Why the Environment Protection and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives

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The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act) constitutes an improvement on previous Commonwealth environmental law, particularly the Environment Protection (Impact of Proposals) Act 1974 (Cth) and the Endangered Species Protection Act 1992 (Cth). Among other things, it introduced a new Commonwealth referral, assessment and approval process that is intended to provide protection for the so called "matters of national environmental significance", the environment on Commonwealth land and the environment generally where the relevant action is taken by the Commonwealth or a Commonwealth agency. This process is also intended to promote the ecologically sustainable use of natural resources and the conservation of biodiversity. However, after four years, there is mounting evidence that the referral, assessment and approval process is failing to achieve its environmental objectives. This article presents statistics on the operation of the referral, assessment and approval process between 16 July 2000 and 30 September 2003 and analyses why this process is failing to achieve its environmental objectives. The conclusion is reached that dramatic changes are required in both the way the EPBC Act is being administered and the structure of the referral, assessment and approval process if the objectives of this process are to be realised.

PART 1 – INTRODUCTION

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) commenced in July 2000 amid much fanfare about its ability to make a meaningful contribution to the protection and conservation of Australia's biodiversity and natural heritage. There is little doubt it is an improvement on previous Commonwealth environmental law, particularly the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and the *Endangered Species Protection Act 1992* (Cth). Among other things, it has introduced a new Commonwealth referral, assessment and approval process that is intended to provide protection for the so-called "matters of national environmental significance", the environment on Commonwealth land and the environment generally where the relevant action is taken by the Commonwealth or a Commonwealth agency. This process is the main mechanism for the achievement of the objects of the EPBC Act to promote the conservation of biodiversity, to provide protection for the environment (particularly the matters of national environmental significance), and to promote the ecologically sustainable use of natural resources. However, after four years, there is mounting evidence that the EPBC Act's referral, assessment and approval process is failing to make a meaningful contribution to the achievement of these objectives.

* The opinions expressed in this article are exclusively those of the author.

This article seeks to examine why the referral, assessment and approval process is failing to realise its environmental objectives. Part 2 provides an overview of the objects of the Act and the main functions of the referral, assessment and approval process. Part 3 reviews the statistics on the operation of the referral, assessment and approval process between 16 July 2000 and 30 September 2003 and then assesses whether this process is performing its functions effectively. Part 4 evaluates why the referral, assessment and approval process is failing to adequately perform its functions and Part 5 provides a brief conclusion.

PART 2 –THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT AND ITS OBJECTS

The EPBC Act is a large piece of legislation that replaces six other statutes.[1] It is not the author's intention to provide a comprehensive overview of the entire Act. Rather, this article will focus on the referral, assessment and approval process. In doing so, it will ignore important provisions of the Act. These include:

(a) the provisions concerning actions in Commonwealth areas that may harm or injure a cetacean or a member of a listed threatened species, threatened ecological community, migratory species or marine species;[2]

(b) the provisions concerning the regulation of wildlife trade;[3]

(c) the provisions concerning the preparation and implementation of management plans, recovery plans and wildlife conservation plans;[4] and

(d) the provisions that regulate actions in Commonwealth reserves.[5]

These aspects of the Act are important and have the potential to make a meaningful contribution to the protection and conservation of Australia's biodiversity and its natural and cultural heritage. However, space prevents this article from covering all aspects of the Act. Further, the referral, assessment and approval process is the centrepiece of the Act's regulatory structure for the protection and conservation of the matters of national environmental significance, the environment on Commonwealth land and the environment generally where the relevant action involves the Commonwealth or Commonwealth agencies.

Set out below is a description of the objects of the Act, an overview of the referral, assessment and approval process, and an analysis of the functions that this process is intended to serve.

2.1 The objects of the Act

Section 3(1) of the EPBC Act states that the objects of the Act are:

(a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

(c) to promote the conservation of biodiversity; and

(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

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[1] The *Environmental Reform (Consequential Provisions) Act 1999* (Cth), which accompanied the EPBC Act, repealed five Acts: *Environment Protection (Impact of Proposals) Act 1974* (Cth); *Endangered Species Protection Act 1992* (Cth); *National Parks and Wildlife Conservation Act 1975* (Cth); *World Heritage Properties Conservation Act 1983* (Cth) and the *Whale Protection Act 1980* (Cth). The *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* (Cth), which received Royal Assent in July 2001, repealed the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* and inserted the wildlife trade provisions now found in Pt 13A of the Act.

[2] See EPBC Act, Pt 13.

[3] See EPBC Act, Pt 13A.

[4] See EPBC Act, Pts 13 and 15.

[5] See EPBC Act, Pt 15.

(e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

2.2 The referral, assessment and approval process

Broadly, the referral, assessment and approval provisions prohibit a person from taking an "action" (which is defined as including a project, development, undertaking, activity or series of activities) that is likely to have a significant impact on a "matter protected under a provision of Part 3" without the approval of the Minister.[6] The matters protected under Pt 3 are divided into two categories: the "matters of national environmental significance" (Pt 3, Div 1) and the environment where the action involves the Commonwealth or Commonwealth land (Pt 3, Div 2).

There are currently six matters of national environmental significance: listed threatened species (other than those listed as "extinct" or "conservation dependent")[7] and ecological communities (other than those listed as "vulnerable");[8] listed migratory species;[9] the ecological character of Ramsar wetlands;[10] the world heritage values of World Heritage properties;[11] "nuclear actions" that are likely to have a significant impact on the environment;[12] and the environment in Commonwealth marine areas and Commonwealth managed fisheries.[13] A seventh will soon be added, namely the National Heritage values of National Heritage places.[14]

Part 3, Div 2 requires approval to be obtained for the following actions involving the Commonwealth:

(a) an action that is likely to have a significant impact on the environment on Commonwealth land;

(b) an action taken on Commonwealth land that is likely to have a significant impact on the environment; and

(c) an action carried out by the Commonwealth or a Commonwealth agency that is likely to have a significant impact on the environment.

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[6] There are a number of exceptions to, and exemptions from, this general prohibition. It should also be noted that there are exemptions from the entire referral, assessment and approval process as well as exemptions from the assessment process only (eg, where an action is assessed under a State process in accordance with an "assessment" bilateral agreement). Further details of the exemptions are provided in Part 4.2.3 of this article below.

[7] See EPBC Act, ss 18 and 18A. Note that the list of threatened species contains six categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable and conservation dependent.

[8] See EPBC Act, ss 18 and 18A. Note that the list of threatened ecological communities contains three categories: critically endangered, endangered and vulnerable.

[9] See EPBC Act, ss 20 and 20A. Note that the list of migratory species contains all species included in the appendices to the *Convention on the Conservation of Migratory Species of Wild Animals (1979)* (Bonn Convention), all species included on the lists established under the *Japan-Australia Migratory Bird Agreement (1974)* (JAMBA) and the *Chinese-Australia Migratory Bird Agreement (1986)* (CAMBA) and all species identified in a list or instrument established under an international agreement approved by the Minister for the purposes of the list of migratory species (see s 209).

[10] See EPBC Act, ss 16 and 17B. Note that "Ramsar wetlands" are wetlands designated by the Commonwealth under Art 2 of the *Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971)* (Ramsar Convention) for inclusion on the List of Wetlands of International Importance. The Minister can also declare wetlands to be Ramsar wetlands for the purposes of the referral, assessment and approval process in certain circumstances (see s 17A).

[11] See EPBC Act, ss 12 and 15A. Note that "World Heritage properties" are properties included on the list kept under Art 11 of the *Convention for the Protection of the World Cultural and Natural Heritage (1972)* (World Heritage Convention). The Minister can also declare properties to be World Heritage properties in certain circumstances (see s 14).

[12] See ss 21 and 22A. "Nuclear actions" include establishing or significantly modifying a nuclear installation, transporting spent nuclear fuel or radioactive waste products arising from reprocessing, and mining or milling uranium ore (see s 22).

[13] See EPBC Act, ss 23 and 24A.

[14] The National Heritage places "trigger" will be inserted by the *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth), which received Royal Assent on 23 September 2003 and commenced on 1 January 2004. See Sch 1 of the *Environment and Heritage Legislation Amendment Act (No 1) 2003* (Cth).

The assessment and approval process is usually initiated by proponents, who are required to refer details of an action to the Minister if they believe it may require approval under the Act. The Minister may also "call in" a proposed action if he or she considers it may require approval. Further, a Commonwealth agency, State, Territory or agency of a State or Territory can refer a proposal by another person to take an action to the Minister if they have administrative responsibilities relating to the action.

Upon receiving a referral, the Minister must decide whether approval is required (ie, whether it will have, or is likely to have a significant impact on a matter protected under Pt 3). This is often called the "controlled action decision". If the action requires approval, it is called a "controlled action". The Minister has three options when making a controlled action decision: approval is required; approval is not required; or approval is not required if the action is carried out in a manner specified by the Minister.[15]

If the Minister decides approval is required, the activity is usually required to be assessed under the EPBC Act and the Minister must choose the type of assessment to be undertaken. The assessment options available to the Minister are: an assessment on preliminary documentation; a public environment report; an environmental impact statement (EIS); a public inquiry; and an accredited assessment process.[16] After the assessment has been completed, the Minister decides whether or not to approve the action and, if it is approved, what conditions (if any) to attach to the approval.

2.3 What is the function of the referral, assessment and approval process?

The objects of the EPBC Act suggest the referral, assessment and approval process it is intended to provide a regulatory safety net for the protection of the matters of national environmental significance. It is also apparent that it is intended to ensure that environmental issues are given appropriate consideration in Commonwealth decision-making processes and that the environment in Commonwealth areas is appropriately conserved.

