ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH):
A NEW ERA FOR COMMONWEALTH - QUEENSLAND ENVIRONMENTAL RELATIONS?

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ABSTRACT

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) contains a significant overhaul of Australia’s environmental laws. It has been described as the most fundamental reform of Commonwealth environmental law since the first environmental statutes of the 1970’s. The legislation stems from the Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment, reached in November 1997. The COAG Agreement proposed a framework for comprehensive reform of Commonwealth-State roles and responsibilities for the environment.

For Queensland the significance of the legislation lies in the specific provisions which give accreditation to state environmental assessments and approval processes. The legislation also contemplates cooperative arrangements and consultation with States/Territories in the development of environmental management plans and decisions which affect areas within the State/Territory. The legislation was controversial, as evidenced by the long list of amendments proposed by the Senate.

The Act is divided into 8 Chapters. Chapter 1 deals with preliminary issues. Chapters 2 and 4 provide a framework for environmental assessments and approvals and exceptions. Chapter 3 details arrangements for bilateral agreements with States or Territories. Chapter 5 deals with biodiversity conservation, and provides for the establishment of lists of threatened native species and communities, and internationally protected migratory species, and key threatening processes such as predation by feral cats. Chapter 5 also deals with protected areas, particularly the consultation that must take place with States in relation to World Heritage Properties and Ramsar Wetlands, and with conservation agreements with private landholders. Chapter 6 provides for administrative matters, such as enforcement of the Act and the application of the precautionary principle. Chapter 7 outlines miscellaneous matters and Chapter 8 provides a list of definitions.
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1. INTRODUCTION

The Commonwealth’s Environment Protection and Biodiversity Conservation (EPBC) Bill 1998 was first introduced into the Senate on 2 July 1998, reintroduced on 12 November 1998 after the October 3 election, and debated there on 22 June and 23 June 1999, and in the House of Representatives on 29 June 1999. It was a controversial Bill with some nine hundred amendments put before the Senate; the government and Democrats sponsoring 569 of these. The Bill was passed on 29 June 1999.

Together with the Environmental Reform (Consequential Provisions) Act 1999 (Cth), the EPBC Act contains a significant overhaul of Australia’s environmental laws, and has been described as the most fundamental reform of Commonwealth environmental law since the first environmental statutes of the 1970’s¹, and an attempt to create a contemporary, integrated national environmental legal system.²

The Act arose out of the federal Government’s view that existing Commonwealth environmental laws were piecemeal and inadequate to ensure proper recognition of the principles of ecologically sustainable development in areas of Commonwealth responsibility. In addition, the laws did not reflect an appropriate role for the Commonwealth in environmental matters, and relied on ad hoc and indirect constitutional triggers for Commonwealth involvement such as the foreign affairs and trade and commerce power.³


1.1 BACKGROUND TO THE ACT

1.1.1 Intergovernmental Agreement on the Environment (IGAE) 1992

At the Special Premiers’ Conference held in Brisbane in October 1990, all levels of Australian government agreed to develop an Intergovernmental Agreement on the Environment to facilitate:

- a cooperative national approach to the environment;
- a better definition of the roles of the respective governments;
- a reduction in the number of disputes between the Commonwealth and the States and Territories on environmental issues;
- greater certainty of Government and business decision making; and
- better environmental protection.

The IGAE was signed in 1992 and has been described as a significant development in cooperative environmental relations between the Commonwealth and States and Territories.4 Section 2 of the IGAE broadly identifies the responsibilities and interests of each level of government. Particularly, it recognises that the States and Territories have responsibility for the majority of environmental issues within their borders.5 The Schedules to the IGAE deal with amongst other things, resource assessment and approval processes, environmental impact assessment, biological diversity, world heritage and nature conservation.

The IGAE is considered to be a political compact rather than a legal document, which means its enforceability is problematic.6 That is, it has been argued that the courts are unlikely to find that agreements between the Commonwealth and a State create enforceable legal relations unless those agreements are in the nature of

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private law contracts.\textsuperscript{7} For this reason there has been difficulty in implementing the IGAE comprehensively.\textsuperscript{8} The shortcomings of the IGAE have been outlined as:\textsuperscript{9}

\begin{quote}
Issues remaining in need of further clarification include clearer definition of the roles of the Commonwealth and the States, recognition and implementation of the Commonwealth’s role in matters of national environmental significance, provision of an accreditation mechanism for State processes, review of triggers for Commonwealth involvement and Commonwealth compliance with State laws.
\end{quote}

\subsection*{1.1.2 1997 COAG Agreement}

These unresolved issues of the IGAE were targeted by the Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment, reached in November 1997. The COAG Agreement proposes a framework for comprehensive reform of Commonwealth-State roles and responsibilities for the environment.\textsuperscript{10} It also provides a model for the integration of Commonwealth and State environmental laws through a mechanism of Commonwealth accreditation of State processes.\textsuperscript{11} Attachment 1 of the COAG Agreement lists thirty matters of national environmental significance. Part 1 of the Attachment lists those matters of national environmental significance which have been incorporated in the EPBC Act\textsuperscript{12} and which are to act as triggers for the Commonwealth’s environmental assessment and approval process. Those matters are World Heritage properties, Ramsar wetlands, nationally endangered or vulnerable species and communities, migratory species and cetaceans, nuclear activities, and management and protection of the marine and coastal environment.

\begin{itemize}
\item \textsuperscript{9} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 4.
\item \textsuperscript{10} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 9.
\item \textsuperscript{12} With the exception of Places of National Significance which is not dealt with under the EPBC Act.
\end{itemize}
2. WHAT DOES THE ACT DO?

The stated objects of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) are to:

- provide for environmental protection, particularly for matters of **national environmental significance**;
- promote **ecologically sustainable development** through the conservation and ecologically sustainable use of natural resources;
- promote the conservation of **biodiversity**;
- promote a cooperative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
- assist in the cooperative implementation of Australia’s environmental responsibilities;
- recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity; and
- promote the use of indigenous peoples’ knowledge of biodiversity with the involvement of, and in the cooperation with, the owners of the knowledge.

The Act is divided into 8 Chapters. Chapter 1 deals with preliminary issues. Chapters 2 and 4 provide a framework for environmental assessments and approvals and exceptions. Chapter 3 details arrangements for bilateral agreements with States or Territories. Chapter 5 deals with biodiversity conservation, and provides for the establishment of lists of threatened native species and communities, and internationally protected migratory species, and key threatening processes. Chapter 5 also deals with protected areas, particularly the consultation that must take place with States in relation to World Heritage Properties and Ramsar Wetlands, and with conservation agreements with private landholders. Chapter 6 provides for administrative matters, such as enforcement of the Act and the application of the precautionary principle. Chapter 7 outlines miscellaneous matters and Chapter 8 provides a list of definitions.

2.1 CHAPTER 2 - REQUIREMENT FOR APPROVALS

2.1.1 National Environmental Significance

Chapter 2 of the Act is titled Protecting the Environment. The key concept here is that Commonwealth approval processes are to apply only to matters which will have a **significant impact** on matters of **national environmental significance**.
The term **significant impact** was criticised in the Senate debates, as being problematic because of its subjective nature. As Senator John Hogg stated\(^\text{13}\):

*What is of significant impact to one is of no impact to another. What is of importance to one group has absolutely no meaning elsewhere.*

As already mentioned, the Act lists only 6 matters of **national environmental significance**, which are extracted from the 30 or so in the COAG Agreement. These are:

- World Heritage properties;
- wetlands which are declared under the Ramsar Convention\(^\text{14}\),
- nationally listed threatened species,
- listed migratory species (eg. migratory birds),
- the marine environment,
- and nuclear actions.

