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**New Commonwealth and State
Government Environment
Relationships**

by

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EXECUTIVE SUMMARY

The Australian State of the Environment Report of 1996 was the first ever independent and comprehensive report on the state of Australia's environment. The Report noted the following: *The national ability to manage the environment is continually hamstrung by structural problems between different areas of government. Standards vary from State to State, and State and Commonwealth governments frequently battle over environmental issues. The recently established National Environment Protection Council will address some of these issues.* Clearly, intergovernmental relationships are a major factor in environmental management (page 1).

The Commonwealth has recently introduced new legislation to redefine its environmental responsibilities, which has repercussions for the States. This paper traces the history of Commonwealth and State environmental relationships and explains the operation and impact of the recently introduced Commonwealth *Environment Protection and Conservation Act 1999*.

The Australian federal system of government has resulted in there being two distinct sources of environmental legislation - the Commonwealth and the State Parliaments. The Australian Constitution, which defines Commonwealth powers, makes scant reference to the environment. Instead, successive Commonwealth governments have relied on various heads of power to promulgate environmental laws (pages 3-4).

Since Federation, the Commonwealth has had an evolving relationship with the States in relation to environmental protection (pages 4-8). Since the mid to late 1980s, the view within dominant sections of government and industry has been what is called 'co-operative federalism'. This policy holds that the Commonwealth should take the lead on matters of national significance and national coordination, while pulling back from direct command and control of other matters which have traditionally been regulated by State laws. This approach led to the rewriting of Commonwealth environment legislation and the introduction of the *Environment Protection and Biodiversity Conservation Act 1999* (page 8).

The Act is divided into eight chapters, which are examined on pp 10-25.

While industry has been generally supportive of the new legislation, a common criticism has been that it will not achieve the goal of promoting uniform environmental impact standards and processes throughout Australia, although the elimination of duplication is seen as a significant step forward (page 25).

The reaction from the environment movement has been mixed. Sections of the movement supported the final Bill, as 80% of the desired amendments were included. Other environment organisations, such as the Australian Conservation Foundation, criticised the Act, stating that the Act has very limited national powers and fails to address national issues such as greenhouse gas emissions, forest protection, land clearing and water allocation.

1.0 Introduction

The Australian State of the Environment Report of 1996 was the first ever independent and comprehensive report on the state of Australia's environment.¹ Prepared by an Advisory Council and expert reference groups, the report showed that Australia has a beautiful, diverse and unique environment. It found that some aspects of the nation's environment are in good condition by international standards, and that Australia also has some serious environmental problems. The Report's Executive Summary gave an overview of environmental management responses, and divided these responses into commendable actions, questionable actions, and poor responses. Heading the poor responses was the following:

The national ability to manage the environment is continually hamstrung by structural problems between different areas of government. Standards vary from State to State, and State and Commonwealth governments frequently battle over environmental issues. The recently established National Environment Protection Council will address some of these issues.²

Clearly, intergovernmental relationships are a major factor in environmental management.

The Australian Constitution defines the powers of the Commonwealth, and in doing so makes scant reference to the environment. Especially with the emergence of environmental awareness in Australia since the early 1970s, the Commonwealth has been grappling with the issue of their role to play and their relationship with the States in regard to environmental management. The Commonwealth has recently introduced new legislation to redefine its environmental responsibilities, which has repercussions for the States. This paper traces the history of Commonwealth and State environmental relationships and explains the operation and impact of the recently introduced Commonwealth environmental legislation - the *Environment Protection and Biodiversity Conservation Act 1999*.

2.0 Sources of Commonwealth Power in Regard to Environmental Management

The Australian federal system of government has resulted in there being two distinct sources of environmental legislation - the Commonwealth and the State Parliaments. The Australian Constitution provides the Commonwealth with specific powers, whilst the remainder lie with the States. The Constitution makes no specific reference to the environment, except for section 100 which restricts the power of the Commonwealth to make a law limiting 'the

¹ Commonwealth of Australia, *Australia, State of the Environment 1996*. CSIRO Publishing, 1996.

² Commonwealth of Australia, *Australia, State of the Environment 1996*. CSIRO Publishing, 1996, at ESI-9.

reasonable use of waters of rivers for conservation or irrigation'.³

As a consequence of this the States and Territories have traditionally been considered to have primary responsibility for environmental management, whilst the Commonwealth has had only a very limited capacity to promulgate environmental laws. As will be seen, this 'traditional' view has been widely challenged in recent times, with the Constitutional lawyer James Crawford describing this traditional view as more imaginary than real.⁴

There have been three main reasons identified why environmental concerns were omitted from the Constitution, and hence not considered a national responsibility. First, there was little if any environmental consciousness or concern with preservation of the environment at the turn of the 19th century. Second, the framers of the Constitution would have considered the natural environment as being something to be tamed and exploited rather than something requiring protection in an important national document. Third, to the extent that the framers thought of the environment as an issue requiring legislative attention, it would not have been viewed as a national matter. Land, mineral and other static resources would have been seen as an item of State concern.⁵

Successive Federal Governments have been reluctant to respond to calls for a referendum to change the Constitution to recognise the powers of the Commonwealth to make laws with respect to the environment. From the 1970s, the emergence of a need for a national and international approach to environmental problems was evident, and the Commonwealth began to pass significant laws for environmental purposes on a wide range of issues under various heads of power. Instead of seeking to change the Constitution through referendum to recognise Commonwealth environmental powers, the Commonwealth has relied on a variety of heads of power to regulate activities in order to protect and conserve the environment, even when those powers did not necessarily have any apparent environmental purpose behind them. As long as Commonwealth legislation rests on some head of power, even though not directly related to the environment, the Commonwealth is entitled to act for environmental reasons alone.⁶

The following are the key Constitutional powers that the Commonwealth has used to

³ Australian Constitution Act, s.100. Under this section, the Commonwealth does have the power to limit 'unreasonable use' of waters of rivers for either 'conservation or irrigation'. As Crawford notes, conservation at that time meant the storage of water for later use. See Crawford, J. "The Constitution" in Bonyhady T (ed) *Environmental Practice and Legal Change*, 1992, p 2-3.

⁴ Crawford, J "The Constitution and the Environment" in *Sydney Law Review*, vol 13 no 11 at 12, 1991.

⁵ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 2.9.

⁶ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 2.13 and 2.16.

support environmental legislation in Australia.

(i) The Corporations Power (s.51(xx))

This section of the Constitution enables the Federal Parliament to make laws with respect to ‘foreign corporations, and trading or financial corporations formed with the limits of the Commonwealth’. Within this section the Commonwealth can regulate any activities of a corporation undertaken within Australia. For example, the Commonwealth may legislate for uniform pollution emission standards for corporations throughout Australia.

(ii) The Trade and Commerce Power (s. 51(i))

This has been described as Parliaments first and most general power as it allows the laws to be made with respect to ‘trade and commerce with other countries and among the States’. It is of considerable importance with respect to environmental protection because most manufacturing and resource development projects are undertaken for the purpose of interstate or overseas trade.