Clearly, other measures are intended to assist in the conservation and protection of the matters of national environmental significance. In many instances, this will include State and Territory environmental and planning laws and other Commonwealth laws. It will also include non-regulatory mechanisms, such as grants programs being conducted under the Natural Heritage Trust and the National Action Plan for Salinity and Water Quality. However, the EPBC Act's referral, assessment and approval process is intended to provide an integral part of the framework for the protection of the matters of national environmental significance.

The objects of the Act and the nature of the referral, assessment and approval process also suggest that it is intended, in conjunction with other aspects of the Act, to "promote" ecologically sustainable development and the conservation of biodiversity. The use of the term "promote" in the objects is important, as it emphasises that the Act is part of a broader strategy that is intended to conserve biodiversity and bring about the ecologically sustainable use of natural resources. This point should be kept in mind when reviewing the statistics on the operation of the referral, assessment and approval process.

On a more procedural note, the referral, assessment and approval process was intended to rationalise Commonwealth environmental laws in order to provide a more efficient and effective assessment and approval process. It was also intended to minimise unnecessary duplication between Commonwealth, State and Territory environmental assessment and approval processes and to create greater certainty for all stakeholders in relation to the Commonwealth's role in

[15] See EPBC Act, ss 75 and 77.

[16] Assessments under accredited assessment processes are described as assessments "under the Act". However, in reality, they involve the accreditation of another Commonwealth assessment process or an assessment process of a State or Territory for the purpose of the assessment of the relevant impacts of the proposed action. At the completion of the accredited assessment process, a report is required to be submitted to the Minister on the impacts of the proposed activity on the relevant matters protected under Pt 3 of the EPBC Act. The Minister then uses this report as the basis for his or her decision on whether or not to approve the activity.

environmental issues. In this regard, the Explanatory Memorandum for the Environment Protection and Biodiversity Conservation Bill 1998 states:

> Environment assessment and approval procedures will be simplified and streamlined. Circumstances under which Commonwealth processes are triggered will be much clearer than at present, and clear timelines will be set out … Continuing compliance costs will be negative (ie the changes are beneficial) due to the increased certainty and efficiency of the environmental assessment and approvals process …

On the basis of the above facts, it is reasonable to assert that the main functions of the referral, assessment and approval process are:

(a) to provide protection for the matters of national environmental significance and the environment in Commonwealth areas;

(b) to ensure environmental issues are given appropriate consideration in Commonwealth actions;

(c) to promote ecologically sustainable development;

(d) to promote the conservation of biodiversity; and

(e) to ensure that (a)-(d) above are achieved in a manner that is efficient and minimises uncertainty for all stakeholders.

PART 3 – HOW HAS THE REFERRAL, ASSESSMENT AND APPROVAL PROCESS PERFORMED SO FAR?

3.1 The statistics

Set out below are key statistics on the administration of the EPBC Act's referral, assessment and approval processes between 16 July 2000 and 30 September 2003.

Table 1: Number of referrals and referral decisions to 30 September 2003

Total No. of Referrals	**1017**
Total No. of referral Decisions	**967**
Approval Required	253 (26%)
Approval Not Required	574 (59%)
Approval Not Required – Manner Specified	140 (14%)
Referrals withdrawn	13
Being processed at 30 September 2003	37

Table 2: Proportional use of the six available assessment approaches to 30 September 2003

Total No. of Assessment Approach Decisions	
Preliminary Documentation	(50%)
Accredited Assessment Approach	(31%)
Environmental Impact Statement	(9%)
Public Environment Report	(6%)
Public Inquiries	0
Bilateral Agreement	(4%)

Table 3: Number of assessments completed and assessment approaches used to 30 September 2003

Total No. of Assessments Completed	**88**
Preliminary Documentation	67
Accredited Assessment Approach	12
Environmental Impact Statement	5
Public Environment Report	1
Public Inquiries	0
Bilateral Agreement	3

Table 4: Number of approval decisions at 30 September 2003

Total No. of Approvals Granted	**72**
Approvals with conditions	63
Approvals without conditions	8
Total No. of Approvals Refused	**1**

3.2 Analysis

At 30 September 2003, only one action that had been referred to the Minister had been prevented from being undertaken by virtue of the operation of the EPBC Act.[17] Seventy-two approvals had been granted, and one had been refused. Approximately 73% (714) of all referrals have not required approval under Pt 9. Of the 1017 referrals that were made between 16 July 2000 and 30 September 2003, 582 were approved in one-way or another without any conditions or restrictions (574 did not require approval and eight were approved without conditions). One-hundred and forty were declared not to require approval under the Act if they are carried out in a manner specified by the Minister.[18] Approximately 66% of these "manner specified" decisions were made in the period between 30 June 2002 and 30 September 2003.

These statistics have been used as evidencing a failure by the Commonwealth to implement the referral, assessment and approval process appropriately so as to protect the matters of national environmental significance.[19] However, as damning as these statistics may first appear, it must be emphasised that this raw data provides no indication of the nature of the projects that are being referred under the EPBC Act. Without conducting a case-by-case analysis of the referrals, it is difficult to draw solid conclusions on the controlled action and approval decisions that have been made. Having said that, the fact that in almost four years only one action has been prevented from

[17] On 21 March 2003, the Minister refused an application for approval under Pt 9 for the first time. The action involved the use of an electrical grid system to kill approximately 5,500 spectacled flying-foxes (*Pteropus conspicillatus*) in the period November to December 2002. However, as is self evident, by the time the Minister made the approval decision the timeframe for the action had passed. At 30 September 2003, this was the only instance where an application for approval had been refused under Pt 9.

[18] At present, the "conditions" imposed under the manner specified process are not binding. If the action is not carried out in the manner specified by the Minister, the person taking the action will only be guilty of contravening the Act if it can be proven that the action had a significant impact on a matter protected under Pt 3. That is, a substantive breach of the provisions of Pt 3 must be proven. It is not enough to simply prove the conditions have been breached. The *Environment and Heritage Legislation Amendment Act (No 1) 2003* changed this by prohibiting a person from contravening a condition imposed under the manner specified process.

[19] See, eg, Christoff P, *In Reverse* (Australian Conservation Foundation, 19 August 2002) pp 38-39, http://www.acfonline.org.au/asp/pages/selectlist.asp?strFilterNmValue=IdTopic&strFilterValue=9&IdDocTyp=13 viewed 15 July 2004.

being carried out by virtue of the operation of the Act is worrying, particularly when regard is had to the rate of environmental degradation over this period.

While it is difficult to draw definitive conclusions on the controlled action and approval decisions that have been made, the available statistics provide firm evidence that the majority of actions that are having the greatest impact on the matters of national environmental significance and Australia's natural heritage are not being referred to the Minister under the Act. This can be attributed to two main factors: non-compliance and the fact that, in many cases, these actions are exempt from the referral, assessment and approval process. The Commonwealth's administration of the EPBC Act may also be a contributing factor, particularly its practice of indicating to people taking relevant actions that they do not have to make referrals.[20]

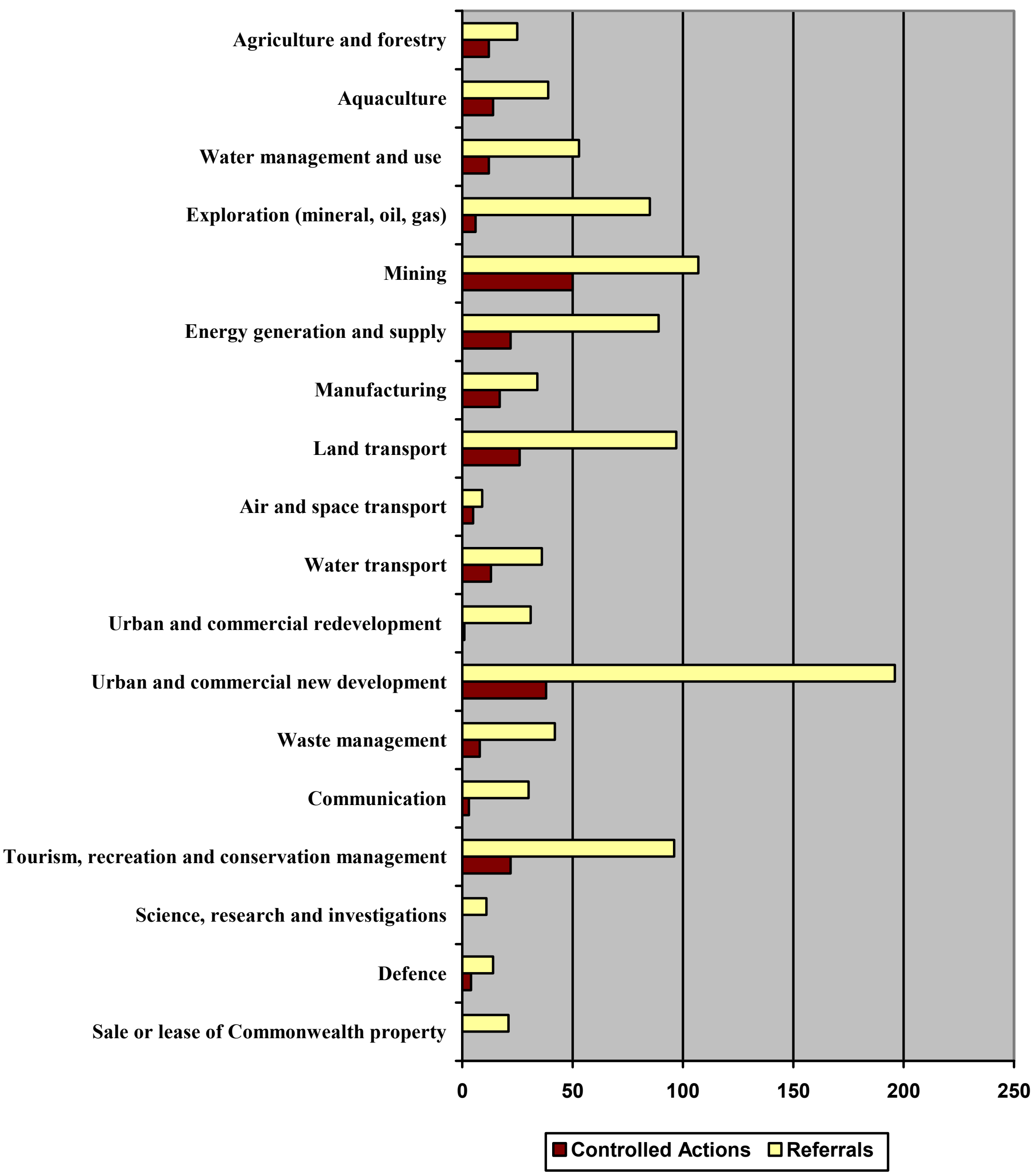
Set opposite is a graph (Figure 1) displaying the number of referrals received and number of actions requiring approval (ie "controlled actions") from 18 industry categories.