When read with Chapter 3 it becomes apparent that even on matters of national environmental significance, the Commonwealth’s role may be quite limited by a bilateral agreement with a State/Territory, which effectively will give assessment and approval powers to the State/Territory in question, and not to the Commonwealth. If used widely, bilateral agreements will allow the Commonwealth to relinquish most of its responsibility for environmental management in favour of the States.\(^\text{15}\)

### 2.1.2 Requirements for Environmental Approvals

An environmental approval will be required where a person takes action that will have a significant impact on: a World Heritage property; a Ramsar Wetland; a listed threatened or migratory species; a Commonwealth marine area; or takes nuclear action which is likely to have a significant impact on the environment (s 12, 16, 18, 20, 21, 23). Nuclear action includes uranium mining (s 22). Additional matters of national environmental significance can be added by regulation provided that the federal environment minister consults with State and Territory environment ministers as required by s 25.

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\(^{14}\) The Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar, Iran, 1971.

\(^{15}\) Peel, p 4.
There are also provisions relating to approvals required for activities which are likely to have a significant environmental impact on Commonwealth land (ss 26-27A). Commonwealth agencies are also required to get approvals for activities that are likely to have a significant impact on the environment (s 28).

2.1.3 Exceptions to the Requirement for Approvals

There are a number of situations in which approvals will not be required for such actions.

These include:

- Where there is a bilateral agreement in place which allows the activity (s 29);
- Where there is an accredited Commonwealth management plan in place and the action is declared by the Minister as allowed (s 33). There are prerequisites the Minister must follow in making any such declarations (ss 34A-34E).
- Forestry operations which are permitted by regional forest agreements or which are in regions subject to a process of negotiation for a regional forest agreement (ss 38-41).
- Where a person has authority under the Great Barrier Reef Marine Park Act 1975 (Cth) to take action in the Great Barrier Reef Marine Park (s 43).
- An approval is in existence under Chapter 4, Part 9.
- A conservation agreement is in place (ss 305-306).

2.1.4 Review of matters that require environmental approvals

Every five years the Minister must prepare a report on whether Chapter 2 needs to be amended to include additional actions which are likely to have a significant impact on environmental matters that may properly be regarded as being of national or international significance (s 28A).

2.2 Chapter 3 - Bilateral Agreements

One of the key innovations of the Act is the introduction of bilateral agreements. The need for bilateral agreements is explained in the Senate Committee’s Report. It is stated there that much of the Commonwealth environmental law regime was enacted at a time when the States did not have sophisticated environmental

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16 The EPBC Act does not deal with regional forest agreements.
legislation, and over the years as the States have developed their own environmental legislation, there has been duplication and overlap between Commonwealth and State environmental law regimes. The aim of bilateral agreements is to provide a smoother, more efficient, and cost effective approval and assessment process. It was recognised in the Explanatory Memorandum that:

most states have now enacted relatively comprehensive environmental law regimes. In fact some States have recently enacted their second or third generation of environmental statutes. The evolution of State law has not been adequately recognised in the Commonwealth’s legislative framework, thus hindering seamless and productive integration of Commonwealth and State laws.

A bilateral agreement is defined as a written agreement between the Commonwealth and a State or self-governing Territory that is expressed to be a bilateral agreement and provides for one or more of the following:

- protecting the environment;
- promoting the conservation and ecologically sustainable use of natural resources;
- ensuring an efficient, timely and effective process for environmental assessment and approval of actions;
- minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa) (s 45).

It is noteworthy that this list is not expressed to be cumulative. That is, a bilateral agreement need only provide for one of these factors. This means for example, that it need not specifically provide for environmental protection, if it outlines Commonwealth accreditation of State or Territory processes.

The accreditation process seems to rely on the bilateral agreement declaring that the relevant State/Territory has approved the proposed actions, in accordance with a bilaterally accredited management plan.

Generally, the chief mechanism for the management of conservation areas in Australia has been the preparation and implementation of a plan of management, and all Australian jurisdictions have provisions dealing with the creation of

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17 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 75.

18 Explanatory Memorandum, p 6.
management plans.\textsuperscript{19} For example, in Queensland the \textit{Nature Conservation Act 1992} (Qld) in ss 110-126 deals with conservation and management plans.

A \textbf{bilaterally accredited management plan} needs to be in force under a law of the State or Territory that is a party to the agreement and identified in the bilateral agreement. It must also be accredited in writing by the Minister in accordance with s 46. Section 46 requires that the Minister must be satisfied that the management plan and the law of the State/Territory under which the management plan is in force meet the criteria prescribed by the regulations and that there will be adequate assessment of the impacts of actions approved in accordance with the management plan (s 46(3)). The management plan must be tabled in both houses of the federal parliament at least 15 sitting days before it is accredited (s 46(5)).

A key idea behind a bilateral agreement is that it \textbf{allows classes of actions which would otherwise require a special approval under Chapter 2, to take place without such approval}. The declaration in a bilateral agreement that actions have been approved by the relevant State or self-governing Territory in accordance with a bilaterally accredited management plan, does not have effect unless the bilateral agreement requires the relevant State or self-governing Territory to act in accordance with the plan and to not approve the taking of actions inconsistent with the plan (s 46(10)). A safeguard with bilateral agreements is the requirement that the Minister be satisfied that there has been an impact assessment of the action before she or he enters into a bilateral agreement (s 47(2)). Further, a bilateral agreement must include an undertaking by the State/Territory to ensure that the environmental impacts of the actions covered by the declaration will be assessed to the greatest extent practicable (s 48A). Kakadu, Uluru-Kata Tjuta National Parks, and Booderee National Park, are expressly excluded from the operation of any bilateral agreement (s 49).

\subsection*{2.2.1 Prerequisites for making of Bilateral Agreements}

There are specific requirements that the Minister must comply with before entering into a bilateral agreement or accrediting a bilateral management plan. These are:

- The Minister must publish a draft of the agreement and an invitation for any person to give the Minister comments on the draft within a period of at least 28 days after the draft or invitation was published (s 49A).
- The Minister must take into account the comments received in response to the invitation (s 49A).

- The Minister must consider the role and interests of indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement and taking into account Australia’s obligations under the Biodiversity Convention (s 49A).
- The Minister must be satisfied that the agreement accords with the objects of the Act and meets any requirements prescribed by regulation (s 50).
- In relation to World Heritage properties, the Minister must be satisfied that the bilateral agreement/management plan is not inconsistent with Australia’s obligations under the World Heritage Convention; and that the agreement/plan will promote the management of the property in accordance with Australian World Heritage Management principles (s 51).
- Similarly, in relation to declared Ramsar Wetlands, the Minister must be satisfied that the bilateral agreement/management plan is not inconsistent with Australia’s obligations under the Ramsar Convention; and that the agreement will promote the management of the wetland in accordance with the Australian Ramsar management principles (s 52).
- In relation to listed threatened species and ecological communities, the Minister must be satisfied that the bilateral agreement/management plan is not inconsistent with Australia’s obligations under the Biodiversity Convention\textsuperscript{20}, or the Apia Convention\textsuperscript{21}, or CITES\textsuperscript{22} and the agreement/management plan will promote the survival and/or enhance the conservation status of each species or community to which the provision relates; and the Minister is satisfied that the plan is not inconsistent with any recovery plan for the species or community (s 53).
- In relation to listed migratory species, the Minister must be satisfied that the agreement/plan is not inconsistent with the Commonwealth’s obligations under the Bonn Convention\textsuperscript{23}, or CAMBA\textsuperscript{24}, or JAMBA\textsuperscript{25} or an

\textsuperscript{20} The Biodiversity Convention means the Convention on Biological Diversity done at Rio de Janeiro on 5 June 1992, as in force for Australia immediately before the commencement of this Act (s 528).

\textsuperscript{21} The Apia Convention means the Convention on Conservation of Nature in the South Pacific, done at Apia, Western Samoa, 12 June 1976, as in force immediately before the commencement of this Act (s 528).

\textsuperscript{22} CITES means the Convention on International Trade in Endangered Species of Wild Fauna and Flora done at Washington on 3 March 1973, as in force for Australia immediately before the commencement of this Act (s 528).