The decision of *Murphyores Incorporated Pty Ltd v the Commonwealth (1976) 136 CLR 1*, confirmed that the Commonwealth may regulate the environmental impact of any activity for which export approval is required, even though they may have satisfied any State environmental requirements. In the above case, the sandmining company Murphyores wished to sandmine parts of Fraser Island for export markets, was given State Government approval but was denied export approval by the Federal Government. Subsequently, mining did not go ahead and Fraser Island was declared a World Heritage Area.

(iii) Financial Powers

(a) The taxation power (s.51 (ii))

The taxation power is of great potential use for environmental management by the Commonwealth as it enables the Commonwealth to tax environmentally harmful activities or to allow deductions for sound environmental practices - such as environmental audits.

(b) Specific purpose grants and loans (s.96)

The Commonwealth may provide specific purpose grants and loans under s.96 of the Constitution, and these may be tied to environmental conditions for the expenditure of funds for environmental purposes.

(c) Federal spending powers (s.81-83)

The High Court has indicated that the Commonwealth Government under s.81 is entitled to spend money for purposes which are incidental to the legislative powers of the Commonwealth. The Commonwealth could allocate funds for specific environmental purposes.

(iv) External Affairs Power(s. 51(xxix))

This power to make laws with respect to external affairs has by Federal choice largely been confined to the context of conservation and heritage legislation. An example is the *World Heritage Properties Conservation Act 1983*, which was implemented in response to the multilateral treaty, the International Convention for the Protection of the World Cultural and Natural Heritage Convention. The World Heritage Properties Conservation Act was then used to block the construction of the Franklin dam in Tasmania.

Even with these powers widely confirmed by the High Court, the Senate Environment, Communications Information Technology and the Arts References Committee (the Senate Environment Committee) noted that there is still some lingering Constitutional uncertainty on the limitations of the Commonwealth's ability to pass environmental legislation. The Committee noted that this Constitutional uncertainty has manifested itself in two ways.

Firstly, the uncertainty has acted as an impediment to national environmental protection. Whether for reasons of political difficulty or expediency, Commonwealth governments of all persuasions have often fallen back on claimed uncertainty created by the lack of an express environmental power as an excuse not to legislate for the protection of the environment. Second, perceived Constitutional uncertainty has prompted needless litigation in active challenges to Commonwealth environmental laws. However, a benefit of this litigation has been the ability of the High Court to confirm the Commonwealth's extensive powers to legislate on environmental issues.⁷

3.0 A History of Commonwealth Environmental Action

The Senate Environment Committee Chair's report noted that there was overwhelming support in submissions for the Commonwealth to take a leadership role in environmental matters. The Committee Chair's report also noted the view that the Commonwealth's initial entry into the field of environmental regulation and continued and growing involvement has generally followed inaction on the part of the States. Commonwealth involvement has resulted from considerable pressure from the community to do something to prevent ongoing environmental harm.⁸

However, the Senate Environment Committee report also contained separate reports from both Government and ALP Senators. The Government Senators' Report noted that State government submissions stressed the need for consultation and co-operation in intergovernmental relations, and that they agreed with that. In addition, the Government Senators noted that the authoritarian centralism advocated by the majority of submissions

⁷ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 2.22.

⁸ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 3.2.

to the Inquiry will not win the support of State or local governments, and without that support there cannot be good outcomes for the environment. The Government Senators noted that their main concern with the Committee Report was its underlying centralist bias.⁹

The ALP Senators in their report noted that the Commonwealth has a critical and far reaching role to play in environmental protection. Whilst this role can be one of coordination and leadership with the States, it may also require unilateral action. The ALP Senators also noted the historic failure of Commonwealth legislation to recognise the role of local government. The ALP Senators agreed with the main direction of the Chair's Report, agreed with many of the recommendations, but noted that some of the recommendations need strengthening and some could not be supported at all.¹⁰

The nature of the involvement by the Commonwealth in environmental regulation and protection has changed over the years, but there are two fundamental philosophies at play. These are: to respect State's rights and to limit the Commonwealth role; and the centralist notion that the national government has a legitimate role to play in environmental regulation. Since Federation and until the early 1970s, the Commonwealth displayed little enthusiasm for taking a role in environmental protection. It was not until the election of a Federal Labor Government in 1972 that the Commonwealth took on a greater role. During 1974-75, the Commonwealth passed legislation covering: environmental impact assessment (*Environmental Protection, Impact of Proposals Act 1974*); national parks and wildlife (*National Parks and Wildlife Conservation Act 1975*); the marine environment; and heritage protection.

By 1975 with the election of a conservative Federal government, Commonwealth - State relations returned to the pre-1972 norm known as 'co-operative federalism'. This policy holds that the Commonwealth should take the lead on matters of national significance and national coordination, while pulling back from direct command and control of other matters which have traditionally been regulated by State laws.¹¹ However, in what has been described as an aberration, the Fraser Coalition Government stopped sand mining on Fraser Island, against the wishes of the conservative Bjelke-Petersen Queensland Government.¹² As part of co-operative federalism, a new 'Advisory Council for Intergovernmental Relations' first met in June 1977. The primary responsibility of the Council was to help inter-governmental cooperation. Demonstrating its independence, Queensland chose not

⁹ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, Government Senators Report at p.127-128.

¹⁰ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, ALP Senators Report at p.123-124.

¹¹ Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 3.11.

¹² See Toyne, P *The Reluctant Nation. Environment, Law and Politics in Australia*. ABC Books 1994, at 11.

to participate.¹³

Fowler notes that during this time of cooperative federalism in the late 1970s and early 1980s, national soil conservation, environmental protection and national park programs were either reduced or stopped.¹⁴ However, in 1983, at the time the Tasmanian Government wanted to construct a hydro-electricity scheme which would affect a World Heritage Listed Area, a new federal Labor Government was elected. The Hawke Government immediately implemented a national approach to environmental protection. The initial result was the passage of Commonwealth legislation to implement the International Convention for the Protection of the World Cultural and Natural Heritage: the *World Heritage Properties Conservation Act 1983*. This legislation was designed to enable the Commonwealth government to halt construction work on the Gordon below Franklin Dam in Tasmania.

The Hawke Government continued to use its powers to intervene in State concerns in order to protect the environment. In 1989, despite fierce opposition from the Queensland Government, the Commonwealth nominated Queensland's tropical rainforests for World Heritage Listing, and enacted regulations under the *World Heritage Properties Conservation Act* to prohibit logging in the area. In 1989, the Tasmanian Wesley Vale Pulp Mill was abandoned by its proposers after the Commonwealth, using the power of the Foreign Investment Review Board, insisted on tougher pollution controls.