Figure 1 indicates that the industry categories from which the greatest number of referrals were received between 16 July 2000 and 30 September 2003 were urban and commercial new development (196), mining (107), land transport (97), tourism/recreation/conservation management (96), energy generation and supply (89), and exploration (85). In contrast, relatively few referrals were received from the industries that are arguably having the greatest impacts on biodiversity and the matters of national environmental significance, namely, agriculture, forestry and fisheries. At 30 September 2003, only 25 referrals had been received from the agriculture and forestry sectors and none had been received from the fisheries sector (excluding aquaculture).[21]

[20] See *Humane Society International Inc v Minister for the Environment and Heritage* (2003) 126 FCR 205; [2003] FCA 64, which considered the legality of statements in administrative guidelines issued by the Department of the Environment and Heritage that people who killed spectacled and grey-headed flying-foxes in accordance with valid permits issued by the States did not have to make a referral under the EPBC Act. Spectacled and grey-headed flying-foxes are both listed as vulnerable under the EPBC Act.

[21] Three of the agriculture and forestry referrals were withdrawn before an approval decision was made (Ref Nos 2001/381, 2001/440 and 2001/480). Note that figures provided by the Department of the Environment and Heritage indicate that there have been 27 agricultural and forestry referrals. However, the Department of the Environment and Heritage's public notices website only lists 25. The author has used the lower number for these purposes, as he was unable to obtain written evidence of the existence of the other two referrals.

Figure 1: Referrals received and actions requiring approval by industry category at 30 September 2003[22]



[22] The figures for this graph were provided by the Department of the Environment and Heritage and cross-checked against the figures on the Department's public notices website. There is a possibility they contain errors.

3.3 Is the referral, assessment and approval process performing its functions?

It is difficult to analyse whether the referral, assessment and approval process is performing its functions effectively without conducting a case-by-case analysis of all referrals and obtaining accurate data on the condition of the matters protected under Pt 3, threats to their conservation, and changes in their status since the commencement of the Act. It is beyond the scope of this article to attempt to compile and analyse this information. However, the data presented above on the operation of the referral, assessment and approval process suggests there are grounds for alarm about its performance. Of particular concern is the evidence relating to the object to promote biodiversity conservation. The statistics on the operation of the referral, assessment and approval process also cast doubt over whether it is providing effective protection for the matters of national environmental significance and promoting ecologically sustainable use of natural resources. This point can be illustrated by looking more closely at the major threats to Australia's biodiversity.

It is widely recognised that the greatest threats to Australia's biodiversity are caused by:[24]

(a) broad-scale land clearing (excluding clearing for forestry);
(b) forestry operations (including land clearing, establishment of plantations, fire management practices and harvesting forest products);
(c) fishing;
(d) invasive species;
(e) water development and use (which includes the construction of dams, weirs, and bores, the extraction of surface and ground water, and its use for agriculture, industry and urban areas); and
(f) altered fire regimes.

Climate change caused by the increased concentration of greenhouse gases in the atmosphere is also an issue worthy of attention. Although it is arguable that it is not currently having as great an impact on biodiversity as the issues listed above, it is likely to do so over the next 50 to 100 years. Indeed, it has the potential to become *the* most important threat to biodiversity.[25]

The available statistics suggest that the EPBC Act's referral, assessment and approvals process has had very little effect on any of these issues.

With regard to fishing operations, as noted above, no referrals have been received in relation to fisheries operations, either inside or outside Commonwealth waters.[26] The absence of referrals concerning fishing operations can be attributed to three main factors. First, many fishers may be unaware of the Act's referral requirements. Second, the activities of many commercial fishers may be exempt from the referral, assessment and approval process due to the operation of the "prior authorisation exemption" found in s 43A.[27] Third, there is a possibility the strategic assessments that are currently being undertaken in relation to Commonwealth managed fisheries have reduced the incentive for fishers to comply with the referral requirements.[28]

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[24] See, eg, The National Strategy for the Conservation of Australia's Biological Diversity (1996) and Australian State of the Environment Committee, n 23.

[25] See Pittock B (ed), *Climate Change – An Australian Guide to the Science and Potential Impacts* (Australian Greenhouse Office, Commonwealth of Australia, 2003); The National Strategy for the Conservation of Australia's Biological Diversity (1996); and Australian State of the Environment Committee, n 23.

[26] Note also that, at 30 June 2002, no permits had been issued under Pt 13 in relation to fishing operations that could harm or injure a cetacean or a member of a listed threatened species, ecological community, migratory species or marine species.

[27] Section 43A allows a person to take an action that was specifically authorised under a law of the Commonwealth, a State or a Territory prior to the commencement of the EPBC Act, provided no other environmental authorisation was needed immediately prior to the date of commencement of the Act to allow the action to be taken lawfully.

[28] Under Pt 10 of the Act, the Minister is required to undertake a strategic assessment of the impacts of actions taken under fisheries management plans and policies that apply to Commonwealth managed fisheries on the matters protected under

Irrespective of the cause, it would appear the referral, assessment and approval process has not had any effect on the sustainability of fishing operations. That said, the strategic assessment process (which is not part of the formal referral, assessment and approval process) clearly does have the potential to improve the ecological sustainability of fishing operations in Commonwealth managed fisheries. Only time will tell if this potential is realised.

The available evidence, and extrapolations from data for the period 1995-2002, suggests that the total area of native vegetation cleared in Australia over the four years since July 2000 is likely to have been in excess of 1,500,000 hectares.[29] The majority of broad scale land clearing is associated with agriculture, although numerous important ecosystems are threatened by urban expansion.[30] Queensland has the highest rates of land clearing for agricultural purposes by a significant margin.[31] The high rate of land clearing in Queensland has the potential to have severe impacts on a number of matters of national environmental significance, including the Great Barrier Reef World Heritage Area and several threatened species and ecological communities. Land clearing for agricultural purposes in several other States and Territories (particularly in New South Wales and western Victoria) is also threatening matters of national environmental significance.[32] Has the EPBC Act arrested the rates of broad scale land clearing for agricultural or urban development purposes?

Pt 3. At the completion of the strategic assessment process, it is expected that fishing operations that are carried out in accordance with fisheries management plans and policies that are endorsed by the Minister will be exempt from the provisions of Pt 3 concerning the protection of the environment in Commonwealth marine areas. Note that the Government has made it clear it has no intention of pursuing breaches of the Act concerning the bycatch of protected species in Commonwealth managed fisheries until the strategic assessments have been completed. See *AFMA News* (newsletter of the Australian Fisheries Management Authority), Vol 4, Issue 8 (December 2000) p 2.

[29] See: Queensland Department of Natural Resources and Mines, *Land Cover Change in Queensland 1999-2001*, State-wide Landcover and Trees Study Report (Queensland, January 2003); Australian State of the Environment Committee, n 23; National Land and Water Resources Audit, *Australian Native Vegetation Assessment 2001*, Independent Report to the Commonwealth Minister for the Environment and Heritage and the Commonwealth Minister for Agriculture, Fisheries and Forestry (Commonwealth of Australia, 2001); Queensland Department of Natural Resources, *Land Cover Change in Queensland 1997-1999*, State-wide Landcover and Trees Study Report (Queensland, September 2000); Queensland Herbarium, *Remnant Vegetation in Queensland: Analysis of Pre-clearing Remnant 1997-1999 Regional Ecosystem Information* (Queensland, 2001); New South Wales Auditor-General, *Performance Audit Report: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation* (The Audit Office of NSW, August 2002); Benson J, "Clearing Rates in NSW – The Full Picture" (2001) 6 *Hunter Flora* 4 (Hunter Catchment Management Trust, Paterson New South Wales); Cox S, Sivertsen D, and Bedward M, "Clearing in the NSW Northern Wheatbelt" (2001) 7(1) *Cunninghamia* 101; Bedward M, Sivertsen D, Metcalfe L, Cox S and Simpson C, *Monitoring the Rate of Native Woody Vegetation Change in the NSW Wheatbelt*, Final Project Report to the Natural Heritage Trust/Environment Australia (National Parks and Wildlife Service, Sydney, 2001); Environmental Research and Information Consortium Pty Ltd, *Rates of Clearing of Native Woody Vegetation 1997-2000*, Report for the New South Wales Department of Land and Water Conservation (Canberra, 2001); New South Wales Department of Land and Water Conservation, *Rates of Clearing of Native Woody Vegetation 1995-2000* (May 2001); New South Wales Department of Infrastructure, Planning and Natural Resources, *2003 – Proposed Land Use – Area Approved For Clearing* (2003); New South Wales Department of Infrastructure, Planning and Natural Resources, *2002 – Proposed Land Use – Area Approved For Clearing* (2002); New South Wales Department of Infrastructure, Planning and Natural Resources, *2001 – Proposed Land Use – Area Approved For Clearing* (2001); New South Wales Department of Infrastructure, Planning and Natural Resources, *2000 – Proposed Land Use – Area Approved For Clearing* (2000); Peatling S, "Illegal Land Clearing Strips Vast Swathes of State", *The Sydney Morning Herald* (17 November 2003).