\textsuperscript{23} The Bonn Convention is the Convention on the Conservation of Migratory Species of Wild Animals, done at Bonn on 23 June 1979, as in force for Australia immediately before the commencement of this Act (s 528).
international agreement approved under s 209(4). The Minister must also be satisfied that the agreement/plan will promote the survival or enhance the conservation status of the relevant species (s 54).

Bilateral agreements expire after 5 years (s 65) and can be suspended or cancelled where the Minister decides that the bilateral agreement has been contravened or not given effect to (ss 57-64).

### 2.3 **Chapter 4: Environmental Assessments and Approvals**

This chapter deals with assessment and approval of actions that Chapter 2 prohibits without approval (controlled actions). That is, actions that will have a significant impact on World Heritage property; a Ramsar Wetland; a listed threatened or migratory species; a Commonwealth marine area; or significant impact nuclear actions. The particular sections in Chapter 2 which prohibit those actions are referred to as controlling provisions. A proposal to take action can be referred to the Minister for the Minister to make a decision whether or not the action is a controlled action (ss 68-74). In making a decision whether the action is a controlled action, the Minister must consider public comment and any adverse impacts the action will have on the matter protected in Chapter 2 (s 75). The Minister must also give notice of and reasons for the decision unless the person proposing the action stated in the referral to the Minister that the person thought the action was a controlled action (s 77). These provisions are much more direct than the previous legislation which had to rely on sometimes obscure triggers, generally under the trade and commerce power, external affairs power, corporations power or fisheries power under s 51 of the Commonwealth Constitution.

States or Territories can request the Minister to reconsider the decision as to whether an action is a controlled action (s 79(1)). Within 20 business days the Minister must reconsider the decision and either confirm or revoke it. The Minister must give reasons for the outcome, and also publish notice of the outcome and the reasons for it in accordance with regulations (s 79(3)).

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24 CAMBA means the Agreement between China and Australia on the protection of Migratory Birds and their Environment, done at Canberra on 20 October 1986, as in force for Australia immediately before the commencement of this Act (s 528).

25 JAMBA means the Agreement between Japan and Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment, done at Tokyo on 6 February 1974, as in force for Australia immediately before the commencement of this Act (s 528).

26 Section 209 deals with listed migratory species and subsection (4) provides that the Minister may by instrument published in the Gazette, approve an international agreement if satisfied that it is an agreement relevant to the conservation of migratory species.
Chapter 4 also deals with methods of assessing impacts of controlled actions. If the Minister has decided something is a controlled action then the Minister must choose one of the following assessment approaches for the relevant impacts of the action (s 87):

- an accredited assessment process;
- an assessment on preliminary documentation (ss 92-95);
- a public environment report (ss 96-100);
- environmental impact statement (ss 101-105);
- a public inquiry (ss 106-129).

If the Act is to be taken in a State or Territory and the action is a controlled action within Chapter 2, then the Minister must invite the appropriate Minister of the State/Territory to provide information regarding which approach is appropriate (s 87). The Minister must give written notice of the decision to the proponent and to the appropriate Minister of the State or Territory, within 10 business days of making a decision on the approach to be used (s 91).

Chapter 4 also deals with approval of actions. Before the federal environment Minister decides whether or not to approve the taking of an action, and what conditions (if any) to attach to an approval, he or she must seek feedback from any other relevant Minister (ie one who has administrative responsibilities relating to the action), within 10 business days (s 131(1)). Those comments may relate to social and economic matters relating to the action and may be considered by the Federal Minister consistently with the principles of ecologically sustainable development (s 131(2)). It is noteworthy that the section is not drafted to require the Minister to consider the principles of ESD but rather allows the Minister to exercise his or her discretion in choosing whether to do so. After receiving an assessment report relating to a controlled action, or the report of a commission that has conducted an inquiry into the controlled action, the Minister may approve the taking of the action (s 133).

The approval must be in writing; and specify the action that may be taken; and by whom, and for what period of time, and also specify the Chapter 2 provisions for which the approval has effect, and any conditions attached to the approval (s 133).

The conditions that can be attached to the approval include:

- conditions relating to any security to be given by the person by bond, guarantee or cash deposit to comply with the Act and the regulations;

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27 The principles of ecologically sustainable development include the precautionary principle which is discussed later.
• conditions requiring the person to insure against any specified liability of the person to the Commonwealth for measures taken by the Commonwealth to repair and mitigate damage caused by a contravention of the Act by the person;
• conditions requiring the person to take action to comply with conditions specified in an instrument or authorisation granted under a State/Territory law or another Commonwealth law;
• conditions requiring an environmental audit of the action to be carried out periodically by an independent person;
• conditions requiring the preparation and implementation of a plan for managing the impacts of the approved action;
• conditions requiring specified environmental monitoring or testing to be carried out;
• and conditions requiring compliance with a specified industry standard or code of practice (s 134(3)).

2.3.1 What must the Minister take into account in deciding whether to give an approval or attach conditions?

The Minister must consider economic and social matters and any matters relevant in the controlling provisions of Chapter 2. In considering those matters the Minister must take into account some very broad factors. These include the principles of ecologically sustainable development; any assessment reports or environmental impact statements relating to the action; if an inquiry was conducted in relation to the action, the report of the commissioners; any other information the Minister has on the relevant impacts of the action; and any relevant comments given to the Minister by another Minister in accordance with the invitation under s 131 (s 136(2)).

Further, the Minister may have regard to a person’s history in relation to environmental matters in considering whether the person is a suitable person to be granted an approval (s 136(4)). The Minister must not have regard to matters that the Minister is not required or permitted by s 136 to consider (s 136(5)), however given the breadth of these factors this is not much of a limitation.

In relation to World Heritage properties, Ramsar wetlands areas, threatened species or endangered communities, and migratory species, there is the extra requirement that the Minister must not act inconsistently with Australia’s obligations under the respective international Conventions (ss 137-140). No approval can be given for the construction or operation of any of the following nuclear installations: a nuclear fuel fabrication plant; a nuclear power plant; an enrichment plant; or a reprocessing facility (s 140A).
2.3.2 Compliance with Conditions on Approval

It is an offence for a person to contravene the conditions on an approval if the action or omission results or will result in a significant impact on a matter protected by a provision of Chapter 2, whether or not the person was reckless as to that fact (s 142A(1)-(3)).

2.3.3 Variation, Suspension, Revocation and Transfer of Approvals

The Minister can revoke, vary or add to any conditions attached to an approval (s 143); as well as suspend the effect of an approval (s 144); or revoke the approval (s 145). Where an approval has been revoked or suspended this is generally because there has been some significant impact that was not identified in assessing the action and the approval would not have been granted if the Minister had had the information available when the decision to approve the action was made (s 144(2) and s 145(2)). Suspended or revoked approvals can be reinstated (s 145A).

If the Minister consents, a person can transfer their approval to someone else (s 145B). In deciding whether or not to consent to the transfer, the Minister may consider whether the transferee is a suitable person to be granted the approval, having regard to the transferee’s history in relation to environmental matters; and whether the transferee can comply with the conditions attached to the approval (s 145B(4)).

2.3.4 Exemptions

A person proposing to take a controlled action may apply to the Minister in writing, for an exemption from a specified environmental approval requirement in Chapter 2 or from Chapter 4. The Minister may give such an exemption only if he or she is satisfied that it is in the national interest to do so. National interest is not limited to Australia’s defence or security (s 158).

2.3.5 Assessment under Agreement with State or Territory

Where an action is to be taken in a State/Territory then the Minister and a Minister of the State/Territory can agree to apply one of the assessment processes from Part 8 to the action (s 167(1)). The Minister may only agree if the Minister is satisfied that the action is not a controlled action (s 167(2)).