However, the Hawke Government became increasingly reluctant to engage in bitter and politically contentious intervention in State environment disputes, and Hawke promoted what he called a 'New Federalism'.¹⁵ In response to these views, at a Special Premiers Conference in September 1990, it was agreed that an Intergovernmental Agreement on the Environment (IGAE) should be developed. The Agreement was subsequently concluded in May 1992, and received strong criticism that it was developed with no public involvement. The Agreement is a statement of basic principles and procedures for integrating and co-operating on environmental management, and was an attempt to reduce disputes between the Commonwealth and the States.¹⁶ One of the more significant outcomes of the IGAE was the formation of a new Ministerial Council, known as the National Environment Protection Council. The Council is empowered to set national environment protection measures in the form of standards, goals, guidelines or protocols in relation to the following areas: ambient air quality; ambient marine, estuarine and freshwater quality; noise; contaminated site assessment guidelines; hazardous wastes; and the re-use

¹³ See Mathews, R. *Australian Federalism 1977*. The ANU Research Centre on Research of Federal Financial Relations, 1978.

¹⁴ Fowler, R. "Environmental law and its administration in Australia", in *Environmental and Planning Law Journal*, Vol 1 No 10, 1984.

¹⁵ See Toyne, P. *The Reluctant Nation. Environment, Law and Politics in Australia*. ABC Books 1994, at 12.

¹⁶ See Gardner, A. "Federal Intergovernmental Cooperation on Environmental Management: A Comparison of Developments in Australia and Canada." in *Environmental and Planning Law Journal*, Vol 11 No 2 1994.

and recycling of used materials.¹⁷

Following a change in government in 1996, the Council of Australian Governments (COAG) commenced a broad review of Commonwealth/State roles and responsibilities for the Environment. The outcome of the review was a *Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment* which was released on 7 November 1998. The COAG Heads of Agreement limited the focus of the Commonwealth role to matters of 'national environmental significance'. It listed seven matters which were viewed as the responsibility of the Commonwealth Government and should serve as the only triggers of Commonwealth environmental assessment and approval. The triggers were:¹⁸

- World Heritage Areas;
- wetlands listed under the Ramsar Convention;
- heritage places of national significance;
- nationally endangered or vulnerable species and communities;
- migratory species and cetaceans;
- nuclear activities;
- management and protection of the marine and coastal environment.

The COAG Heads of Agreement listed another 23 'matters of national environmental significance' where it was agreed the Commonwealth has 'interests and obligations', but which would not serve as triggers for Commonwealth environmental assessment purposes or require Commonwealth approvals. These were:

- reducing emissions of greenhouse gases and protecting and enhancing greenhouse sinks;
- regulation of ozone depleting substances;
- conservation of biological diversity;
- protection and management of forests;
- genetically modified organisms which may have an adverse impact on the environment;
- agricultural, veterinary and industrial chemicals;
- matters requiring national environmental protection measures;
- management of hazardous waste relating to Commonwealth obligations arising from the Basel Convention;
- access to biological resources;
- international trade in wildlife;
- development and maintenance of national environmental and heritage data sets arising from intergovernmental arrangements and international obligations;

¹⁷ See *National Environment Protection Council (NSW) Bill 1995*, NSW Parliamentary Library Bills Digest No 1/95.

¹⁸ See Commonwealth of Australia, Senate Environment, Communications Information Technology and the Arts References Committee, *Commonwealth Environmental Powers*, 27 May 1999, at 3.15 and 3.17.

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- applying uniform national emission standards to motor vehicles;
 - polices and practices of a State resulting in potentially significant adverse external effects in relation to the environment of another State, where the States involved cannot solve the problem;
 - ‘national interest’ environmental issues covered by the *Telecommunications Act 1997*;¹⁹
 - quarantine matters;
 - aviation airspace management including assessment of aircraft noise and emissions;
 - Natural Heritage Trust Programs;
 - implementation of the National Strategy for Ecologically Sustainable Development;
 - nationally significant feral animals and weeds;
 - conservation of native vegetation and fauna;
 - prevention of land and water degradation;
 - matters that are from time to time agreed by the Commonwealth and the States as being matters of national environmental significance.

In early 1998 the Minister for the Environment Senator Hill released a consultation paper on reform of Commonwealth Environment Legislation.²⁰ The Consultation Paper envisaged the introduction of two new Acts - the Environment Protection Act and the Biodiversity Conservation Act. Subsequently, the Government introduced the *Environment Protection and Biodiversity Conservation Bill 1998*, which combined the two.

4.0 The Environment Protection and Biodiversity Conservation Act 1999

The Environment Protection and Biodiversity Conservation Bill 1998, as originally introduced into the Senate by Senator Hill on 2 July 1998, was strongly criticised by environment groups around the country.²¹ Major criticisms included: the failure to demonstrate strong environmental leadership at the national level; the handing back of environmental responsibility to the States; and the exclusion of significant areas of environmental concern from Commonwealth government responsibility or scrutiny.

The Bill was referred to the then Senate Environment, Recreation, Communications and the Arts Legislation Committee for inquiry and report by 7 October 1998. With an election held on 3 October 1998, the Bill was re-introduced into the Senate on 12 November 1998, and was re-referred to the Senate Environment, Communications, Information Technology and the Arts Committee. The Committee reported back in April 1999, and recommended that

¹⁹ See *The Telecommunications Act 1997: Summary of Implications for NSW*, NSW Parliamentary Library Briefing Paper No 13/97.

²⁰ Commonwealth of Australia, *Reform of Commonwealth Environment Legislation. Consultation Paper*. Issued by Senator the Hon Robert Hill, Commonwealth Minister for the Environment, 1998.

²¹ See for example: Environmental Defender’s Office, *Submission from 11 Environment Groups in response to the Reform of the Commonwealth Environment Legislation Consultation Paper*, 23 March 1998.

the Bill be passed with 26 recommendations.

However, in minority reports, the Australian Greens and The Greens (WA) recommended that the Bill be withdrawn. They considered that the Bill reflected the Commonwealth's underlying desire to 'wash its hands' of any significant involvement in environmental affairs, and had three major fundamental objections to the Bill. These were:

- inadequate definition and use of ESD principles, especially with respect to the importance of public involvement;
- the limited view as to the Commonwealth's responsibilities. For example, excluding several vital matters of national environmental significance, and using bilateral agreements to delegate Commonwealth decision making to States and Territories;
- the large scope for Ministerial discretion and other exemptions from the Bill. For example, with bilateral agreements, Ministerial declarations and specially accredited processes.²²

The Australian Labor Party Senators believed the Bill to be fundamentally flawed. The Senators noted 15 points about the Bill they considered needed changing, including: maintaining a Commonwealth reserve power to protect the environment; opposing bilateral agreements with the States; extending coverage of the legislation from Commonwealth lands only; and maintaining current levels of protection for World Heritage Areas.²³

The Australian Democrat Senators recommended that the Senate should not consider the Bill until the Government put up or supported amendments which would make the legislation, in its entirety, significantly better. The Democrats had three fundamental objections to the Bill, which were substantially the same as those of the Greens as described above.²⁴

In the end, under a deal with the Australian Democrats, the Government accepted more than

²² Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999. Report of the Australian Greens and The Greens (WA), at p213.