[30] National Land and Water Resources Audit, *Australian Native Vegetation Assessment 2001*, Independent Report to the Commonwealth Minister for the Environment and Heritage and the Commonwealth Minister for Agriculture, Fisheries and Forestry (Commonwealth of Australia, 2001); Queensland Department of Natural Resources and Mines, n 28.

[31] Queensland Department of Natural Resources and Mines, n 28; Australian State of the Environment Committee, n 23; National Land and Water Resources Audit, *Australian Native Vegetation Assessment 2001*, Independent Report to the Commonwealth Minister for the Environment and Heritage and the Commonwealth Minister for Agriculture, Fisheries and Forestry (Commonwealth of Australia, 2001).

[32] See National Land and Water Resources Audit, *Australian Terrestrial Biodiversity Assessment 2002* (Commonwealth of Australia, 2002).

Decreases in land clearing have been detected in Queensland since mid-2000.[33] There is also some questionable data showing the rates of land clearing in NSW have declined since the late 1990s.[34] The most plausible explanation for the reduction in the rate of land clearing in Queensland over this period is the commencement of the *Vegetation Management Act 1999* (Qld) in September 2000 and the panic clearing that preceded its commencement.[35] Similarly, if there has been a decrease in the rate of land clearing in NSW since the late 1990s, the most likely cause is the operation of the *State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation Policy* and the *Native Vegetation Conservation Act 1997* (NSW) and a series of prosecutions under those statutory instruments in the late 1990s.[36] The fact that in the period July 2000 to September 2003, only five referrals were received from Queensland, five from Victoria, three from New South Wales, one from South Australia, and one from Tasmania that involved land clearing for agricultural purposes points to the conclusion that the EPBC Act's contribution to reducing the rate of land clearing in Australia has been negligible.[37] Having said that, there is a possibility the fear of triggering the requirement to make a referral under the EPBC Act has resulted in a decrease in the rates of land clearing in certain agricultural areas. Yet, the available circumstantial evidence suggests this is unlikely.

The Act's performance in relation to clearing for urban expansion is more positive. At 30 September 2003, 227 referrals had been received from the urban and commercial redevelopment (31) and urban and commercial new development (196) categories. However, at 30 September 2003, none of these had been prevented from proceeding and only six had been approved with binding conditions.[38] In summary, while there is insufficient data on which to base a definitive conclusion, the available evidence suggests the EPBC Act's referral, assessment and approval process has had very little (if any) impact on the rates of broad-scale land clearing.

Due to the exemption for RFA forestry operations carried out in accordance with a regional forestry agreement, the referral, assessment and approval process is incapable of regulating the majority of forestry operations, irrespective of their potential impact on the matters protected under Pt 3. This is reflected in the fact that only four referrals were made in relation to forestry and timber operations in the first 38 months of the Act's operation and only one of these involved clearing a substantial area of native vegetation.[39]

The referral, assessment and approval process does not deal directly with the use and release of invasive species. Consequently, this issue can only be dealt with indirectly when an action triggers the approval process on the grounds of its potential impacts on a matter protected under Pt 3. However, other provisions of the Act do address invasive species. In this regard, the wildlife trade provisions in Pt 13A regulate the importation and exportation of certain live specimens (among other things). Further, under s 301A, regulations can be made to control the use and release of non-native species within Australia.[40] At 30 September 2003, no regulations had been

[33] See Queensland Department of Natural Resources and Mines, n 28; Queensland Department of Natural Resources and Mines, *Land Cover Change in the Fitzroy River Catchment 1999-2001*, State-wide Landcover and Trees Study Report, (Queensland, 2002); Queensland Department of Natural Resources and Mines, *Land Cover Change in the Queensland Murray Darling Basin 1999-2001*, State-wide Landcover and Trees Study Report (Queensland, 2002).

[34] See Environmental Research and Information Consortium Pty Ltd, *Rates of Clearing of Native Woody Vegetation 1997-2000*, Report for the New South Wales Department of Land and Water Conservation (Canberra, 2001); New South Wales Auditor General, *Performance Audit Report: Department of Land and Water Conservation – Regulating the Clearing of Native Vegetation* (Audit Office of New South Wales, 2002).

[35] See Queensland Department of Natural Resources and Mines, n 28; The Hon Stephen Robertson MP, "Beattie flags tough new measures to stop illegal clearing", Media Release (22 January 2003).

[36] See Bartel R, "Compliance and Complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales" (2003) 20 EPLJ 116.

[37] These figures were obtained from the Department of the Environment and Heritage's public notices website. There is a possibility they are incorrect, as the website many contain errors and some referral notices do not state clearly whether the relevant action involves land clearing.

[38] At 30 September 2003, three had been approved without conditions.

[39] Ref No 2001/229, which involved clearing to establish a hardwood plantation on Melville Island.

[40] The scope of any regulations made under s 301A will be limited by the extent of the Commonwealth's Constitutional powers to make laws for these purposes.

made for these purposes. Therefore, while the referral, assessment and approval process may be unable to make a meaningful contribution to controlling the spread of invasive species, the Act contains other provisions that are capable of doing so.

Water development and use can be regulated under the referral, assessment and approval process indirectly via the provisions concerning World Heritage properties, Ramsar wetlands, migratory species, threatened species, threatened ecological communities and Commonwealth areas. At 30 September 2003, 53 referrals had been made from the water management and use category. The majority of these concerned the construction of new water infrastructure (ie dams, weirs, pipelines, sewerage systems, stormwater drains etc) and upgrades of existing infrastructure. However, no water infrastructure projects have been prevented from being undertaken as a result of the operation of the Act. Two major dams that are likely to have a significant adverse impact on biodiversity have been approved (Paradise Dam in Queensland and Meander Dam in Tasmania) and the conditions that were placed on these developments were of questionable value.[41] Another important fact is that there have been very few referrals in relation to water use and releases from water storages.

The small number of referrals in relation to water use is primarily due to the fact that the threats to biodiversity and the matters protected under Pt 3 that are posed by inappropriate water use are caused by the cumulative impacts of many separate actions taken by numerous water users. Consequently, the impacts of most water use actions are relatively "insignificant". The small number of referrals concerning releases from water storages can be attributed to the fact that it is unlikely the "impacts" of releases include the impacts of irrigated agriculture using the water from the relevant watercourses (this is discussed in more detail below). This fact also limits the effectiveness of the referral, assessment and approval process in relation to actions concerning water developments. The small number of referrals concerning releases from water storages may also be due to the operation of the "existing use" and "prior environmental authorisation" exemptions.[42] In short, it would appear the EPBC Act's referral, assessment and approval process has done very little to control water development and use and its capacity to do so appears to be largely confined to new developments.

The referral, assessment and approval process can regulate actions involving the use of fire via the provisions concerning World Heritage properties, Ramsar wetlands, migratory species, threatened species, threatened ecological communities and Commonwealth areas. However, at 30 September 2003, very few referrals had been made in relation to fire management activities.[43] Further, there is no obligation on property managers to refer a decision not to undertake controlled burning that is necessary for the conservation of matters of national environmental significance. Inaction is not an "action" for the purposes of the EPBC Act. Therefore, there is very little evidence to support the claim that the referral, assessment and approval process has helped address the issues associated with altered fire regimes.

Part 3 of the EPBC Act does not currently contain a greenhouse gas approval "trigger". Consequently, the referral, assessment and approval process is incapable of effectively regulating activities that contribute to Australia's greenhouse gas emissions. The only exception to this principle is where a proposed action will be undertaken by a Commonwealth agency or carried out in a Commonwealth area. In these circumstances, it is possible for the referral, assessment and approval process to be triggered on the grounds the greenhouse gas emissions generated by the action are likely to have a significant impact on the environment. However, in the vast majority of cases, actions that will result in substantial increases in greenhouse gas emissions (eg, power

[41] Ref Nos 2001/422 (Paradise Dam) and 2002/565 (Meander Dam). With regard to the adequacy of the conditions on Paradise Dam, see O'Malley B, "Last Gasp for Lungfish?" *The Courier Mail* (18 September 2003).

[42] See ss 43A and 43B.

[43] Upon searching the Department of the Environment and Heritage's public notices website on 1 December 2003, the author could only identify eight referrals concerned fire management activities: Ref Nos 2001/401, 2001/440, 2001/448, 2001/450, 2003/1030, 2003/1181, 2003/1184 and 2003/1272. (There is a possibility other referrals have been made concerning actions involving the use of fire.)

plants) are likely to be undertaken in the States and Territories and will not involve Commonwealth agencies. As a result, they will fall outside the scope of the Commonwealth approval triggers. Therefore, the referral, assessment and approval process has not addressed the causes of greenhouse gas emissions and, at present, it does not have the ability to do so.

Having regard to the issues discussed above, this article will return to the question of whether referral, assessment and approval process is effectively performed its main functions.