The agreement must specify that one of the divisions of Part 8 (Assessing impacts of controlled actions) will apply in relation to the action. These deal with:

- assessment on preliminary documentation;
- public environment reports;
- environmental impact statements;
- inquiries;
or Division 1 of Part 10 which deals with strategic assessment. Strategic assessments are one of the processes which can permit a person to do an otherwise prohibited action in relation to a matter of national environmental significance (s 146). The Minister may agree with a person responsible for the adoption or implementation of a policy, plan, or program that an assessment be made of the relevant impacts of actions under the policy, plan or program that are controlled actions. The agreement must provide for the preparation of a draft of a report on the impacts to which the agreement relates and endorsement of the policy, plan or program by the Minister if the Minister is satisfied that the report adequately addresses those impacts (s 146(2)(a) and (f)). The agreement must also provide for the publication of the draft terms of reference of the report, and for public comment for a period of at least 28 days (s 146(2)(ab)).

Depending on which division applies, the agreement can specify how the Minister will exercise his/her power, for example to prepare guidelines for the content of a report/statement; or approve publication of a draft report; or to specify the manner in which a commission is to carry out an inquiry (s 168).

**Publication of Information Relating to Assessments**

The Secretary must publish on the internet on a weekly basis a number of notices. These include (s170A):

- notice of the Minister’s intention to develop a draft bilateral agreement;
- each referral of an action received by the Minister under Division 1 of Part 7 (see s 68);
- each decision in the immediately preceding week that an action is a controlled action (see ss 75-79);
- each decision in the immediately preceding week about which approach is to be used for assessment of the relevant impacts of an action (Division 3 of Part 8);
- the information and invitations published in the immediate preceding week under the assessment on preliminary documentation provisions (Division 4 of Part 8);
- each set of guidelines prepared, or public invitations issued, or draft or finalised report or statement published, in the immediately preceding week by the Minister for a public environment report or environmental impact statement (Division 5 or 6 of Part 8).
2.4 CHAPTER 5 - CONSERVATION OF BIODIVERSITY

A large part of the legislation deals with the conservation of biodiversity. Biodiversity is defined in Chapter 8 as:

the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part) and includes:

(a) diversity within species and between species; and

(b) diversity of ecosystems.

2.4.1 Identifying and Monitoring Biodiversity

The Minister may on behalf of the Commonwealth, cooperate with and give assistance to, any person for the purpose of identifying and monitoring components of biodiversity (s 171(1)). The assistance can include the following:

- identifying and monitoring components of biodiversity that are important for its conservation and ecologically sustainable use;
- identifying components of biodiversity that are inadequately understood;
- collecting and analysing information about the conservation status of components of biodiversity;
- collecting and analysing information about processes or activities that are likely to have a significant impact on the conservation and ecologically sustainable use of biodiversity;
- assessing strategies and techniques for the conservation and ecologically sustainable use of biodiversity and systematically determining biodiversity conservation needs and priorities (s 171(2)).

The Minister must prepare inventories that identify, and state the abundance of, the listed threatened species, listed threatened ecological communities, listed migratory species and listed marine species on Commonwealth land (s 172(1)). Commonwealth land must be covered by an inventory within 5 years of the commencement of the Act or within 5 years of the land becoming Commonwealth land, whichever is the later (s 172(2)).

For Commonwealth marine areas, the Minister must prepare surveys that identify, and state the extent of the range of cetaceans, and the listed threatened species, listed threatened ecological communities, listed migratory species and listed marine species in those marine areas (s 173). Commonwealth marine areas must be covered by a survey within 10 years after the commencement of the Act or within

28 These are marine mammals including whales, dolphins, and porpoises.
10 years after the area became a Commonwealth marine area, or whichever is later (s 173). These inventories and surveys need to be maintained in an up-to-date form (s 174). Obligations under the Act are not affected by any lack of inventories or surveys in relation to Commonwealth land or marine areas (s 175).

2.4.2 Bioregional Plans

The Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan. The Minister may on the Commonwealth’s behalf, cooperate with a State or Territory or any other person, in the preparation of a bioregional plan for a bioregion that is not wholly within a Commonwealth area. The Minister must have regard to a bioregional plan in making any decision under the Act to which the plan is relevant (s 176).

A bioregional plan may include provisions about the components of biodiversity, their distribution and conservation status; important economic and social values; objectives relating to biodiversity and other values; priorities, strategies and actions to achieve the objectives; mechanisms for community involvement in implementing the plan; and measures for monitoring and reviewing the plan (s 176).

In Queensland, bioregions have been proposed as a primary tool in biodiversity classification and planning biodiversity conservation.29 These regions are based on broad landscape patterns that reflect the major structural geologies and climate as well as major changes in plant and animal groupings. They have provided a basic framework in planning the expansion of National Parks over the past decade30, and have been defined in the Nature Conservation (Protected Areas) Regulation 1994 (Qld) as biogeographical regions as shown on the map titled ‘Biogeographic Regions of Queensland’ prepared by the Queensland Department of Environment.31

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30 Sattler and Williams (eds), p 1/4.

31 Note also that various other Queensland legislation such as the *Nature Conservation Act 1992* (Qld), and *Integrated Planning Act 1997* (Qld) include the concept of “biological diversity”.
2.4.3 Species and Communities

Listings

The Minister must, by instrument published in the Commonwealth Gazette, establish a list of threatened species divided into the following categories:

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable;
- conservation dependent.

Initially this list must contain only the species listed in Schedule 1 to the *Endangered Species Protection Act 1992* (Cth). This list is quite extensive and includes over 70 species of animals, such as the spotted tree frog; the legless lizard; the loggerhead turtle, the western ground parrot; the desert bandicoot; and blue whale; as well as numerous plant species.

Different Categories of Threatened Species

A native species is eligible to be included in the extinct category at a particular time if, at that time, there is no reasonable doubt that the last member of the species has died (s 179(1)).

A native species is eligible to be included in the extinct in the wild category at a particular time if, at that time it is known only to survive in cultivation, in captivity or as a naturalised population well outside its past range; or it has not been recorded in its habitat, at appropriate seasons, anywhere in its past range, despite exhaustive surveys over a time frame appropriate to its life cycle and form (s 179(2)).

A native species is eligible to be included in the critically endangered category at a particular time, if at that time, it is facing an extremely high risk of extinction in the wild in the immediate future. (s 179(3)).

To be included in the endangered category, a native species must not be critically endangered and must be facing a very high risk of extinction in the wild in the near future (s 179(4)).

A native species is eligible to be included in the vulnerable category at a particular time if at that time it is not endangered or critically endangered, and it is facing a high risk of extinction in the wild in the medium-term future (s 179(5)).
A native species is eligible to be included in the **conservation dependent** category at a particular time if at that time, the species is the focus of a specific conservation program, the end of which would result in the species becoming vulnerable, endangered, or critically endangered within a period of 5 years (s 179(6)).

Similar criteria apply for the listing of threatened ecological communities (ss 181-182). The lists may be amended (ss 184, 186, 187, 188) and must be kept up to date by the Minister (s 185). In deciding whether to amend these lists, the Minister must obtain and consider advice from the Scientific Committee. In preparing such advice, the Scientific Committee must not consider any matter that does not relate to the survival of the native species or ecological community concerned (s 189). Interestingly, if the Minister is satisfied that a native species poses a serious threat to human health, the Minister may publish in the Commonwealth Gazette, a determination that the species is not appropriate for inclusion in any of the threatened species categories (s 193).

**Permit System**

Sections 196-196E make it an offence to injure, kill, take, trade, keep, or move a member of a native species listed in one of the threatened species/ecological communities categories.

However, a person can apply to the Minister for a permit (s 200) which authorises its holder to take an action specified in the permit, without breaching ss 196-196E (s 201). The Minister must not issue the permit unless satisfied that:

- the specified action will contribute significantly to the conservation of the listed threatened species; or
- the impact of the specified action on a member of the listed threatened species of listed threatened ecological community concerned is incidental to, and not the purpose of, the taking of the action; and
- the taking of the action will not adversely affect the survival or recovery in nature of that species or ecological community; and
- the taking of the action is not inconsistent with a recovery plan that is in force for that species or ecological community, and the holder of the permit will take all reasonable steps to minimise the impact of the action on that species; or
- the specified action is of particular significance to indigenous tradition and will not adversely affect the survival or recovery in nature of the listed threatened species of listed threatened ecological community concerned (s 201).