²³ Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, ALP Senators Report, at p 197-198.

²⁴ Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999. Minority Report by the Australian Democrats, at p 199.

440 amendments to the Bill and it was finally passed.²⁵ The Act has received Royal Assent and was gazetted on 16 July 1999. The date it will be proclaimed and take effect from has yet to be announced.

This Act is over 500 pages long, and hence only the key features of the Act will be discussed. Upon its commencement, the following five Acts will be repealed: *Endangered Species Protection Act 1992*; *Environment Protection (Impact of Proposals Act 1974)*; *National Parks and Wildlife Conservation Act 1975*; *Whale Protection Act 1980*; and the *World Heritage Properties Conservation Act 1983*. The *Environmental Reform (Consequential Provisions) Act 1999* provides for the repeal of these Acts and other consequential amendments upon commencement of the *Environment Protection and Conservation Act 1999*.

The Act is comprised of eight chapters, as follows:

- **Chapter 1 - Preliminary**
- **Chapter 2 - Protecting the Environment** - this chapter provides a basis for the Minister to decide whether or not an action that has, or is likely to have a significant impact on certain aspects of the environment should proceed. It prohibits certain actions without Ministerial approval, or the Minister deciding that approval is not required. In addition, approval is not required if it is stated in a bilateral agreement between the Commonwealth and the relevant State.
- **Chapter 3 - Bilateral Agreements** - this chapter provides for agreements between the Commonwealth and States that aim to: ensure an efficient, timely and effective process for environmental assessment and approval of actions; and minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the process of the State and vice versa.
- **Chapter 4 - Environmental Assessments and Approvals** - this chapter deals with the assessment and approval of actions that are prohibited without approval (known as controlled actions). A person proposing to take an action, or a government body aware of the proposal, may refer the proposal to the Minister so he or she can decide whether Ministerial approval is required or not, and how to assess the impacts of the action. Seven different assessment options are available to the Minister, ranging from a public inquiry, an environmental impact statement, to a process laid down under a bilateral agreement.

²⁵ See "Amended Bill will impact on federal-state relations" in *Environment Business*, June 1999.

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- **Chapter 5 - Conservation of Biodiversity** - this chapter includes identifying and monitoring biodiversity, the listing of threatened species and ecological communities, and protecting critical habitat. Provisions for protecting migratory species, cetaceans and marine species are also included. Recovery plans for listed threatened species and ecological communities, and threat abatement plans for key threatening processes must also be developed and bind the Commonwealth. The Minister must ensure a recovery plan is in force for each listed threatened species and ecological community. However, a threat abatement plan need only be developed if the Minister decides that a plan is a feasible, effective and efficient way of abating the process.

Part 15 of the Chapter includes provisions relating to managing World Heritage Properties. The Commonwealth may submit a property for inclusion on the World Heritage List only after seeking the agreement of the relevant State and landholders. Similar provisions apply to the Commonwealth designating a wetland for inclusion in the List of Wetland of International Importance, kept under the Ramsar Convention. The Chapter also includes provisions for the making of reserves over Commonwealth land or sea.

- **Chapter 6 - Administration** - this chapter requires the Minister to take account of the precautionary principle when making decisions as specified in 16 different sections of the Act. The Act defines the precautionary principle as: that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible damage. The chapter also includes administrative provisions for wardens and rangers, the boarding of vessels and search warrants. The Minister may make conservation orders controlling activities, and requiring specified people to take specified actions, in Commonwealth areas to protect listed threatened species or ecological communities. The chapter also includes provisions for civil penalties and criminal proceedings for offences against the Act.
- **Chapter 7 - Miscellaneous** - this chapter refers to a variety of areas including compensation for the acquisition of property, the making of regulations and an independent review of the Act to be undertaken within 10 years within the commencement of the Act, and not more than 10 year intervals thereafter.
- **Chapter 8 - Definitions** - contains definitions of terms and words used in the Act.

4.1 Parts of the Act in More Detail

Chapter 2 - Protecting the Environment

This chapter deals with the requirements relating to matters of national environmental significance. These are defined as:

- World Heritage Areas;
- wetlands of international importance (ie, Ramsar listed wetlands);
- listed (nationally) threatened species and communities;
- listed migratory species;
- protection of the environment from nuclear actions;
- the Commonwealth marine environment.

The majority of the Act revolves around Commonwealth involvement in these six key areas of national significance. The Act requires that every five years a report, the draft of which has been released for public comment, will be published on whether the above six ‘trigger’ areas should be amended. Whilst the COAG Heads of Agreement contained seven trigger areas, the Act omits one - ‘heritage places of national significance’. The inclusion of a national heritage places trigger is dependent upon the development of a National Heritage Places Strategy. The Commonwealth expects that the Strategy will be implemented through Commonwealth and State legislation, and some form of cooperative legislative scheme will be relied upon. The existing *Australian Heritage Commission Act 1975* will be revoked and new Commonwealth legislation put in place to give effect to the new Strategy.²⁶

Under the present (but to be repealed as explained on page 10) *Environment Protection (Impact of Proposals) Act 1974*, Commonwealth involvement in the assessment and approval of development projects has been relatively ad hoc. This is because Commonwealth involvement has depended on whether some other form of approval is required. For example, export approval for woodchips or mineral sands has been a trigger for Commonwealth environmental assessment. Similarly, foreign investment approval has often triggered environmental assessment of tourism projects.²⁷ Under this regime, where no other Commonwealth approval is required, the Commonwealth is also locked out of the environmental assessment of projects that may affect matters of national environmental interest. Moreover, Senator Hill in his Second Reading Speech on the Bill noted that the reliance on non-environment triggers has resulted in the Commonwealth becoming involved in issues that are of only local or State significance.²⁸

²⁶ Commonwealth of Australia, *Reform of Commonwealth Environment Legislation. Consultation Paper*. Issued by Senator the Hon Robert Hill, Commonwealth Minister for the Environment, 1998, at 33.

²⁷ See “Act of Convenience threatens ecology” in *The Australian*, 25 June 1999. Article by Rob Fowler of the Australian Centre for Environmental Law.

²⁸ *Senate*, 2 July 1998, Senator Hill at p. 4796.

Under the new legislation, actions likely to have a significant impact on any of the six trigger areas as noted above will be automatically subject to Commonwealth environmental assessment, even if they occur in a State or Territory jurisdiction and no other form of Commonwealth government approval is required. The triggers for Commonwealth involvement will no longer be ad hoc.