On the basis of the available information, there is nothing to suggest the referral, assessment and approval process has made a notable contribution to the promotion of biodiversity conservation. The statistics demonstrate that the process has not addressed the major threats to Australia's biodiversity. In some cases this can be attributed to structural flaws in the EPBC Act. In others, it may be the result of noncompliance and ineffective administration. However, irrespective of the causes, the evidence is relatively clear: the contribution of the referral, assessment and approval process to the promotion of biodiversity conservation has been limited.

The available evidence concerning the performance of the referral, assessment and approval process against the object to promote the ecologically sustainable use of natural resources is more varied. The fact that a mere 25 referrals have been made from the agriculture, forestry and fisheries sectors (excluding aquaculture) in almost four years is extremely damning. However, a reasonable number of referrals have been received in relation to actions involving the use of natural resources in other industries (eg, mining, aquaculture, exploration, energy generation and supply, and tourism, recreation and conservation management). Yet, in many cases, the referral, assessment and approval process does not have the capacity to effectively regulate the use of the relevant resource. The focus of the referral, assessment and approval process is on the impacts of the action in question on the matters protected under Pt 3 of the Act that triggered the approval requirement (what the Act calls the "relevant impacts"),[45] not the use of natural resources that are not protected under Pt 3. Further, at 30 September 2003, only one action had been prevented from being carried out by virtue of the operation of the Act and, in many cases, the conditions that have been imposed on approvals have been relatively limited. Therefore, there are reasonable grounds for arguing the referral, assessment and approval process has not effectively promoted the ecologically sustainable use of natural resources.

It is more difficult to assess whether the referral, assessment and approval process has provided effective protection for the matters of national environmental significance and the environment on Commonwealth land. As noted, there have been very few referrals from those industries that pose the greatest threat to the matters of national environmental significance (namely the agricultural, forestry and fisheries sectors) and only one action has been prevented from being taken as a result of the operation of the referral, assessment and approval process. These statistics cast doubt over whether the referral, assessment and approval process is effectively performing this function.

However, in certain cases, the absence of referrals and the small number of approvals may simply be caused by a lack of proposed actions that may affect relevant matters protected under Pt 3. For instance, between July 2000 and September 2003, there were very few developments in a number of World Heritage properties, including the Tasmanian Wilderness, Lord Howe Island Group, Heard and McDonald Island, and Macquarie Island World Heritage Areas. The absence of developments may be partly attributable to the protection provided for World Heritage properties under Pt 3 of the Act. Conscious of the heritage values of these areas and the protections afforded under the EPBC Act, developers may have steered clear of these areas. This may have also been a factor in relation to actions concerning certain Ramsar wetlands, Commonwealth areas, readily identifiable ecological communities and habitats of threatened species, and nuclear developments. However, in many cases, the preventative effect of the referral, assessment and approval process is watered down by the fact that other Commonwealth (including other aspects of the EPBC Act), State and Territory laws limit developments in these areas.

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[44] See EPBC Act, s 82.
[45] See EPBC Act, s 82.

In conclusion, the overwhelming feeling one gets from the available statistics and a fair reading of the relevant provisions of the EPBC Act is that the degree of protection provided by the referral, assessment and approval process for the matters of national environmental significance and the environment on Commonwealth land has been relatively limited, particularly in relation to threatened species, threatened ecological communities, migratory species, Ramsar wetlands, Commonwealth marine areas and Commonwealth managed fisheries.

There is insufficient information to draw conclusions on whether the referral, assessment and approval process has ensured environmental issues are given appropriate consideration in decision-making processes concerning the actions of the Commonwealth and Commonwealth agencies. There is circumstantial evidence that the referral, assessment and approval process has had an effect on the operations of some Commonwealth agencies, including the Commonwealth Minister for Defence, AusAID, and Airservices Australia.[46] Yet, less than 5% of all controlled actions have been triggered on the grounds the action will be taken by the Commonwealth or a Commonwealth agency and it is likely to have a significant impact on the environment. However, these statistics do not provide any meaningful insight into the degree to which the referral, assessment and approval process has influenced the decision-making processes of the Commonwealth and Commonwealth agencies.

Similarly, there is insufficient evidence on which to draw conclusions about whether the referral, assessment and approval process has provided greater certainty for stakeholders. This is a question that can only be answered through a detailed survey of relevant stakeholders. However, in the author's opinion, the referral, assessment and approval process contains considerable uncertainty and it is this uncertainty that is a key cause of the apparent failure of the process to effectively perform its environmental functions. The causes of this uncertainty are discussed below.

The final issue is whether the referral, assessment and approval process is performing its functions in an efficient manner. That is, whether it is timely and cost effective. It is extremely difficult to determine how much money has been spent on the implementation of the EPBC Act, let alone evaluate how much of this can be attributed to administration of the referral, assessment and approval process. Budget documents released by the Government indicate that at least $25 million was spent on the implementation of the Act between July 2000 and September 2003.[47] The figure is more likely to be somewhere near $40 or $50 million, a significant proportion of which could be allocated to the implementation of the referral, assessment and approval process. Has this been a constructive investment?

In most instances, the Commonwealth is meeting the statutory timeframes prescribed in the Act in relation to the referral, assessment and approval process.[48] The signing of assessment bilateral agreements with Tasmania, Western Australia and the Northern Territory and utilisation of the accredited assessment process (which has been used in 31% of all assessments) may also have successfully reduced unnecessary duplication and assisted in meeting the statutory timeframes for decisions. However, as discussed, the available evidence suggests that the referral, assessment and approval process is failing to perform its major environmental functions. Therefore, while it may be timely and have the potential to reduce unnecessary duplication, it would appear it has been far from a cost effective means of addressing key environmental issues.

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[46] See Australian National Audit Office, *Performance Audit: Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Audit Report No 38, 2002-2003 (Commonwealth of Australia, 2003) p 20.

[47] See Minister for the Environment and Heritage, *Investing in Our Natural and Cultural Heritage – Commonwealth Environment Expenditure 2001-2002* (Commonwealth of Australia, 2001) p 68; Minister for the Environment and Heritage, *Towards a Sustainable Australia – Commonwealth Environment Expenditure 2003-2003* (Commonwealth of Australia, 2002) p 65.

[48] Statistics on the timeless of decisions concerning the referral, assessment and approval process are in the Commonwealth Department of the Environment and Heritage's Annual Reports, which are available on the Department's website http://www.deh.gov.au/epbc/publications/annualreports/index.html viewed 15 July 2004.

PART 4 –WHY IS THE REFERRAL, ASSESSMENT AND APPROVAL PROCESS FAILING?

The failure of the referral, assessment and approval process to perform its main functions is the result of noncompliance, administrative failures and structural deficiencies in the Act. In the author's opinion, the primary cause of this failure is the structural flaws in the process. In its current form, the referral, assessment and approval process does not have the ability to effectively protect the majority of the matters of national environmental significance or Australia's biodiversity. However, there are a number of aspects of the Commonwealth's administration of relevant aspects of the EPBC Act that are blunting its effectiveness. These issues and the structural deficiencies in the referral, assessment and approval process are discussed below.

4.1 Administrative failings

There are several elements of the Commonwealth's administration of relevant elements of the EPBC Act that are of concern. These include the following.

Enforcement

It is self evident that the effective operation of a regulatory system is, to some extent, dependent upon enforcement of the statutory requirements. In the absence of enforcement, contraventions go unpunished and the incentive for compliance is diminished. Enforcement of regulatory requirements can also clarify areas of uncertainty.

At 30 September 2003, only two enforcement proceedings had been taken in relation to the referral, assessment and approval process. The first involved two Japanese citizens who were found in possession of a large quantity of stag beetles (*Lamprima insularis*) and other insects at Sydney's Kingsford Smith Airport. The stag beetles are only found on Lord Howe Island (which is part of the Lord Howe Island Group World Heritage Area). The Commonwealth charged the men with offences under s 15A of the EPBC Act, which prohibits any person from taking an action that is likely to have a significant impact on the world heritage values of a declared World Heritage property without the approval of the Minister. However, the case against the two men for contravening s 15A was dismissed at the committal hearing.

The second case concerns land clearing on a property near the NSW town of Moree known as "Windella", which contains approximately 100 hectares of the Ramsar listed Gwydir Wetlands.[49] Approximately 99% of the Ramsar wetland on *Windella* was cleared between October 2002 and August 2003. There is also evidence that native vegetation was cleared from areas around the wetlands prior to October 2002. At the time of writing, the Federal Court was hearing an application by the Commonwealth for an injunction to prevent further clearing, ploughing or cropping in the wetland or the adjacent area and a civil penalty order in relation to this issue.

Given the evidence of wide-spread noncompliance with the referral, assessment and approval requirements in certain areas and industries, the Commonwealth's record of enforcement is disappointing. The reluctance to take enforcement proceedings may be a contributing factor in the apparent failure of the referral, assessment and approval process, as it may have reduced the incentive to comply with the Act's requirements.

Basing controlled action decisions on trade offs

Between 16 July 2000 and 30 September 2003, a number of controlled action decisions were made on the basis of "trade offs".[50] Trade offs are situation where an action that will result in an adverse

[49] See *Minister for the Environment and Heritage v Greentree* [2003] FCA 857 (8 August 2003).