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32 Scientific Committee means the Threatened Species Scientific Committee established under s 502 (see Chapter 8 definitions).
Further situations in which such otherwise prohibited action can be taken include: the action was provided for in a recovery plan in force under Division 5; or is an action that is taken in accordance with an accredited management plan; or an action is taken in a humane manner and is reasonably necessary to relieve or prevent suffering by a member of a listed threatened species; or an action that is reasonably necessary to prevent a risk to human health; or an action by a Commonwealth agency, or an agency of a State or Territory that is reasonably necessary for the purposes of law enforcement; or an action that is reasonably necessary to deal with an emergency involving a serious threat to human life or property (s 197).

**Recovery Plans**

The idea seems to be that once a threatened species or threatened ecological community has been listed, the Minister must make a recovery plan and a threat abatement plan. A recovery plan or threat abatement plan can be made by the Minister alone or jointly with relevant States and Territories, or the Minister can adopt a State or Territory plan (s 267). There must be public consultation and advice from the Scientific Committee about the plan, regardless of how it is made or adopted (ss 274-275). Recovery plans bind the Commonwealth and Commonwealth agencies (s 268). If the recovery plan or threat abatement plan applies outside a Commonwealth area, then the Commonwealth must seek the cooperation of the relevant State/Territory with a view to implementing the plan jointly with the State/Territory (s 269).

Any variations that are made by the State/Territory to a plan is of no effect unless it is approved by the Minister (s 280). The Minister is required to obtain and consider advice from the Scientific Committee on the content of the variation; and the Minister must be satisfied that there has been sufficient public consultation (s 280(2)). The Commonwealth may give to a State/Territory, financial or other assistance to make or implement a recovery plan or a threat abatement plan (s 281).

**Wildlife Conservation Plans**

The Minister can make wildlife conservation plans for listed migratory and marine species and cetaceans and conservation dependent species. Wildlife conservation plans are for the protection, conservation and management of these species. The Minister must seek cooperation of States/Territories in which these species occur, with a view to making and implementing jointly with those States/Territories a joint wildlife conservation plan, unless the species occurs only in a Commonwealth area (s 285). Before making such a plan, the Minister must have public

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33 Cetaceans are marine mammals and include whales, dolphins and porpoises.
consultation and consider advice of the Scientific Committee (s 285(6)). Similar requirements apply in adopting a State plan (s 292).

**Access to Biological Resources**

Section 301 is the only section in this division. It provides that the control of access to biological resources in Commonwealth areas can be provided for by regulation. The regulations may contain provisions about the equitable sharing of benefits arising from the use of biological resources in Commonwealth areas, the right to deny access and the granting of access to such resources.

**Control of Non-Native Species**

Regulations may also provide for the establishment and maintenance of a list of non-native species, whose members may threaten biodiversity in the Australian jurisdiction. The regulations may prohibit the importation of the species into the Australian jurisdiction and provide for the making and implementation of plans to reduce, eliminate or prevent impacts of members of species included in the list (s 301A).

**Exemptions**

If it is in the national interest, the Minister may grant an exemption from this Part (Species and Communities) to a person (s 303A).

**2.4.4 Conservation Agreements**

Conservation agreements are agreements whose primary object is to enhance the conservation of biodiversity. They are to be made between the Commonwealth and private individuals or corporations (s 304) and can provide for example, for the control or prohibition of actions or processes that might adversely affect the species, ecological communities, habitats or potential habitats covered by the agreement; or require the Commonwealth to provide financial, technical or other assistance to a person bound by the agreement (s 305). The Minister must not enter into a conservation agreement unless satisfied that the proposed agreement will result in a net benefit to the conservation of biodiversity and that the proposed agreement is not inconsistent with a recovery plan, threat abatement plan or wildlife conservation plan (s 305). It has been noted however, that there is no guidance
given on how to assess whether there has been a “net benefit” and there is no requirement for advice from the Scientific Committee to be considered.\textsuperscript{34}

There was also a view that clause 306(1)(f) of the Bill, which stated that a conservation agreement could declare that a specified action taken in a specified manner does not require Commonwealth environmental approval, was a potential loophole for avoiding environmental impact assessments. Environmental groups argued that the provision was undesirable and unnecessary because it provided people with the incentive of an exemption from environmental laws.\textsuperscript{35}

The Senate Committee, however, was of the view that conservation agreements were of great value because they presented a flexible, voluntary tool for promoting the conservation of biodiversity, particularly on private land.\textsuperscript{36} The Senate Committee considered that clause 306(1)(f) of the Bill would not be used to avoid environmental impact assessment since the Minister had to be certain that the conservation agreement could not result in a diminution to the conservation of biodiversity.\textsuperscript{37} Interestingly, clause 306(1)(f) does not appear in the Act.

Conservation agreements are of no effect if they are inconsistent with either Commonwealth or State/Territory legislation (s 311).

\subsection*{2.4.5 Protected Areas}

Part 15 of the Act provides for the management of protected areas, namely World Heritage properties, wetlands of international importance, biosphere reserves and Commonwealth reserves.

\textit{Managing World Heritage Properties}

The Commonwealth may submit property for inclusion in the World Heritage List only after seeking the agreement of relevant States/Territories. Before submitting


\textsuperscript{35} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 150.

\textsuperscript{36} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 149.

\textsuperscript{37} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 151.
land for World Heritage listing, the Commonwealth must use its best endeavours to reach agreement with the owner; and if the land is in a State/Territory, then the Commonwealth must use its best endeavours to reach agreement with the State or Territory (s 314). The Minister must make a written plan for managing World Heritage listed property that is entirely within a Commonwealth area (s 316). The plan must not be inconsistent with Australia’s World Heritage Convention obligations or the Australian World Heritage Management Principles (s 316). Where the World Heritage property is in a State/Territory (which is all except Heard, McDonald, and Macquarie Islands) then the Commonwealth must again use its best endeavours to ensure the plan is implemented in cooperation with the State or Territory (s 321).

World Heritage listing does not affect ownership rights. Ownership remains as it was prior to nomination, with State and local laws still applicable. The effect of listing is that the Commonwealth Government has an international obligation to protect and conserve the World Heritage property. This should not be an impediment to existing land uses unless they threaten the outstanding natural and cultural values of the property.

Australian World Heritage listed properties are:

- 1981 Great Barrier Reef
- 1981 Kakadu National Park
- 1981 Willandra Lakes Region
- 1982 Tasmanian Wilderness
- 1982 Lord Howe Island Group
- 1987 Uluru-Kata Tjuta National Park
- 1987 Central Eastern Rainforest Reserves (Australia)
- 1988 Wet Tropics of Queensland
- 1991 Shark Bay, Western Australia
- 1992 Fraser Island
- 1994 Australian Fossil Mammal Sites (Riversleigh/Naracoorte)
- 1997 Heard and McDonald Islands
- 1997 Macquarie Island

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Five of these properties are in Queensland.

The regulations must prescribe principles for the management of natural heritage and cultural heritage. The principles prescribed are called the *Australian World Heritage Management Principles* and must be consistent with Australia’s obligations under the World Heritage Convention (s 323).

Australia’s obligations under the World Heritage Convention are broadly to do all it can to ensure the identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage which is of outstanding universal value (Article 4). Specifically Australia is required to **endeavour, in so far as possible** to (Article 5):

- adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;
- set up within its territories, where such services do not exist, one or more services for the protection, conservation and preservation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- develop scientific, and technical studies and research and to work out such operating methods as will make Australia capable of counteracting the dangers that threaten its cultural or natural heritage;
- take the appropriate legal, scientific, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage;
- foster the establishment of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Further, Australia may have obligations to assist other countries who request it, in identifying, protecting and conserving natural and cultural heritage. Australia must also not take any deliberate measures which might damage directly or indirectly damage the World Heritage areas of other countries (Article 6).