The Act restricts Commonwealth involvement to the six trigger areas only. If a development proposal, no matter how small or large, may affect the environment outside of these six areas, the Commonwealth has no role to play in its environmental assessment or approval. This is so even if other Commonwealth approval, such as foreign investment approval, is required. A variety of criticisms have arisen here. Firstly, conservation groups have been critical of the limited trigger areas that the Act allows for Commonwealth involvement. For instance, the Australian Conservation Foundation concluded that at a minimum triggers should also include: greenhouse; land clearing; land degradation; genetic manipulation; forestry operations; and water allocation.²⁹ In regard to these other trigger areas it was also suggested that minimum thresholds be applied for Commonwealth involvement. For example, land clearing applications should be a minimum size before Commonwealth involvement is triggered. Had these triggers been included the scope for Commonwealth involvement in environmental management would obviously be much greater, and reflects the conservation movement's goal of a greater national presence in environmental decision making.

In response to these criticisms the Senate Environment Committee Majority Report noted that the Government has many policies and programs in place that effectively deal with the other trigger areas - such as greenhouse gas emission reduction programs. The Majority Report noted significant difficulties to include other trigger areas like greenhouse gas emissions and land clearing, and stated:

These processes typically result from the cumulative effect of diffuse, small scale, individual activities which are more appropriately regulated at the local and State government levels and for which it is difficult to justify a direct legislative role for the Commonwealth.³⁰

However, against this it is objected that local and State governments do not have the ability to see or consider the 'big picture' or cumulative effects of the 'tyranny of small decisions'. For example, a NSW government, in deciding on a new coal fired power station, is unlikely

²⁹ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, submission by Mr Michael Krockenburger of the Australian Conservation Foundation, at p. 48.

³⁰ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at 6.27, p 51.

to take into account the cumulative greenhouse emissions from the new project as well as any new projects proposed for Western Australia. By its very nature, only the Commonwealth can. By not including any of these other environmental areas as Commonwealth triggers, the likely result is that no level of government will be able to gain the 'big picture' and regulate accordingly. This also creates pressure on the other programs and policies of the Commonwealth government to succeed in order to satisfy its national and international commitments.

For all its recognised limitations, it is self evident that the *Environment Protection (Impact of Proposals) Act 1974* has allowed for the protection of significant elements of the Australian environment by successive Federal governments of all persuasions in the face of opposition by hostile State governments. Many of those areas 'saved' by the Federal government are now World Heritage Areas and recognised world wide for their natural and cultural values. For instance, sandmining on Fraser Island was stopped by the Commonwealth even before it became a World Heritage Area. If the new Act was in place back in the early 1970s, the question must be asked, could the Commonwealth have stopped the mining and forestry operations in the face of a hostile State Government? Some commentators doubt this, especially with the operation of bilateral agreements with the States, which is discussed in section 3.0 below. In regard to the Commonwealth protecting an area which has or is likely to have world heritage values, and is under imminent threat, the Minister may by publication in the Gazette declare the area to be a World Heritage Property without any consultation with the relevant State government. This ability to quickly gazette a property then provides the Commonwealth with the legislative power to invoke the rest of the Act, requiring Commonwealth approval for actions that may have a significant impact on the values of the World Heritage property. Similar provisions apply to wetlands of international importance.

The Act provides for a series of penalties for those who contravene this part of the Act. Unless given approval or otherwise allowed for under the Act, a person must not take an action that will have a significant impact, or is likely to have a significant impact on the above sites or species, or take a nuclear action that has, will have or is likely to have a significant impact on the environment. Civil penalties for a person are up to \$550,000, and a corporation \$5,500,000. Criminal penalties up to seven years imprisonment or \$50,600 fine are also applicable to persons who are reckless as to the fact of their action which significantly impacts on the above areas. The original Bill as introduced by the Government included only civil penalties, but included criminal provisions as part of their deal with the Australian Democrats.

Unless given approval or otherwise allowed for under the Act, it is an offence to take an action on Commonwealth land that has, will have or is likely to have a significant impact on the environment. In addition, taking an action outside Commonwealth land which has or will have a significant impact on the environment on Commonwealth land, or is likely to have a significant impact is also an offence. In these cases the civil penalty is \$110,000 and for a body corporate \$1,110,000, and if convicted criminally imprisonment up to two years or a \$13,200 fine.

Unless given approval or otherwise provided for under the Act, the Commonwealth or a Commonwealth agency must not take inside or outside the Australian jurisdiction an action that has, will have or is likely to have a significant impact on the environment inside or outside Australian jurisdiction.

Part 4 of chapter 2 includes those cases in which an environmental approval is not required. These actions may include those covered by: a bilateral agreement; a Commonwealth Ministerial Declaration that approval is not necessary because the action is approved in accordance with an accredited management plan; and forestry operations covered by regional forest agreements.

Chapter 3 - Bilateral Agreements

The Senate Environment Committee noted that much of the Commonwealth environmental law regime (from the 1970s) was enacted at a time when most of the States did not have any significant environmental legislation. However, as States have developed environmental protection laws, many of which are now into their second generation, duplication and overlap of environment legislation between the Commonwealth and the States has developed. Whilst the Commonwealth currently accredits State processes in a variety of ways, it has never been able to accredit a State process under its own legislation.³¹ The new legislation aims to remedy this failing by formally accrediting State assessment and approval processes, even for the six matters of national environmental significance. This accreditation is known as a Bilateral Agreement.

Bilateral Agreements (the Agreements) are agreements between the Commonwealth and States/Territories in an attempt to reduce duplication of environmental processes between the two governments. The Commonwealth may accredit a State environmental assessment and approval process, and therefore not be involved in environmental assessment and approval or non-approval of a development application. An Agreement can even relate to the six trigger areas of national environmental significance, and hence the Commonwealth may not involve itself in matters of national environmental significance around the country at all.

The Commonwealth Department of the Environment and Heritage noted that an example of an Agreement would be a management plan for a World Heritage Property which authorised classes of actions and excluded other classes of actions, and would include standards for other areas such as environmental impact assessment processes.³²

³¹ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 75.

³² Mr Roger Beale, Secretary of the Department of Environment and Heritage. See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 80.

There are a variety of ‘safety nets’ in regard to State approvals under an Agreement in place. The State environmental approval process must be outlined in an accredited bilateral management plan. States will only be able to grant approvals if they are in accordance with management plans which are in force under State or Commonwealth law and have been accredited with the Commonwealth Environment Minister. A management plan can only be accredited by the Minister if: the plan, and the law of the State under which the management plan is in force, meet the criteria specified in the regulations; there has been or will be adequate impact assessment; and the plan has been tabled in both Commonwealth Houses of Parliament and not disallowed.

A draft Bilateral Agreement must be published by the Minister for at least 28 days and comments sought and taken into account in the development of the final Agreement. The Minister must also be satisfied that the Agreement is in accordance with the objects of the Act.

The Act provides that an Agreement may include provisions for auditing, monitoring and reporting on the operation and effectiveness of the Agreement. In addition, the Agreement must have provisions recognising that the Commonwealth Auditor-General may audit the operations of the Commonwealth public sector.

The inclusion of Bilateral Agreements in the Act is one of its more contentious areas. Whilst most commentators agreed that some form of accreditation of State processes is useful and necessary, conservation groups in particular suggested limiting accreditation to the assessment process, leaving final approval to the Commonwealth. Giving responsibility for assessment and approval to the States is considered a complete abrogation of Commonwealth responsibility.