[50] See, eg, the controlled action decision concerning Ref No 2002/849, where the decision to declare that an action involving clearing habitat of the endangered red-tailed black cockatoo (south-eastern) (*Calyptorhynchus banksii graptogyne*) was not a controlled action was based on the fact that the proponent had undertaken to fence off another area containing feeding habitat. See also the controlled action decisions concerning Ref Nos 2002/842 and 2002/733, where the decision to declare actions that involved the clearance of habitat of the endangered swift parrot (*Lathamus discolor*) were not controlled actions were based on the fact that the person taking the action had undertaken to re-establish an area of native bushland to provide an equivalent area of habitat.

impact on a matter protected under Pt 3 includes a component that will have a beneficial impact on the relevant matter protected under Pt 3 (or it is included as part of the "manner specified" by the Minister).[51] That is, there is a "trade off" so the net impact of the action on the matter protected under Pt 3 is supposedly neutral. The Minister then decides the action is not a controlled action if the trade off is carried out (ie, the trade off is the "manner specified").

Irrespective of the merits or otherwise of trade offs, there is a good argument the Minister is not permitted to base controlled action decisions on trade offs. Obviously, whether a particular decision is ultra vires will depend upon the facts of the case. However, there are two provisions that appear to severely curtail the Minister's ability to base controlled action decisions on trade offs. First, s 75(2)(b) prohibits the Minister from having regard to "any beneficial impacts" that the relevant action is likely to have on a matter protected under Pt 3 when making the controlled action decision. Secondly, s 77(3) provides that the quasi-conditions that can be imposed on a controlled action decision must relate to the manner in which the action will be undertaken. So, eg, if the relevant action involves land clearing, the "manner specified" arguably could not include activities involving tree planting.

The practice of basing controlled action decisions on trade offs is arguably illegal and has reduced the number of actions that have been assessed and approved under the Act. In doing so, has undermined the effectiveness of the referral, assessment and approval process.

Splitting actions for the purposes of referrals

Another aspect of the administration of the Act that is of concern is the treatment of referrals that relate to an action that has been divided into smaller components. If a development that is likely to have a significant impact on a matter protected under Pt 3 is divided into smaller stages, the impacts of each stage will also be reduced. This lessens the likelihood that a single stage will require approval under the Act. It also restricts the scope of the assessment and hinders the imposition of appropriate conditions on the entire development.

The ability of split actions to undermine the effectiveness of the referral, assessment and approval process was recognised by the legislature in drafting the statute. This is reflected in the fact that "action" is defined to include "an activity or series of activities". In this regard, the Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 states (at para 685):

> An action may be a series of activities carried out over a particular time period (for example, under a licence or permit). This is intended to ensure a person cannot avoid the provisions of the Act by breaking one action into many small actions.

Despite the stated intentions of Parliament and the obvious ability of this practice to undermine the effectiveness of the Act, a number of controlled action decisions have been made in relation to split actions.[52] This practice is diminishing the ability of the referral, assessment and approval process to effectively perform its main functions. However, in the Commonwealth's defence, there has been a degree of uncertainty about whether or not the Minister has the power to address this issue. This uncertainty was removed by the *Environment and Heritage Legislation Amendment Act (No 1) 2003*, which clarifies that the Minister has the power to reject a referral that relates to a split action and to call in the larger action for a determination on whether it requires approval under the Act.[53]

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[51] Take the example of a land clearing proposal involving the destruction of an area of habitat of a threatened species. A trade off would involve an undertaking to replant similar plant species as those being cleared in another area on the grounds this revegetated area will provide an equivalent area of habitat as the area being cleared.

[52] For example, see Ref Nos 2001/228, 2001/164, 2001/165, 2000/58, 2001/246, 2001/248, 2002/706, 2002/789, 2002/790, 2002/792, 2002/786 and 2002/787.

[53] See Sch 4 of the *Environment and Heritage Legislation Amendment Act (No 1) 2003*.

Manner specified process

There are several problems with the manner specified process, most notably the fact that the quasi-conditions that constitute the "manner specified" only became enforceable in January 2004.[54] It also ensures actions that may adversely affect the matters protected under Pt 3 are not subject to the Act's environmental assessment process. However, if the manner specified process is going to be used, the Commonwealth must ensure the terms of the manner specified are sufficiently certain to enable the person taking the action to be prosecuted under Pt 3 if they fail to comply with the terms of the decision.

Manner specified decisions comprised 14% (140) of all controlled action decisions between July 2000 and September 2003. Unfortunately, on numerous occasions, the terms of the manner specified have been extremely ambiguous and uncertain.[55] The ambiguity in the terms of the manner specified makes it difficult to determine the scope of the exemption provided by the controlled action decision for the purposes of Pt 3. In doing so, it hinders both compliance and enforcement and undermines the effectiveness of the referral, assessment and approval process.

Listing threatened species and ecological communities

The ability of the EPBC Act's referral, assessment and approval process to promote the conservation of biodiversity is highly dependent on the timely identification and listing of threatened species and ecological communities. In recognition of this, s 185 requires the Minister to take all reasonably practical steps to ensure the lists of threatened species and ecological communities contains all species and communities that are eligible for listing.

Despite this statutory duty, only seven ecological communities were listed between 16 July 2000 and 30 September 2003, five of which were listed in the first 10 months of the operation of the Act. Since the controversial listing of Bluegrass (*Dichanthium* spp) dominant grasslands of the Brigalow Belt Bioregions (North and South) and Brigalow (*Acacia harpophylla* dominant and co-dominant) as endangered ecological communities in April 2001, only two ecological communities have been listed: the Mabi Forest (Complex Notophyll Vine Forest 5b) (which was listed as critically endangered on 8 October 2002) and Swamps of the Fleurieu Peninsula (which was listed as critically endangered on 21 March 2003). At the end of September 2003, there were a mere 29 listed threatened ecological communities (27 endangered communities and two critically endangered communities). The extent of the Commonwealth's failure to appropriately maintain the list of threatened ecological communities is vividly illustrated by the fact that the National Land and Water Resources Audit has identified 2891 threatened ecosystems and other ecological communities across Australia.[56]

The rate of listing of threatened species has been better, but still unsatisfactory. At the commencement of the EPBC Act, 1566 species (1236 plants and 332 animals) were included on the list of threatened species. Between July 2000 and 30 September 2003, a further 53 species were listed, 36 species were transferred to different categories on the lists (34 to higher conservation categories, two to a lower category), and four species and one ecological community were removed from the list.[57] This brought the total number of species on the list at 30 September 2003 to 1615 (1245 plants and 370 animals). While this is a staggeringly large number, it falls well short

[54] Upon commencement of the *Environment and Heritage Legislation Amendment Act (No 1) 2003*, the EPBC Act has prohibited a person from contravening the terms of a manner specified decision: see Sch 4 of the *Environment and Heritage Legislation Amendment Act (No 1) 2003*.

[55] See, eg, the controlled action decisions made in relation to Ref Nos 2002/874, 2002/733, 2002/842, 2003/913, 2003/916 and 2003/915.

[56] National Land and Water Resources Audit, *Australian Terrestrial Biodiversity Assessment 2002* (Commonwealth of Australia, 2002). Note that it is likely that a number of the threatened ecosystems and ecological communities identified in the National Land and Water Resources Audit assessment could be amalgamated for the purpose of listing under the EPBC Act.

[57] Semi-evergreen Vine Thickets of the Brigalow Belt South Bioregion in New South Wales was removed from the list. However, it was effectively redefined as part of another ecological community that was subsequently included on the list of threatened ecological communities, being the Semi-evergreen vine thickets of the Brigalow Belt (North and South) and Nandewar Bioregions.

of the number of species that are likely to be eligible for inclusion on the list. Of particular concern is the very low number of listed invertebrates, non-vascular plants and micro-organisms. A major cause of the gaps in the list is the current lack of knowledge about the conservation status of many species. This must be rectified if the referral, assessment and approval process is going to be able to effectively promote the conservation of biodiversity.

Register of Critical Habitat

From a strict legal perspective, the Register of Critical Habitat is of limited relevance to the referral, assessment and approval process. The Act only provides explicit protection for places on the Register if they are located in a Commonwealth area.[58] However, the Register of Critical Habitat could provide a centralised and comprehensive source of information on the location of habitats that are important to the survival and recovery of threatened species and ecological communities. By providing this information, the Register could aid compliance with the Act and the administration of the referral, assessment and approval process.

Unfortunately, to date, the Register has been largely neglected. At 30 September 2003, it contained only three entries, all of which are located on remote islands or rocky outcrops and related to albatross species.[59] This is despite the Coalition's 2001 election promise to:

> … ensure, after full consultation, that critical habitat is identified and entered in the register of critical habitat for endangered and critically endangered species.[60]

4.2 Structural flaws

While the administration of the Act is a matter of concern and considerable improvements could be made, the primary cause of the referral, assessment and approval processes failure to realise its environmental objectives is its structural flaws. There are three main flaws:

(a) the inability of the Act to effectively deal with cumulative impacts;

(b) uncertainty associated with key elements of the Act; and

(c) the exemptions provided for activities that are having adverse impacts on matters of national environmental significance.

4.2.1 Cumulative impacts

The greatest threats to Australia's biodiversity and the matters of national environmental significance are caused by the cumulative impacts of many actions. It is a relatively rare occurrence that a single action has a catastrophic impact on biodiversity or the matters of national environmental significance.

Unfortunately, the referral, assessment and approval process is ill-suited to dealing with cumulative impacts. It is based upon the piecemeal assessment of individual actions and their impacts on the matters protected under Pt 3. As described above, the obligation to obtain approval arises when an action is likely to have a significant impact on a matter protected under Pt 3. What are the impacts of an action is uncertain (this issue is discussed below). However, generally, these impacts are likely to be limited to those impacts that are foreseeable and causally related to the action. Consequently, cumulative impacts are largely irrelevant in relation to determining whether approval is required. They are only relevant once the Minister has determined an action requires approval under the EPBC Act. Even then, it is unlikely these cumulative impacts can be adequately addressed due to the piecemeal nature of the assessment and approval process and the fact that it will only look at the "relevant impacts" of the action.

