exceptions to the usual environmental assessment and Ministerial approval process.

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The great majority of the changes proposed by the Bill appear to have arisen from the practical experiences of the EPBCA's six years of operation. Presumably these experiences have been the subject of extensive discussions between the Department of Environment and Heritage and various stakeholders over several years and possibly some of these discussions have encompassed some of the specific changes contained in the Bill. However, given the Bill is some 400 pages long, it is certainly arguable that it could have been released as an exposure draft Bill, or alternatively a longer period could have been allowed for submissions to the Senate inquiry process – the Bill was referred to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts on November 17, and that Committee requested written submissions by 27 November.

Section 522A of the EPBCA requires that an independent review of the Act be undertaken within ten years of the commencement of the Act. This will be in mid 2010. Assuming the Bill is passed, that review should give a fair indication as to whether the Government's objectives in this Bill have been met.

Endnotes

1. The Hon Greg Hunt MP, House of Representatives, Debates, 12 October 2006, p. 7.
2. See for example the comments of representatives from The Australian Conservation Foundation, WWF and ACT Heritage Council in Committee [hearings on 3 November 2006](#).
3. See comments of Senator Ian MacDonald, Committee hearings, 3 November, p. 17.
4. Explanatory Memorandum, p. 17.
5. See for example comments from representatives of the Australia Institute (3 November).
6. See comments from the representative of the Australian Network of Environmental Defenders Officers, 3 November, p. 45.
7. See comments from the representative of the Australian ICOMOS, 3 November, pp. 17–22.
8. See for example comments from representatives of the Australia Institute (3 November).
9. See Comments by Mr Gerard Early, in Committee [hearings on 6 November 2006](#) at pp. 51–52.
10. Explanatory Memorandum, p. 1.
11. *ibid.*, p. 42.
12. *ibid.*, p. 93
13. The Minister appealed the decision to the Full Federal Court in 2004 but the appeal was dismissed.
14. Explanatory Memorandum, p. 33.

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15. The document must also contain a summary of both any public comments and how they have been taken into account.
16. A Public Environment Report, or PER, is one level above 'assessment on preliminary information' in the existing hierarchy of assessment approaches in Part 8.
17. Environmental Impact Statements, or EIS, sit immediately above PERs in the assessment hierarchy.
18. Explanatory Memorandum, p. 30.
19. *ibid.*, p. 26.
20. A key threatening process is one that threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community. A list can be viewed at <http://www.deh.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>.
21. Explanatory Memorandum, p. 46.
22. *ibid.*, p. 56.
23. *ibid.*, p. 43.
24. Explanatory Memorandum, p. 49.
25. Explanatory Memorandum, p. 62.
26. Explanatory Memorandum, p. 78.
27. House of Representatives, Debates, 12 October p. 5.
28. Partial in the sense that if the relevant action has a significant impact on (say) a listed threatened species, as opposed to just the marine environment in general, Part 9 approval would be required in respect to the impact on that threatened species.
29. The only current regulations in those that relate to Commonwealth managed fisheries (Clause 2A.01 of the EPBC Regulations.)
30. These may also be a class of actions.
31. For Commonwealth areas, public consultation is required in line with regulations.
32. See: <http://www.deh.gov.au/epbc/assessmentsapprovals/strategic/index.html>
33. Explanatory Memorandum, p. 41.
34. In such cases, liability would arise under existing sections 142 or 142A, rather than Part 3.
35. Explanatory Memorandum, p. 28.
36. *ibid.*, p. 92.
37. A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. February 2004, p. 24. See: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/07B8DF7C133D46C8CA256E5F00339FC/\\$FILE/Consolidated+Guide+++February+2004.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/personal/07B8DF7C133D46C8CA256E5F00339FC/$FILE/Consolidated+Guide+++February+2004.pdf)
38. Explanatory Memorandum, p. 39.

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39. *ibid.*, p. 61.
40. *ibid.*, p. 88.
41. [Information](#) provided by the Department of the Environment and Heritage on 15 November in response to Questions from the Senate Committee.
42. See for examples comments from the representative of the Australian Network of Environmental Defenders Officers, 3 November, p. 42 and those of the Humane Society International, p. 54.
43. See Comments by Mr Gerard Early, in Committee [hearings on 6 November 2006](#) at p. 51.
44. Explanatory Memorandum, p. 59.
45. *ibid.*, p. 76.

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