Amendments by the Australian Democrats saw the strengthening of the Commonwealth supervision of the Agreements - for instance accredited management plans must be placed before both Houses of Parliament. Nevertheless, Rob Fowler of the Australian Centre for Environmental Law believes that accredited management plans are an insufficient safeguard to protect areas of national significance, as no management plan can possibly foresee all eventualities. Fowler continues that management plans are no more than guidelines and their legal effect on State laws remains unclear.³³

With these concerns, how to enforce the underlying provisions of the Act (ie, the protection of nationally environmentally significant areas) is therefore of utmost importance. Fowler believes that under the new Act, it is possible that a Commonwealth government will not have the legislative power to prevent damage to the nationally significant environment. In this way, the Commonwealth will not be able to protect future ‘Fraser Islands’ or similar.

However, the Act does contain provisions for cancelling or suspending an Agreement. Firstly, any person may refer to the Minister a matter that they believe involves a

³³ See “Act of Convenience threatens ecology” in *The Australian*, 25 June 1999. Article by Rob Fowler of the Australian Centre for Environmental Law.

contravention of the Agreement. The Minister must then decide whether the Agreement has been contravened, what action to take, and publish the decision and reasons for that decision. However, the Minister need not make a decision if he considers that the referral is vexatious or frivolous, or more importantly, the person referring the matter would not be eligible for standing for an injunction in relation to the contravention. This may limit the opportunities to ensure the Minister makes a decision.

If, after consultation with the relevant State Minister, the Commonwealth Environment Minister is not satisfied that the State has or will comply with the Agreement, the Minister may then issue a notice to either suspend or cancel the Agreement at least 10 days after the notice has been issued. The Minister also has the ability to give effect to an emergency suspension of an Agreement where the State is not complying and this contravention may result in a significant impact on a matter of national environmental significance.

The Commonwealth Department of Environment and Heritage provided a hypothetical example to illustrate the effect of cancelling or suspending an Agreement:

A Bilateral Agreement may specify that approvals granted by the State are accredited if they are consistent with a management plan for a Ramsar wetland. Suppose the Commonwealth suspended the Agreement (for any reason). The State continues to approve the building of a motel in a part of the wetland zoned for no development under the management plan, then the approval granted by the State would not be valid, since it was not given in the specified manner, and the Commonwealth would be free to take action against the proponent under the Act to prevent the action proceeding.³⁴

Chapter 4 - Environmental Assessments and Approvals

Under current legislation, the *Environment Protection (Impact of Proposals) Act 1974*, the responsibility for deciding whether an action (a project proposal or granting of a licence for instance) requires any Commonwealth environmental assessment lies with the relevant Minister. These decisions are not the responsibility of the Environment Minister unless his Department is the action Department. For instance, the Minister for Resources is responsible for granting a licence for offshore pipelines in Commonwealth waters and is therefore the action Minister for any such proposals.³⁵ If an action Minister decides that the proposed action is environmentally significant, the action Minister must refer the matter to the Minister for the Environment. Following an environmental assessment, the action

³⁴ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 89.

³⁵ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 97.

Minister must take into account the comments of the Environment Minister, but is responsible for making the final decision on the proposal. The Environment Minister does not have veto power over this decision.

The new Act fundamentally reverses this Ministerial power. The Minister for the Environment will now determine whether an environmental assessment and approval is required, will grant (or refuse) approval, and set the conditions attached to that approval. This is a major advance over the old regime, and is in line with current public sector management principles of separating the proponent and decision maker. It is one of the few parts of the Act to win endorsement from conservation groups. However, industry groups opposed this transfer of power to the Environment Minister. Some from industry were concerned that the Environment Minister would not adequately balance environmental, economic and social considerations and argued that environmental decision making should be a whole of government activity taken in conjunction with other aspects of project approval.³⁶

Chapter 4 provides the outline for how the Environment Minister is to: determine whether approval for an action is required; provide different assessment methods and the process of choosing that assessment method for those actions requiring approval; and the process for approving actions once assessed.

A controlled action is as an action which chapter two prohibits without approval. These actions relate to the six Commonwealth trigger areas. A person proposing to take an action that may be or is a controlled action must refer the proposal to the Minister. A person proposing an action that they think is not a controlled action may refer the proposal to the Minister for their decision as to whether or not it is a controlled action.

Once referred to the Minister, he/she must make a decision within 20 days on whether or not the proposed action needs approval. If circumstances change or new evidence comes to light, the Minister may revoke the first decision and substitute a new decision. However, this is not permitted once the Minister has given approval for the action.

Part 8 of Chapter 4 covers assessing the impacts of controlled actions. Under the previous environment legislation, the Minister had to consider all aspects of the proposal. The new Act restricts the Minister to consider only the relevant impacts of an action. A relevant impact is one that involves a matter of national environment significance, ie, those six trigger areas defined in Chapter 2. If the controlled action is covered by a bilateral agreement, assessment of the relevant impact by the Commonwealth Minister does not apply.

If the Minister decides that the controlled action will have an impact on matters of national interest then he or she must choose a method to determine its environmental impact.

³⁶ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1999* and *Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 99. Submission from the Minerals Council of Australia.

Choices include:

- assessment by an accredited assessment process;
- assessment on preliminary documentation;
- assessment by public environment report;
- assessment by environmental impact statement;
- assessment by inquiry.

In this way the Act establishes a hierarchy of scrutiny, with an inquiry being the most comprehensive form of assessment. The choice of assessment is at the discretion of the Minister.

The discretionary powers of the Environment Minister are considerable in the Act, and this has created some concern for both environment and industry groups. Industry groups have noted that whilst this discretion may significantly streamline the approvals process, it could also 'represent a radical extension of the Commonwealth's capacity to intervene in environmental matters'.³⁷ In contrast, environment groups considered that the Environment Minister has too much discretion as to whether to intervene in, or opt out of, decisions resulting in the protection of the environment. The Australian Conservation Foundation suggested that many of the discretionary provisions in the Bill should have been replaced with mandatory provisions.³⁸

The Minister must make a decision whether or not to approve the controlled action within 30 days after he or she receives an assessment report, or 40 days after receipt of a commission report. However, in certain circumstances the States have a role to play as well.³⁹ If the controlled action is to be taken in a State, the State must prepare a notice stating that the certain and likely impacts of the action on things other than matters protected by the six national trigger areas have been assessed to the greatest extent practicable, and explaining how they have been assessed. This means that the Minister cannot grant approval until he or she has received this notice from a State or Territory.

Section 136 of the Act provides the considerations the Minister must and may take into

³⁷ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 98. Submission by Minerals Council of Australia.

³⁸ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 98. Submission by the Australian Conservation Foundation.