**Managing Wetlands of International Importance**

The Act provides for similar management principles to apply to wetlands as to World Heritage areas. That is, the Commonwealth may designate a wetland for inclusion in the List of Wetlands of International Importance under the Ramsar

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Convention only after using its **best endeavours** in seeking the agreement of relevant land-holders, States or Territories (s 326). Management plans must be made for wetlands which are not inconsistent with obligations under the Ramsar Convention, and for those wetlands in States/Territories, the Commonwealth must use its **best endeavours** to ensure the plans are prepared and implemented in cooperation with the State/Territory (ss 328, 333). Regulations must prescribe principles for the management of Ramsar listed wetlands. The principles prescribed are the **Australian Ramsar Management Principles** and must be consistent with Australia’s obligations under the Ramsar Convention (s 335).

Australia’s obligations under the Ramsar Convention include:

- designating suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance (Article 2);
- planning so as to promote the conservation of the wetlands included in the List, and the wise use of wetlands in Australian territory (Article 3);
- monitoring the ecological character of any relevant wetlands with reference to changes caused by technological developments, pollution or other human interference (Article 3);
- promoting the conservation of wetlands and waterfowl by establishing nature reserves on wetlands (Article 4);
- encouraging research and the exchange of data and publications regarding the wetlands and their flora and fauna (Article 4).

Of the 42 Ramsar listed wetlands in Australia (as at 1996), only 2 are found in Queensland. These are Moreton Bay (near Brisbane) and Bowling Green Bay (near Townsville and Ayr).41

**Commonwealth Reserves**

Certain areas of land or sea can be declared by the Governor-General to be Commonwealth Reserves. This includes areas owned by the Commonwealth in or outside a Territory, or held under a lease by the Commonwealth in or outside a Territory; or outside Australia in respect of which Australia has international obligations relating to biodiversity or heritage and that may be met by declaring the area a Commonwealth reserve (s 344).

However if land is in a State or Territory and is already reserved under the State’s or Territory’s law as being related to nature conservation or

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historical/archaeological/geological importance or as having special significance to
indigenous persons, then the Commonwealth must get the State/Territory’s consent
before declaring it a reserve (s 344(2)).

In Queensland, land could already be reserved under the Land Act 1994 (Qld), the
Aboriginal Land Act 1991 (Qld), the Local Government (Aboriginal Lands) Act
1978 (Qld), the Aborigines and Torres Strait Islanders (Land Holding) Act 1985
(Qld), the Nature Conservation Act 1992 (Qld), the Queensland Heritage Act 1992
(Qld) and potentially other legislation.

The Uluru-Kata Tjuta National Park is confirmed as being a Commonwealth
reserve under s 344(3) which refers to the Environmental Reform (Consequential

The categories of reserve (referred to as IUCN\textsuperscript{42} categories) are (s 347(2)):

- **strict nature reserve** - must contain some outstanding or representative
ecosystems, geological or physiological features or species;

- **wilderness area** - consists of a large area of land or sea or both, that is
unmodified or only slightly modified by modern or colonial society; and
retains its natural character and does not contain permanent or significant
habitation;

- **national park** - area consists of land, sea or both in natural condition;

- **natural monument** - contains a specific natural or natural and cultural
feature of outstanding value because of its rarity, representativeness,
aesthetic quality or cultural significance;

- **habitat/species management area** - contains habitat for one or more
species;

- **protected landscape/seascape** - an area where the interaction of people and
nature over time has given the area a distinct character with significant
aesthetic, cultural or ecological value;

- **managed resource protected area** - contains natural systems largely
unmodified by modern/colonial technology.

The category will affect how the area is managed. The reserves are to be managed
in accordance with the Australian IUCN Reserve Management Principles for each
category and these are to be found in the regulations (s 347(1) and s 348).

\textsuperscript{42} IUCN is the World Conservation Union. See their homepage <http://www.iucn.org/>.
Activities in Commonwealth Reserves

Many activities are prohibited in a Commonwealth reserve unless there is a management plan in place which permits them (ss 353-354). For example, a person must not kill, injure, take, or move a member of a native species (s 354(1)(a)). However if there is no management plan in place, the Director of National Parks whose functions include administering, managing and controlling Commonwealth reserves and conservation zones (s 514B), may do one of the prohibited acts in s 354(1) for the purposes of for example protecting or conserving biodiversity or heritage in the reserve, or protecting persons or property in the reserve (s 354(2)).

Special procedures apply in relation to Commonwealth reserves which are in Kakadu, Uluru, or Jervis Bay Territory (s 354(3) and ss 384-390J). For example, mining is not allowed in Kakadu National Park under s 387, however there is a list of activities which are not prevented (including transportation of materials through the Park, the construction of pipelines and powerlines in the Park, and prescribed activities which are incidental to mining operations carried on outside the Park). The proposed Jabiluka uranium mine, although completely surrounded by the Park area, was in fact set aside from the Park in the mid 1970’s, so s 387 will not affect the Jabiluka proposal. Further, s 359 provides that prior rights relating to Commonwealth reserves continue to have effect. In addition, s 359A preserves traditional indigenous hunting, food-gathering or ceremonial uses over an area in a Commonwealth reserve.

In relation to Commonwealth reserves generally, there are limits on mining operations (s 355). That is, mining is still allowed if the Governor-General has approved the process and the mining applicant carries them on in accordance with a management plan. This provision was criticised by conservation groups in the Senate Committee’s enquiry into the Bill. Conservation groups recommended that the Bill be amended to provide that environmentally destructive or disruptive activities such as mining be prohibited in strict nature reserves, wilderness areas,

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national parks, and habitat/species management areas. However, the Senate Committee noted that clause 355 was very similar to the existing provisions of the National Parks and Wildlife Conservation Act 1975 (Cth). The Committee also considered that the conservationist’s concerns were addressed by the standards and requirements included in the Act and the Government’s commitment to apply the IUCN Protected Areas Management Guidelines (which in the Act are referred to as Australian IUCN Reserve Management Principles).

**Conservation Zones**

An area can be proclaimed to be a conservation zone by the Governor-General, with the aim of conserving biodiversity in the area whilst it is being assessed for inclusion in a Commonwealth reserve (s 390C). Regulations relating to conservation zones may amongst other things regulate tourism; and provide for the protection and conservation of biodiversity in conservation zones; and regulate the use of vehicles in such zones (s 390E). Prior usage rights relating to conservation zones are protected, however extensions or renewals of such rights will be subject to the Minister’s consent and any conditions determined by the Minister (s 390H). State/Territory laws continue to apply to the usage right (s 390H(2)).

### 2.5 CHAPTER 6 - ADMINISTRATION

#### 2.5.1 The Precautionary Principle

The precautionary principle is defined as (s 391(2)):

**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 environmental damage.**

The precautionary principle is regarded as a principle of **ecologically sustainable development** (see s 3A). Ecologically sustainable development comes from

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45 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 169.

46 National Parks and Wildlife Conservation Act 1975 (Cth), s 10(2) provides that: “No operations for the recovery of minerals shall be carried on in a park or reserve (not being Kakadu National Park) other than operations that are carried on, with the approval of the Governor-General, in accordance with the plan of management relating to that park or reserve”.

47 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 169.
international law and has been incorporated in major Australian policy documents, the National Strategy for Ecologically Sustainable Development 1992, and the Intergovernmental Agreement on the Environment 1992. It has also manifested itself increasingly in environmental legislation, for example in the Environmental Protection Act 1994 (Qld) where it appears in s 3 as the object of the Queensland Act and in the Integrated Planning Act 1997 (Qld) s 1.2.3 which provides that in advancing that Act’s purpose, the precautionary principle should be applied in decision-making processes.

The Minister is required to take into account the precautionary principle in making a variety of decisions under the Commonwealth Act (s 391(1)&(3)) to the extent the Minister can do so consistently with the other provisions of the Act. This seems to suggest that if there is some inconsistency between a provision of the Act and the precautionary principle then the precautionary principle will not be required to be taken into account. However, ecologically sustainable development is a professed object of the Commonwealth Act in s 3 and the precautionary principle is recognised in s 3A as being a principle of ecologically sustainable development.