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[58] See ss 207B and 207C.

[59] The relevant species concerned are *Diomedea exulans* (wandering Albatross), *Thalassarche cauta* (shy albatross) and *Thalassarche chrysostoma* (grey-headed albatross). The habitat included in the Register of Critical Habitat for these species are Macquarie Island (for the wandering albatross and grey-headed albatross) and Albatross Island, the Mewstone and Pedra Branca (for the shy albatross).

[60] Liberal Party of Australia and National Party of Australia, *Our Future Action Plan: A Better Environment* (November 2001) at p 22.

The strategic assessment process may offer a partial solution to the problem posed by cumulative impacts. Under this process, the cumulative impacts of actions taken under a policy, plan or program on matters protected under Pt 3 can be assessed. However, with the exception of management plans and policies for Commonwealth managed fisheries, there is no mandatory requirement for policies, plans and programs to undergo strategic assessment. It is a voluntary process that is triggered by the formation of an agreement between Minister and the person responsible for the adoption and/or implementation of the relevant policy, plan or program. Further, as was the case under the *Environment Protection (Impact of Proposals) Act 1974* (Cth), at the completion of the assessment process, the Commonwealth Minister for the Environment and Heritage does not have the power to determine whether or not the policy, plan or program should be allowed to be made and implemented or, if it is allowed to be made and implemented, the conditions under which this should occur. These characteristics of the strategic assessment process greatly reduce its utility as a means of addressing key environmental issues.

4.2.2 Uncertainty

One of the most glaring flaws in the Act is the uncertainty associated with key elements of the referral, assessment and approval process. This uncertainty ensures that it is difficult for proponents to comply with the processes requirements. The difficulty associated with compliance increases the likelihood that stakeholders will be reluctant to observe the requirements of the process, particularly in industries (such as agriculture) dominated by smaller businesses that have limited resources to devote to compliance.[61] Furthermore, the uncertainty makes it extremely difficult for the EPBC Act to be effectively administered and enforced. The main areas of uncertainty are discussed below.

The "significant impact" threshold

There are two main concerns about the "significant impact" threshold.

First, the concept of an action having a "significant impact" on a matter protected under Pt 3 of the Act is fraught with ambiguity. By its nature, it requires subjective value judgements to be made. Further, it assumes a degree of scientific knowledge concerning the state of the matters protected under Pt 3 and the likely impacts of various actions that, in the majority of cases, simply does not exist. The degree of uncertainty concerning the nature and magnitude of relevant impacts is often considerable. This is an unavoidable consequence of our relatively limited understanding of many ecological processes.[62]

The obvious response to this criticism is to claim that the "precautionary principle" can fill the gaps left by scientific uncertainty. In this regard, the Minister is required to "take account of" the precautionary principle in deciding whether actions require approval and in determining whether or not to approve an action.[63] Similarly, the precautionary principle is likely to inform the interpretation and application of relevant provisions of the EPBC Act.[64] However, the precautionary principle is only one of a number of factors that are relevant to the Minister's deliberations concerning controlled action and approval decisions. Further, what the precautionary principle demands in a particular set of circumstances is imprecise. The precautionary principle does not provide a practical solution to the ambiguity and uncertainty created by the use of the phrase "significant impact" as a trigger for the approval requirement and a basis for the imposition of serious criminal and civil penalties.

Second, the use of a "significant impact" threshold ensures the Commonwealth's environmental assessment and approval process is unable to regulate actions that, on their own,

[61] On the factors that can contribute to a culture of noncompliance, see Bardach E and Kagan RA. *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, Philadelphia, 1982).
[62] For further discussion on the issues associated with scientific uncertainty, see Farrier D, Whelan R and Brown C, "Addressing Scientific Uncertainty in Local Government Decision-Making Processes" (2002) 19 EPLJ 429.
[63] See EPBC Act, ss 391 and 136.
[64] See, eg, *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453; *Leatch v Director General, National Parks and Wildlife Service* (1993) 81 LGERA 270; *Woollahra Municipal Council v Minister for Environment* (1991) 23 NSWLR 710; *Packham v Minister for Environment* (1993) 80 LGERA 205.

have a relatively limited impact on the matters protected under Pt 3, but cumulatively cause their demise. As discussed above, it is the cumulative impacts of relatively small actions that are having the greatest impact on Australia's biodiversity and natural heritage. By using a threshold based on the severity of impacts, it ensures that the great majority of actions that are causing the degradation of our biodiversity are not regulated under the EPBC Act. The net result of this is that these actions will usually only be regulated under the laws of the States and Territories (if at all).[65]

The "likely" element

As stated above, an action will require approval under the EPBC Act if it has, will have, or is "likely" to have a significant impact on a matter protected under Pt 3. This adds greater uncertainty to an area already drowning in it. At what point does an impact become "likely"? The Federal Court has suggested that the meaning of "likely" in this context is "prone, with a propensity or liable", or "real or not remote chance or possibility regardless of whether it is less or more than fifty per cent".[66] However, in practice, establishing that there is a real possibility of an impact eventuating is often a complex and resource intensive processes. This decision will usually be based on scientific information, the accuracy and completeness of which will vary considerably from case to case.[67] In individual court cases, this hurdle may not prove to be a great issue. However, a regulatory system cannot rely on an endless stream of court cases to be effective. Moreover, dealing with these areas of legal uncertainty can be extremely difficult for many stakeholders.

What are the "impacts" of an action?

The "significant impact" test contains another area of uncertainty, namely: at what point do the consequences of an action cease to be the "impacts" of an action? This issue was the subject of the Federal Court case of *Queensland Conservation Council Inc v Minister for the Environment and Heritage.*[68]

The case concerned the proposal to construct an 880,000 ML dam known as the Nathan Dam on the Dawson River in central Queensland. The primary purpose of the dam is to provide water for cotton farming in the Fitzroy catchment. The Dawson River joins the Mackenzie River, which becomes the Fitzroy River and eventually flows into the Great Barrier Reef World Heritage Area. The company formed to construct and operate the dam, Sudaw Developments Ltd, referred the proposal to the Minister and claimed the action would not have a significant impact on any of the matters protected under Pt 3 of the Act.

The Minister decided the action was a controlled action on the basis of its potential impacts on listed threatened species and ecological communities. However, he decided the "impacts" of the construction and operation of the dam did not include the impacts of using the water from the dam for the purpose of irrigated cotton farming by persons other than Sudaw Developments Ltd. On the basis of this finding, he held the action was not likely to have a significant impact on the world heritage values of the Great Barrier Reef World Heritage Area. The Queensland Conservation Council (QCC) and WWF Australia appealed the decision on the grounds the Minister had committed an error of law in not having regard to the potential impacts of the increase in irrigated cotton farming on the world heritage values of the Great Barrier Reef.

[65] Note that, in certain cases, actions that do not require approval under the EPBC Act will require approval under other Commonwealth environmental legislation (eg, in order to operate a commercial fishing vessel in a Commonwealth marine area you will usually require appropriate licences and permits under the *Fisheries Management Act 1991* (Cth)). Similarly, an action that does not require approval under the Act, may require a permit (eg. in order to fish in certain Commonwealth marine areas, you may require a permit to harm or injure a member of a listed marine species).

[66] *Booth v Bosworth* (2001) 114 FCR 39, per Branson J at 64. The term "likely" has been interpreted in a similar manner in the context of the *Environmental, Planning and Assessment Act 1979* (NSW), see *Jarasius v Forestry Commission of NSW* (1988) 71 LGRA 79; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* (1989) 67 LGRA 155; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186.

[67] See Farrier D, Whelan R and Brown C, n 61.

[68] [2003] FCA 1463.

The Minister argued the "impacts" should be confined to those that are directly related to, or "inextricably involved" in, the relevant action. If the phrase "impacts" is interpreted more broadly so as to include the consequential impacts of the action, it could result in a person being held vicariously liable for the actions of another person and "this could not have been intended".[69] For example, in this instance, if the dam was constructed without going through the EPBC Act's referral, assessment and approval process, the interpretation favoured by the applicants could result in Sudaw Developments Ltd being criminally and civilly liable for a decline in water quality in the Great Barrier Reef World Heritage Area caused by poor management practices of cotton farmers using water from the dam.

Kiefel J rejected the Minister's argument, preferring the applicants' view that the objects of the Act and existing case law concerning the interpretation of similar phrases support the notion that "impacts" should be given a broad and expansive meaning. The Minister's decision was overturned and he was ordered to remake the decision in accordance with the law.

While there are good reasons to support Kiefel J's interpretation, it creates considerable uncertainty regarding the operation of the prohibition provisions in Pt 3 and the referral, assessment and approval process. It also raises the serious prospect that a person may be held vicariously liable for the impacts of actions they have no control over.

Additional remarks

Many people may respond to my criticism of the "significant impact" test that similar tests have been used in a number of environmental and planning statutes for many years without causing insurmountable problems. However, in the majority of cases the test is not used as the primary determinant of whether or not a governmental approval is required. Tests of this nature are most commonly used in a procedural context. This usually involves the test being the determinant of the type of assessment process that will apply to a proposed development or as a factor that must be taken into account when deciding whether or not to approve a development.[70]

It is arguable that the elements of many pollution offences are also similar to the "likely to have a significant impact" test. Take, eg, the general pollution offences found in many State and Territory environmental laws concerning environmental harm, particularly those relating to "serious" and "material" environmental harm.[71] "Environmental harm" is generally defined extremely broadly to include any adverse effect on the environment or an environmental value. "Material" and "serious" environmental harm are then defined using phrases and terms such as "not negligible", "high impact", "widespread" and "irreversible" harm or damage.[72] However, these tests are not used as the basis of determining when relevant approvals are required. The requirement to obtain a pollution licence or governmental approval is triggered by reference to the nature of the particular activity being carried out.[73] The pollution offences merely complement the relevant licensing and approval systems. The definitions of "material" and "serious" in the

[69] *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 per Kiefel J at [36].