³⁹ This section applies only if the action: is to be taken by any person for the purposes of trade or commerce between Australia and another country, between two States/Territory, or by a constitutional corporation; or is an action whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries. See Section 130.

account when deciding on an approval. Amongst other things, the Minister must consider: economic and social matters; and matters relevant to the six areas of national environmental significance. Concern has been expressed that whereas the Minister must consider all social and economic matters, only certain environmental matters may be taken into account. This approach may therefore be inadequate to protect the environment.⁴⁰ The Minister must also take into account the principles of ecologically sustainable development, any assessment reports, environmental impact statements or commission of inquiry reports.

Chapter 5 - Conservation of Biodiversity

The Act requires the Commonwealth to prepare inventories that identify and state the abundance of: listed threatened species; listed threatened ecological communities; listed migratory species and listed marine species on Commonwealth land/waters. This inventory must be completed within five years of the commencement of the Act, or within five years after the land became Commonwealth land. A similar inventory must be prepared for Commonwealth marine areas for cetaceans and the listed species, communities, migratory and marine species as indicated above.

Noting the current movements towards bioregional planning, the Act also provides for the preparation of bioregional plans for bioregions within a Commonwealth area. Bioregional plans provide a regional overview that integrates environmental, social and economic objectives. Bioregional planning aims to effectively plan and manage for biodiversity conservation, using natural boundaries to facilitate the integration of conservation and production oriented management. The preparation of bioregional plans can identify biodiversity that is not adequately represented in the reserve system, on a regional basis.

The Commonwealth may also cooperate with the States to develop bioregional plans for areas not wholly within a Commonwealth area. A bioregional plan may incorporate the following: the components of biodiversity; important economic and social values; priorities for biodiversity conservation; and mechanisms for community involvement. However, in what seems a serious shortcoming, the Act does not allow for public input or consultation in the preparation of bioregional plans. Both industry and conservation groups have criticised this aspect of the Act. The Senate Environment Committee concluded that the development of effective bioregional plans which are supported by the community will necessarily require public input, and made recommendations along these lines.⁴¹

⁴⁰ Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998*. Parliament of Australia Parliamentary Library, Bills Digest No 135, 1998-99. 1999.

⁴¹ Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 127.

Under section 178 of the Act, the Minister must prepare a list of threatened species divided into the following categories:

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

For Commonwealth legislation, the Act provides for the new categories of: critically endangered; extinct in the wild; and conservation dependent. The categories in the Act are consistent with those established by the International Union for the Conservation of Nature. Initially, the list of threatened species may only contain those species that were listed in the revoked *Endangered Species Protection Act 1992*.

Similarly, a list must be prepared of threatened ecological communities. This list must be divided into the following three categories:

- critically endangered;
- endangered;
- vulnerable.

The new Act improves on the categories of threatened ecological communities from previous legislation by including the vulnerable category. This highlights the need to protect communities before they reach the 'endangered' category. It is invariably easier to protect vulnerable communities before they reach the endangered category, than to wait until they are endangered and then attempt to prevent them sliding into extinction.

A list of threatening processes must also be prepared. A process is defined as threatening if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community. In relation to any of the above lists, the Minister must seek the advice of the Scientific Committee which the Act establishes. Any person may nominate to the Minister a native species, ecological community or a threatening process to be listed. The Minister must refer a nomination to the Scientific Committee, unless the Minister considers the nomination to be vexatious, frivolous or not made in good faith. After considering the Scientific Committee's advice, the Minister must then make a decision whether to amend the list or not. In making that decision, the Minister must not consider any matter that does not relate to the survival of the native species or ecological community concerned, for example, social or economic factors.

The Act provides imprisonment for up to two years for the trading or reckless taking, killing or injuring a listed threatened species or community. Otherwise, strict liability applies if any of the above actions have been taken 'non-recklessly' with fines up to \$55,000. However, the Minister may issue a permit for any of the above actions. Similar provisions apply for the protection of: listed migratory species; listed marine species; and whales and other

cetaceans. The Act also establishes a register of critical habitat, and provides for up to a two year sentence if found guilty of knowingly damaging critical habitat. If Commonwealth land contains critical habitat, then the Commonwealth or any Commonwealth agency must not sell that land without a covenant that protects that habitat and binds its successors in title. The Act also establishes the Australian Whale Sanctuary, comprising the waters of the Exclusive Economic Zone other than the coastal waters of a State or Territory. As noted above, it is an offence to recklessly kill or injure, or intentionally take a cetacean, punishable by imprisonment. To otherwise kill or injure or take a cetacean is an offence of strict liability.

The Act requires recovery plans for listed threatened species and ecological communities, and threat abatement plans for key threatening processes to be developed. These plans bind the Commonwealth. The Minister must ensure a recovery plan is in force for each listed threatened species (except extinct species and conservation dependent species) and each ecological community. However, a threat abatement plan need only be developed if the Minister decides that a plan is feasible, effective and efficient way of abating the process. If a plan applies outside Commonwealth areas, the Commonwealth must seek the co-operation of a State/Territory with a view to implementing the plan jointly. The Commonwealth may also make a Conservation plan for the protection, conservation and management of: listed migratory species; listed marine species; cetaceans; and a conservation dependent species. In making the above plans, amongst others the Minister must have regard to: minimising any significant adverse social and economic impacts; and making the most efficient and effective use of the resources that are allocated for the conservation of species and ecological communities.

Similarly to NSW legislation, Part 14 of the Act provides for the making of conservation agreements between the Commonwealth and a person for the purpose of protecting and conserving biodiversity in the Australian jurisdiction. Previous legislation (the *Endangered Species Protection Act 1992*) only allowed for conservation agreements to apply to Commonwealth areas - a severe limitation on the Act. Conservation Agreements are an important management tool as they allow considerable scope for protecting biodiversity on non-reserve lands. As such, they are generally supported by the conservation movement. However, under section 306 of the Act a conservation agreement may contain provisions that allow the landholder to be exempt from gaining approval for specified actions that would normally be required in relation to the six key areas of national environmental significance. The Environmental Defender's Office notes that it is inappropriate to encourage biodiversity by offering the incentive of an exemption from environmental laws. However, the majority Senate Environment Committee Report concluded that the Act contains adequate safeguards and that conservation agreements will not be used to avoid the application of environmental laws.⁴²

⁴² Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 150-151.

Part 15 of the Act covers protected areas, including the nomination and management of World Heritage properties. If the Commonwealth wishes to nominate a property for inclusion on the World Heritage List, and the property does not belong to the Commonwealth, or is in a State/Territory area, the Commonwealth may only submit the nomination after the Minister is satisfied that the Commonwealth has used its best endeavours to reach agreement with the other person/State on the proposed submission of the property and management arrangements. The Commonwealth does not have to have the approval of the other party to nominate a property, but the Minister must be satisfied that the Commonwealth has done its best to seek agreement.