2.5.2 Enforcement

Rangers and Authorised Officers

Part 17 deals extensively with enforcement. The Minister may appoint wardens and rangers and inspectors to perform functions and exercise powers under the Act (ss 392, 396). Queensland public servants or police officers can be appointed as inspectors (s 398). Additional powers may be provided by regulation (s 400). It is an offence to obstruct, intimidate, resist or hinder a ranger, or authorised officer, in their duties (s 402). Authorised officers are wardens and inspectors (s 528).

Powers of authorised officers include monitoring powers in relation to particular premises, wherein they have the power to inspect and search, take photographs, make sketches, take samples, extracts and copies of anything on the premises (s 407). There are also powers relating to the boarding of vessels, inspection, seizure of goods and monitoring of compliance (ss 403-406, 429, 445, 446). The Senate Committee considered that these powers were not too wide, and were necessary for the efficient enforcement of the Act.

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48 Adrian Deville and Ronnie Harding, Applying the Precautionary Principle, Institute of Environmental Studies University of New South Wales, Federation Press, Sydney, 1997, p 15.

49 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 176.
Environmental Audits

The Minister may require the holder of an environmental authority under the Act, to carry out an environmental audit if the Minister believes or suspects on reasonable grounds that a condition of the authority has been contravened or is likely to be contravened (s 458). The Act also deals with the appointment of an auditor (s 459), the requirements the auditor must adhere to (s 460) and audit reports (s 461).

Although industry groups who made submissions to the Senate Committee, considered that these auditing provisions were heavy-handed, old-fashioned and encroaching on State and Territory responsibilities, the Committee was of the view that the audit provisions are in line with contemporary environmental legislation across Australia.50 Further these environmental audit provisions have been described as51:

...a useful development in environmental protection as previously there was no provision for carrying out ongoing monitoring of environmental performance by way of an audit.

Conservation Orders

In relation to listed threatened species or ecological communities, the Minister can make conservation orders to prohibit or restrict or require specified activities (s 464). The Minister must be satisfied that making a conservation order is justified, by having regard to economic and social considerations that are consistent with the principles of ecologically sustainable development (such as the precautionary principle, discussed above) (s 464(3)). Conservation orders must be reviewed every 5 years (s 466). Contravening a conservation order is an offence (s 470).

50 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 177.

Standing - Injunctions and Judicial Review

Enforcing what can be described as a public right, through standing to seek judicial review of decisions under the Act (s 487) and standing to seek injunctions for potential breaches of the Act (s 475), has been made easier than it was previously.52 For example, s 487 extends the meaning of *person aggrieved* under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), in relation to decisions under the Environment Protection and Biodiversity Conservation Act, to include individuals or organisations who have at any time in the last 2 years before the decision, engaged in conservation activities in Australia. Having such a statutory basis for standing for environmental groups challenging decisions under the Act, represents significant progress over the common law position.53 It creates greater certainty for them and is probably an easier test to satisfy than that which seems to have been distilled by judges in recent caselaw on the standing of environmental organisations.

Section 475 of the Act enables the Minister, an interested person or a person on behalf of the unincorporated association, to apply to the Federal Court for an injunction where there has been some conduct which constitutes an offence or other contravention of the Act. An *interested person* is defined to include individuals and organisations whose interests are affected by the conduct, and also persons or organisations whose activities in the two years before the conduct have included conservation of or research into the environment, and in the case of organisations, the objects or purposes of the organisation included environmental research, protection or conservation (s 475(6)).

The Senate Committee concluded that it was of the view these standing provisions reach a fair balance between enabling public participation in enforcement of the

52 Note the Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue for Public Remedies*, Report No 78, Canberra, 1996, recommended that standing requirements be loosened where there has been a breach of a public duty.

53 The leading case is *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, where Gibbs J held that the ACF did not have standing in that case to seek judicial review of a decision because it had not established it had a special interest in the matter at hand, beyond that of a mere emotional or intellectual concern. Later cases such as *North Coast Environment Council v Minister for Resources* (1994) 127 ALR 617 have applied this test in a more generous manner, finding that legitimate and recognised environmental groups do have a special interest in challenging such decisions made under environmental legislation where for example, the group was created to protect the environment of a particular area; or was recognised by the government as deserving of financial support and participation in government decision-making processes. Some judges also noted that it was the public’s expectation that environmental groups have the ability to do this and in fact are in some cases created for this very purpose.
legislation, and ensuring that decisions under the legislation were not unnecessarily delayed or impeded by vexatious litigation.\(^{54}\) However a major environmental group has expressed disappointment that the Act does not contain provisions similar to New South Wales legislation, which allow “any person” to take action to remedy or restrain a breach of environmental legislation, and to apply for judicial review in relation to decisions made under environmental legislation.\(^{55}\)

**Committees**

Chapter 6 provides for various organisations to be established including a Biological Diversity Advisory Committee (s 504); the Threatened Species Scientific Committee (s 502); and the Indigenous Advisory Committee (s 505A-B). The Indigenous Advisory Committee has the function of advising the Commonwealth Minister on the Act’s operation, taking into account the significance of indigenous peoples’ knowledge of the management of the land and the conservation and sustainable use of biodiversity (s 505B).

**Delegation of Power**

The Minister may delegate all or any of his/her powers or functions under the Act to an officer/employee in the Department (s 515).

3. **CRITICISMS OF THE ACT**

There were a number of criticisms levelled at the Act before its passage. Chief of these was the view that the Act provides for only a limited level of Commonwealth environmental involvement. For example, Senator Nick Bolkus pointed out that the legislation only identifies 6 matters of national environmental significance, whilst the COAG Agreement identified 30 matters.\(^{56}\) It was argued that none of the

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\(^{56}\) Senator Nick Bolkus, ‘Environment Protection and Biodiversity Conservation Bill 1998’, *Senate Hansard*, 22 June 1999, p 5822. This criticism was also made by the ‘Minority Report by the Australian Democrats’, in Senate Environment, Communication Information Technology and the Arts Legislation Committee, *Environment Protection and Biodiversity Conservation*
substantial areas such as climate change, greenhouse gases, salinity, inland water pollution, air quality, land degradation or forest management is directly dealt with in the legislation, and that this represents a huge void in what is considered to be a matter of “national environmental significance” on which the present and future federal governments would be prepared to take action. Further it was argued that the exemptions in relation to matters of “national environmental significance” are too broad. Particularly, exemptions and discretions were thought to undermine certainty.

Implicit in these arguments about the problems of limited Commonwealth environmental involvement is a view that it is problematic to leave environmental issues to the States. For example, a number of Senators cited examples of State governments which had acted in a pro-development fashion in the past, potentially sacrificing areas such as the Franklin River, Lemonthyme Rainforest and Fraser Island, in favour of economic growth. The Senators emphasised that it was the Commonwealth government which had interfered in each of these circumstances to preserve these areas.

Further, it was pointed out that from an environmental perspective, it is essential to have a “national approach” and policies for the whole of the continent, and the best way to deliver such policies is through the federal parliament, which is responsible to all the Australian people. It is an interesting argument because it acknowledges that the people of one state also have an interest in the environment of another state and that it is only the federal parliament which is responsible to both groups. Specifically, Senator Schacht said:

...I am as concerned about the environment in the Kimberleys (in Western Australia) as I am about the Flinders Ranges in my own state and the Franklin River in Tasmania - because I am an Australian, I am in the Australian parliament and all of those areas are represented in this parliament.