[70] See, eg, *Environmental Planning and Assessment Act 1979* (NSW), ss 78A, 79B, 111, 112, 112B, 112C and 115N; *Threatened Species Conservation Act 1995* (NSW), s 94; *Fisheries Management Act 1994* (NSW), s 220ZZ; *National Parks and Wildlife Act 1974* (NSW), ss 91AA and 153B; *Contaminated Land Management Act 1997* (NSW), s 7; *Environmental Protection Act 1986* (WA), s 38; *Environment Effects Act 1978* (Vic), ss 3 and 8; *Biological Control Act 1986* (Vic), s 28; *Planning and Environment Act 1987* (Vic), ss 12 and 60; *Water Act 1989* (Vic), s 42; *Environmental Management and Pollution Control Act 1994* (Tas), s 25; *Environment Protection Act 1993* (SA), s 64; *Gene Technology Act 2000* (Cth), ss 49 and 185.

[71] See, eg, *Environmental Management and Pollution Control Act 1994* (Tas), ss 5 and 50-53; *Environment Protection Act 1993* (SA), ss 5, 79, 80 and 82; *Environment Protection Act 1997* (ACT), ss 4, 137-139 and 141; *Environmental Protection Act 1994* (Qld), ss 14-17, 436-438 and 440.

[72] See *Environmental Management and Pollution Control Act 1994* (Tas), s 5; and *Environmental Protection Act 1994* (Qld), ss 14-17.

[73] See, eg, *Protection of the Environment Operations Act 1997* (NSW), ss 47-49; *Environmental Management and Pollution Control Act 1994* (Tas), Pt 3; *Environment Protection Act 1993* (SA), ss 3 and 36; *Environment Protection Act 1997* (ACT), Pt 8; *Environmental Protection Act 1994* (Qld), ss 18, 20 and 426-428.

relevant State and Territory legislation also usually contain a monetary threshold, which lessens the degree of uncertainty.[74] In addition, the relevant legislation often contains lesser offences of causing environmental harm or causing an environmental nuisance whose elements are easier to establish and that provide a safety net to ensure that all relevant activities are controlled in some respect.

Unlike most other Commonwealth, State and Territory environmental assessment and approval regimes, the approval trigger under the EPBC Act is based on the nature and extent of the potential impact of the relevant action, rather than the nature of the action. This is a significant departure from the traditional method of controlling activities that have the potential to adversely affect the environment.[75] This has placed the EPBC Act's referral, assessment and approval process at odds with most State and Territory environmental and planning assessment and approval processes. It has also generated considerable uncertainty for all stakeholders.

Protecting species and ecological communities

Part 3 of the Act provides protection for threatened and migratory species and threatened ecological communities. However, in practice, it is often very difficult to determine the impact that an action will have on a species or community as a whole. Unless one is a trained scientist, it can be a challenge to even identify certain species and communities and/or their habitats. This issue is most acute amongst invertebrates and certain genera of plants.

Of particular importance is the fact that in many cases there is very little available information about the status of species or ecological community, their habitat requirements, and their behaviour. This makes compliance and enforcement both costly and difficult.

In some instances, these difficulties may be lessened by virtue of the operation of State and Territory laws that require an environmental assessment to be undertaken. However, detailed environmental assessments are not always required under State and Territory planning and approval processes. Further, relevant actions will not always require approval under State and Territory environmental and planning laws.

The complications associated with identification and assessment of the potential impacts of an action on a species or ecological community are not insurmountable for large businesses. However, in smaller businesses where margins are fine and cash flows are limited, gaining access to the relevant scientific and legal expertise that is necessary to assess the likely impacts of an action on a listed threatened species or community is often financially infeasible.

Providing protection for "heritage values" and the "ecological character" of wetlands

Another area of uncertainty associated with the referral, assessment and approval process concerns the world heritage and Ramsar wetland "triggers". As noted, Pt 3 of the EPBC Act provides protection for the "world heritage values" of declared World Heritage properties and the "ecological character" of Ramsar wetlands.[76] Both phrases are inherently ambiguous and are often difficult to apply.

With regard to the world heritage trigger, there is no readily accessible list or register that describes the world heritage values of World Heritage properties. The only way to determine the world heritage values of a World Heritage property is to derive them from the documents used to support the nomination of the property for inclusion on the World Heritage List, the operational guidelines used by the World Heritage Commission to assess the merits of nominations, and the definitions of "natural heritage" and "cultural heritage" contained in the World Heritage

[74] See, eg, *Environmental Management and Pollution Control Act 1994* (Tas), s 5.

[75] This issue is also discussed in Scanlon J and Dyson M, "Will Practice Hinder Principle? – Implementing the EPBC Act" (2001) 18 EPLJ 14.

[76] Upon the commencement of the *Environment and Heritage Legislation Amendment Act (No 1) 2003*, the EPBC Act has also provided statutory protection for the "National Heritage values" of National Heritage places. Similar problems are likely to arise in relation to this referral trigger.

Convention.[77] Even when the values are obtained, they can be ambiguous and difficult to apply to a particular set of facts.

Similar problems arise in relation to the notion of "ecological character" of a Ramsar wetland. "Ecological character" is defined for these purposes as having the same meaning as in the Ramsar Convention. The Ramsar Convention does not contain a definition of "ecological character". However, this term was defined in Resolution VII.10 of the Seventh Meeting of the Conference of the Contracting Parties to the Convention as:

> … the sum of the biological, physical, and chemical components of the wetland ecosystem, and their interactions, which maintain the wetland and its products, functions and attributes.

Much like the case with the phase "world heritage values", the definition of "ecological character" is vague and can be difficult to apply to a particular set of circumstances. This can create difficulties for both administrators and stakeholders who are required to comply with the Act. A more effective means of providing statutory protection for World Heritage Areas and Ramsar wetlands may be to require all developments, or developments of a particular nature, within a defined area to be referred to the Minister.[78]

Split developments

As discussed above, on a number of occasions controlled action decisions have been made in relation to actions that form part of larger developments. This practice undermines the effectiveness of the Act by reducing the likelihood that a project will require approval. It also diminishes the scope of assessments and reduces the likelihood that appropriate conditions will be placed on proposed actions.

As discussed, the Commonwealth's failure to address this issue may partially be due to uncertainty over the Minister's powers to reject referrals that relate to split developments. This uncertainty was resolved by the *Environment and Heritage Legislation Amendment Act (No 1) 2003*. However, the changes made by the *Environment and Heritage Legislation Amendment Act (No 1) 2003* do not outlaw the practice of splitting developments for the purpose of referrals, nor do they compel the Minister to reject referrals that relate to split actions. Therefore, there is the potential for this loophole to continue to undermine the effectiveness of the referral, assessment and approval process in the future.

4.2.3 The breadth of the exemptions

The EPBC Act contains a large number of exemptions that significantly reduce the scope of the referral, assessment and approval process and its ability to provide effective protection for Australia's biodiversity and the matters of national environmental significance. The most important of these exemptions include:

- the exemption provided for RFA forestry operations undertaken in accordance with a regional forestry agreement;[79]
- the exemption provided for actions taken in the Great Barrier Reef Marine Park in accordance with an instrument made under the *Great Barrier Reef Marine Park Act 1975* (Cth);[80]
- the exemption provided for existing uses (ie a use that is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act);[81]
- the ability of the Minister to grant exemptions from the provisions in Pt 3 if he or she is satisfied it is in the national interest that the relevant provisions do not apply to the action;[82] and
- the exemption provided for the activities authorised under a facility installation permit granted under the *Telecommunications Act 1997* (Cth).[83]

[77] See *Booth v Bosworth* (2001) 114 FCR 39; 117 LGERA 168; [2001] FCA 1453 for an explanation of this process.
[78] Note, however, that the efficacy of this proposal may be limited due to Constitutional restrictions.
[79] EPBC Act, Pt 4, Div 4.
[80] EPBC Act, Pt 4, Div 5.
[81] EPBC Act, s 43B.
[82] EPBC Act, ss 158 and 28.

The cumulative effect of these exemptions is to reduce the reach of the referral, assessment and approval process and ensure the Government has the necessary tools to extract controversial proposals from the operation of this process. If the referral, assessment and approval process is going to be able to provide effective protection for the environment (particularly the matters of national environmental significance), the breadth of the available exemptions must be narrowed considerably.

5. CONCLUSION

The EPBC Act's referral, assessment and approval process is undoubtedly an improvement on past Commonwealth environmental assessment processes. However, it is deficient in many regards. Further, the Commonwealth has demonstrated a strong reluctance to administer the referral, assessment and approval provisions forcefully so as to ensure its environmental objects can be realised.

The combination of structural flaws and poor administration have resulted in the failure of the referral, assessment and approval process to provide effective protection for the matters of national environmental significance and to promote the conservation of biodiversity and the ecologically sustainable use of natural resources. Clearly, changes are required both in the structure of the process and the way it is administered if the EPBC Act is going to prove to be a cost effective means of assisting in the conservation of Australia's biodiversity and natural heritage.

[83] *Telecommunications Act 1997* (Cth), Sch 3, s 28.