The Minister must make a management plan for each World Heritage Property which is entirely within a Commonwealth area. For other properties, the Commonwealth must use its best endeavours to ensure a plan which is consistent with Australia's obligations under the World Heritage Convention or the Australian World Heritage management principles is prepared and implemented in co-operation with the relevant State. For instance, the Commonwealth and State could make a bilateral agreement adopting a management plan and providing for its implementation. Similar provisions apply for managing wetlands of international importance, ie, Ramsar listed wetlands.

Division 4 of Chapter 5 includes provisions for the declaration and management of Commonwealth reserves. The Governor-General may declare a reserve within Commonwealth lands or sea, and the reserve must be proclaimed with one of the following categories:

- strict nature reserve - contains some outstanding or representative ecosystems, geological or physiological features;
- wilderness area - large area of land, sea or both that is unmodified, or only slightly modified by modern or colonial society, and retains its natural character and does not contain permanent or significant habitation;
- national park - consists of an area of land, sea or both in natural condition;
- natural monument - contains a specific natural feature, or natural and cultural feature, of outstanding value because of its rarity, representativeness, aesthetic quality or cultural significance;
- habitat/species management area - contains habitat for one or more species;
- protected landscape/seascape - an area of land, with or without sea, where the interaction of people and nature over time has given the area a distinct character with significant aesthetic, cultural or ecological value;
- managed resource protected area - contains natural ecosystems largely unmodified by modern or colonial technology.

The Act has taken the above categories from the International Union for the Conservation of Nature (IUCN). The regulations must prescribe management principles for each of the above categories. Mining is permitted within a Commonwealth reserve if the Governor-General has approved the operations and they are carried out in accordance with a management plan in operation for the reserve. However, the Act expressly prohibits mining in Kakadu National Park.

Chapter 6 - Administration

Section 391 in chapter 6 of the Act lists 14 sections in which the Minister must take account of the precautionary principle in making a decision. The Act defines the precautionary principle as: that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible damage.

Section 458 of the Act provides the Minister with the discretion to require a permit holder to conduct an environmental audit if the Minister believes or suspects that the holder has contravened or is likely to contravene any conditions. This is generally seen as a positive development as previously there was no mechanism for carrying out ongoing monitoring of environmental performance of permit holders.

The Minister may make a conservation order restricting specified activities on or in Commonwealth areas if the Minister reasonably believes that such an order is necessary to protect a listed threatened species or ecological community. In considering whether to make a conservation order, the Minister must have regard to economic and social considerations that are consistent with the principles of ecologically sustainable development. Contravening a conservation order is an offence with a maximum penalty of \$55,000.

Three types of persons may seek an injunction in the Federal Court to restrain a person from engaging or engaged in conduct that would constitute an offence under the Act. These are: the Minister; an interested person (other than an unincorporated organisation); and a person acting on behalf of an unincorporated association. The Act defines the meaning of an interested person/organisation as: interests have been, or would be affected by the conduct or the proposed conduct; or the person/organisation has engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the two years immediately before the conduct or proposed conduct (section 475). Whilst some industry groups considered the standing provisions to be too wide, conservation groups argued that standing should be open to 'any person'. The industry groups objected to the standing provisions on the basis that it would increase the likelihood of frivolous and vexatious litigation, thereby delaying environmental assessment and approvals. The conservation groups noted that standing is open to 'any person' to enforce environmental legislation in various States (NSW being one), with none opening a floodgate of frivolous litigation. Therefore there is no reason why the Commonwealth should limit standing in the new Act.⁴³

Section 516 of the Act requires an Annual Report on the effectiveness of the Act to be produced. Section 516A requires departmental annual reports to include information on how the actions of, and the administration (if any) of legislation, during the period: accorded with the principles of ecologically sustainable development; their effect on the environment;

⁴³ See: Commonwealth of Australia, *Environment Protection and Biodiversity Conservation Bill 1999 and Environmental Reform (Consequential Provisions) Bill 1998*. Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee. April 1999, at p 180.

measures taken to minimise the impact on the environment; and identify mechanisms for reviewing and increasing the effectiveness of minimising measures. This may help the Commonwealth improve its environmental performance when carrying out its duties. In addition, a State of the Environment Report is to be prepared every five years, with the first report prepared by 31 December 2001.

5.0 Responses to the Environment Protection and Biodiversity Conservation Act 1999

While industry has been generally supportive of the new legislation, a common criticism has been that it will not achieve the goal of promoting uniform environmental impact standards and processes throughout Australia, although the elimination of duplication is seen as a significant step forward. One industry concern was whether the new legislation will streamline the environmental approvals process or simply add another layer of uncertainty. The industry journal *Environment Business* reports that, in general, there is considerable confusion and uncertainty within industry about the reach and workings of the new legislation. However, this confusion may clear up once bilateral agreements are finalised and the impact on State legislation becomes clear.⁴⁴

The reaction from the environment movement has been mixed. Sections of the movement supported the Democrat amendments, and hence gave qualified support to the final Bill. For instance, the World Wide Fund for Nature and Humane Society International were reported as applauding the Democrats position, and hence the Act, as 80% of the desired amendments were included.⁴⁵ Other environment organisations, such as the Australian Conservation Foundation, criticised the Government and the Democrats, stating that the Act has very limited national powers and fails to address national issues such as greenhouse gas emissions, forest protection, land clearing and water allocation.⁴⁶ Rob Fowler, Director of the Australian Centre for Environmental Law, concluded that the Act is fundamentally flawed and noted the following reasons for Commonwealth involvement in important project decisions: it is the Commonwealth that has to honour its international environment obligations it has assumed; the contribution of a national perspective in relation to big projects proposed at the State level is often critically important; and the public expects that the pinnacle of the environmental approvals pyramid should remain with the Commonwealth.⁴⁷

⁴⁴ "Legislation clears way for discussions with States." in *Environment Business*, July 1999.

⁴⁵ "Democrats deal seals a green shake-up" in *The Sydney Morning Herald*, 23 June 1999.

⁴⁶ "New legislation only a washed out shade of green." in *The Sydney Morning Herald*, 29 June 1999.

⁴⁷ "Act of convenience threatens ecology." in *The Australian*, 25 June 1999.

6.0 Conclusion

It is pertinent to return to the quote from the Australian State of the Environment Report 1996: *The national ability to manage the environment is continually hamstrung by structural problems between different areas of government.* The *Environment Protection and Biodiversity Conservation Act 1999* is an attempt by both the Commonwealth and State Governments to address this issue, amongst others. Some commentators have already foreshadowed the failure of the Act to do this in a way that will also protect the environment.⁴⁸ Others, notably industry but also some conservation groups, have not been so pessimistic and consider the new legislation to be a vast improvement on the current regime.⁴⁹ The next State of the Environment Report, due to be published by the end of 2001, may provide us with some clues as to which way the legislation is heading. More likely, the next decade is likely to provide us with such answers.

⁴⁸ For instance, Rob Fowler of the Australian Centre for Environmental Law and the Australian Conservation Foundation have been especially critical of the Act.

⁴⁹ See "Legislation clears way for discussions with States" in *Environment Business*, July 1999.