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61 Senator Schacht, p 5857.
The other concerns raised were that indigenous people were insufficiently consulted about the proposed changes of management of national parks\textsuperscript{62}, however these proposals appear to have been dropped from the final legislation. For example, Senator Robert Hill stated that\textsuperscript{63}:

\begin{quote}
The amendments provide for increased recognition of the important role of indigenous peoples in conserving biodiversity and managing jointly managed Commonwealth reserves. In particular, representatives of the traditional owners will have the power to withhold consent, within reason to the appointment to the joint management board of a person nominated by the Northern Territory.
\end{quote}

Further, as to the matter of the Director of the National Parks and Wildlife Service, the government although believing that this was an unnecessary tier in the administrative structure of decision-making, decided not to remove the position “out of respect to the traditional owners” of Kakadu National Park and Uluru-Kata Tjuta National Park.\textsuperscript{64} Also, the nominated Northern Territory representative on the administering boards of both parks must be approved by the traditional owners, although the consent cannot be unreasonably withheld.\textsuperscript{65}

Another indigenous concern was the lack of protection in the legislation to prevent the appropriation by pharmaceutical companies of indigenous biological knowledge without acknowledgment or compensation for significant industrial and commercial gain.\textsuperscript{66} Section 301 leaves the control of access to biological resources to be provided for by regulations.

An additional criticism of the legislation was that it contains no mention of local government and fails to recognise the responsibilities and regulatory powers of local government with regard to environmental management. The legislation also neglects to recognise local government’s role in implementing national

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environmental policies at a local level. The role of local government was recognised in the 1992 Intergovernmental Agreement on the Environment. Specifically the IGAE stated that:

2.4.1 Local Government has a responsibility for the development and implementation of locally relevant and applicable environmental policies within its jurisdiction in cooperation with other levels of Government and the local community.

2.4.2 Local Government units have an interest in the environment of their localities and in the environments to which they are linked.

2.4.3 Local Government also has an interest in the development and implementation of regional, Statewide and national policies, programs and mechanisms which affect more than one Local Government unit.

In the COAG Agreement of November 1997, Local Government was specifically mentioned in Attachment 2 in relation to bilateral agreements. It was stated there that:

During the formulation of such agreements, the States will have regard to the implications for Local Government.

The COAG Agreement also stated that there was a national partnership between all levels of government on environmental issues (clause 2). The Australian Local Government Association was a party to both the 1992 IGAE and the 1997 COAG Agreement.

The Senate Committee did not think that it was necessary for the legislation to have direct provisions for local government, since in the Committee’s view the interaction between State and local governments in pursuit of meeting the requirements of the legislation would ensure that the role of local government would be adequately recognised.

Regional Forest Agreements (RFA) are outside the scope of the legislation. This means that action taken in accordance with an RFA or in a region where an RFA is being developed is not going to be subject to the approval processes under the

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68 Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 41.

69 Note: the Regional Forest Agreements Bill 1998, was passed by the Senate on 2 September 1999, and is likely to be debated on September 20, 1999 in the House of Representatives. See ‘Regional Forests Agreements Bill 1998’, Senate Hansard, 2 September 1999, p 7930.
Act.\textsuperscript{70} This was criticised by environmental groups because of the view that RFAs were negotiated without minimum standards of environmental impact assessment or public participation. This view was rejected by the Senate Committee.\textsuperscript{71}

In relation to bilateral agreements that deal with matters of ‘national environmental significance’ the view was expressed that the criteria that the Minister must abide by in determining the standard of satisfaction are minimal, vague and malleable, with no explicit minimum environmental standards as a condition of entering into such agreements.\textsuperscript{72} Bilateral agreements were also criticised for only being able to be suspended or stopped in very limited circumstances. Suspension can only occur if the Commonwealth considers that a party to a bilateral agreement has transgressed such an agreement or a state or territory has requested suspension or cancellation.\textsuperscript{73}

Further, it has been pointed out that there is no provision for a merits review of decisions made or actions taken under the Bill, despite the extensive discretion granted to the Commonwealth Environment Minister in a number of provisions.\textsuperscript{74}

\section*{4. IMPLICATIONS FOR QUEENSLAND}

A number of matters are left as yet unresolved after the passage of the Commonwealth Act.

Particularly, management plans need to be made for Commonwealth reserves, World Heritage/Ramsar areas, unless there is a bilateral agreement which accredits an already existing Queensland management plan.

\textsuperscript{70} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 71.

\textsuperscript{71} Senate Environment, Communication Information Technology and the Arts Legislation Committee, p 71.


Further, regulations need to be made in relation to a wide variety of matters in the legislation. For example it has been left to regulations to prescribe:

- Australian World Heritage Management Principles (s 323) and Australian Ramsar Management Principles (s 335);
- Additional powers for wardens, rangers, and inspectors (s 400);
- Additional matters to be added to those considered to be of national environmental significance (s 25);
- Criteria for bilaterally accredited management plans (s 46);
- Australian IUCN reserve management principles (ss 347-348);
- Regulate/prohibit various activities in relation to Commonwealth reserves (s 356) and conservation zones (s 390E);
- Matters the Minister must have regard to in deciding whether the proposed conservation agreement will result in a net benefit to biodiversity conservation (s 305);
- Controlling non-native species (s 301A);
- Control of access to biological resources in Commonwealth areas (s 301).

This means there is still considerable uncertainty as to how the legislation can be expected to work in practice, since much of the detail is still to be drafted. As Wayne Cornish the National Farmers Federation Environment Committee Chairman stated:

*NFF has always been concerned that the Bill presented to the community and Parliament was framework legislation, with the operational details being left to the regulations.*

### 4.1 CONSISTENCY

Section 10 of the Act states that the Act is not intended to exclude or limit the concurrent operation of any State or Territory law, except so far as the contrary intention appears. The difficulty here is that it may not be readily apparent whether there is a contrary intention. A number of pieces of Queensland legislation such as the *Environmental Protection Act 1994*, the *Coastal Protection and Management Act 1995*, and the *Nature Conservation Act 1992*, contain provisions which deal with similar topics to the Commonwealth legislation, although not necessarily in exactly the same way. Constitutionally, Queensland (and other State) legislation will be inoperative to the extent of any inconsistency with Commonwealth

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legislation (Commonwealth Constitution s 109). It is therefore of practical importance to establish whether the Queensland statutes can operate concurrently with the Commonwealth legislation.

4.2 **BILATERAL AGREEMENTS**

Bilateral agreements will be a crucial aspect of the operation of this legislation. As already mentioned, these are an accreditation mechanism whereby State/Territory assessment and potentially approval processes are given recognition by the Commonwealth. For example, in Queensland, the management and conservation plans of the *Nature Conservation Act 1992* (Qld) and the environment management programs under the *Environment Protection Act 1994* (Qld) could potentially become processes recognised in bilateral agreements. A considerable amount of detailed work has been done recently in Queensland on bioregions and the systematic conservation of biodiversity, which will clearly have potential to be recognised in bilateral agreements. However at the time of writing, there are no draft bilateral agreements available, and negotiations between Queensland and the Commonwealth on the precise boundaries of bilateral agreements are at a very preliminary stage.

4.3 **COOPERATION WITH THE COMMONWEALTH**

A number of provisions in the legislation require the Commonwealth to endeavour to reach agreement with a State or Territory if the particular action is going to be within the State or Territory. For example, s 269 requires the Commonwealth to seek cooperation of the State or Territory in implementing a recovery plan or threat abatement plan jointly with the State or Territory; whilst s 176 suggests such cooperation in the preparation of a bioregional plan. Section 314 requires the Commonwealth to use its best endeavours to reach agreement with a State or Territory where the Commonwealth proposes to submit land for World Heritage listing. Section 87 provides that the State/Territory must be invited to provide input on the appropriate method for assessing the impacts of controlled actions.

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5. CONCLUSION

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) represents a significant overhaul of national environmental laws. The Act was driven by the Government’s desire to address the division of responsibilities for the environment between the Commonwealth, States and Territories. There was also a perceived need to remove impediments to business and industry, and to improve the efficiency of achieving ecologically sustainable environmental outcomes.

For Queensland the significance of the legislation lies in the specific provisions which give accreditation to state environmental assessments and approval processes. The legislation also contemplates cooperative arrangements and consultation with States/Territories in the development of management plans and decisions which affect areas within the State/Territory.
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