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Impact of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) on the State Approval Process

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SUMMARY

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) has been operating for just over 12 months. During this time it has established itself as central to Australia's environmental assessment and approval process.

The Act establishes an offence, assessment and approval regime for the Commonwealth applicable to actions that have traditionally been regulated by the States and Territories. It empowers the Commonwealth Environment Minister to grant environmental approval to a project or activity and to impose conditions on approvals. In addition, it allows the Commonwealth to accredit State and Territory assessment and approval processes through a relatively novel arrangement of bilateral agreements. The aim of these agreements is to avoid duplication and to coordinate environmental impact assessment and approval.

This paper examines the approval process introduced by the Act. It reviews the methods invoked under the Tasmanian Bilateral Agreement, being the only bilateral agreement that has been adopted to date. Suggested trends applicable to State and Territory approval processes are examined and assessment methods derived under the Act are given particular attention. The paper concludes with an overview of the requirements imposed on environmental impact statements under the legislation, and in light of judicial interpretation.

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INTRODUCTION

The *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (the Act), commenced on 16 July 2000. The Act reflects:

- in-principle endorsement by the Council of Australian Governments (CoAG) in November 1997 to a Heads of Agreement on Roles and Responsibilities for the Environment, including agreement that the Commonwealth's involvement in environmental matters should focus on matters of national environmental significance; and
- proposals for reform of Government environmental legislation discussed in the Consultation Paper issued by the Commonwealth Minister for the Environment in February 1998.

The Act establishes an offence, assessment and approval regime for the Commonwealth applicable to various actions that have traditionally been regulated by the States and Territories.

Commonwealth assessment and approval now extends to projects or activities that are likely to have a significant impact on specific matters of national environmental significance.

The Act provides the Commonwealth Environment Minister with the power to "trigger" the assessment and approval process. The Minister is also provided with the power to grant environmental approval to a project or activity and to impose conditions on approvals.

In addition, the Act allows for the Commonwealth to accredit State and Territory assessment and approval processes through bilateral agreements, and for the establishment of prescribed criteria for such agreements. Bilateral agreements can either be for the environmental impact assessment (EIA) component only or for the decision whether to approve or refuse the project or activity and what conditions to impose.

The Commonwealth Government has stated that it intends to accredit only State and Territory practices that meet "best practice" criteria. In promoting the achievement of this aim it has further stated that it proposes to use bilateral agreements as a mechanism for promoting the application of rigorous and nationally consistent standards across all jurisdictions. In this way bilateral agreements should assist in avoiding duplication between the State and Commonwealth processes and in doing so will co-ordinate EIA and approval of controlled actions.

THE FEDERAL APPROVAL PROCESS TO DATE

Draft bilateral agreements for all States and Territories were released on 20 July 2000 and public submissions closed on 18 August 2000.[1] At the date of writing only Tasmania had entered into a bilateral agreement with the Commonwealth. Other States have been reluctant to enter into proposed bilateral agreements without Commonwealth funding to support them. South Australia in particular has apparently rejected involvement in the bilateral process. Despite the absence of States and Territories committing to the bilateral process, it is reasonable to expect that at some point rationalism will dictate that bilateral agreements will be entered into between the Commonwealth and State and Territory governments. This is evidenced by the fact that both theoretically and in practice the Act has established itself as central to the Australian environmental legal system. The jurisdiction established by the Act, involving automatic triggers for Commonwealth approvals and assessment processes, has effectively re-written the Commonwealth's legislative responsibilities and the Commonwealth State and Territory environmental relationship.

As at 10 July 2001, there had been 304 referrals under the Act involving projects as diverse as mining, urban development, land transport infrastructure, tourism and recreational facilities, energy and infrastructure and water management.[2] Of the 201 referrals decided as at 7 May 2001, 62 had been declared controlled actions requiring further assessment.[3] This is a dramatic increase over the previous *Environment Protection (Impact of Proposals) Act* 1974 (Cth) and this trend is likely to continue.

It is also interesting to note that of the 62 referrals declared as controlled actions, only 25 involved a review of assessment processes under the Act. Fourteen were assessed by preliminary documentation, five by accredited State or Territory assessments, three by Public Environment reports and three by Environmental Impact Statements. Six controlled actions had been given final approval as at 7 May 2001, with conditions imposed on five of these.[4]

Further, while at the current time there have only been a small number of court cases brought under the Act,[5] it has dramatically

[1] See http://www.ea.gov.au/epbc.

[2] Statistics compiled by the WorldWide Fund for Nature (Australia) from the official website of Environment Australia at http://www.ea.gov.au/epbc/.

[3] Statistics compiled by the WorldWide Fund for Nature (Australia) from the official website of Environment Australia at http://www.ea.gov.au/epbc/.

[4] Ibid.

[5] Three in total.

increased the opportunity for public interest groups to challenge projects.

KEY ISSUES ARISING OUT OF THE ACT

Bilateral Agreements

Bilateral agreements are a relatively novel arrangement between the Commonwealth and State and Territory governments and go a long way towards coordinating environmental impact assessments and approvals and avoiding duplication.

There are two main types of Bilateral Agreements:

(a) An agreement under which particular State environment assessment processes may be accredited (*Assessment Bilateral*).

(b) An agreement under which particular State environment assessment processes and associated decisions made by the State on the action may be accredited (*Approval Bilateral*).

The effect of an Assessment Bilateral is that a proponent would need to complete only the accredited State assessment. The Commonwealth Environment Minister would then use the information from that accredited assessment to form the basis for making his or her own decision on whether to grant or refuse an approval.

The effect of an Approval Bilateral is that a proponent would need to complete only the accredited State assessment and receive a decision on the proposal from the State. This type of agreement promotes a one-stop-shop approach for proponents.

The assessment processes under the Act means that bilateral agreements afford important opportunities to enhance State and Territory approval and assessment processes that may be substandard at the present.[6]

Implications for State Environmental Legislation

The indications are that primarily the Act will affect State and Territory regimes in three key areas.

First, the Act represents the first time that Commonwealth approval is required automatically for a wide range of specified actions directly affecting the environment. Accordingly, State Government decisions regarding actions that have or are likely to have a significant impact

[6] See for instance the analysis of the Queensland EIA systems in D E Fisher, “Environmental Impact Assessment in Queensland” (2001) 18 (2) EPLJ 109.

on a matter of national environmental significance will no longer be the final approval (unless an Approval Bilateral exists).[7]

Secondly, the Act applies to State and local governments. This means that in addition to private developments, State and local government actions that have, will have or are likely to have a significant impact on a matter of "national environmental significance" will require approval under the Act. This is a significant development, the provisions of the Act would be triggered for example, by a repeat of the facts in the *Commonwealth v Tasmania*.[8]

Thirdly, due to s 109 of the Commonwealth Constitution, the Act has supervening power over State and Territory legislation and prevails to the extent of any inconsistency. Therefore, the Act sits above all State and Territory environmental legislation.

There are further noteworthy implications of the Act specific to each State and Territory. For instance in Queensland there are two specific legal implications:

1. The *Great Barrier Reef Marine Parks Act* 1975 (Cth) (GBRMP Act) continues and will operate in conjunction with the Act. Accordingly, the usual approvals under the GBRMP Act will still be required for activities within or affecting the Great Barrier Reef Marine Park. In response to the potential duplication and overlap the Commonwealth Environment Minister has stated that, at least for aquaculture projects in the Great Barrier Reef region, a single administrative system will apply to applications for approvals and permits from 1 August 2001.[9]

2. The offence provisions for listed threatened species under the Act represents a major shift in legal liability with respect to the clearing of vegetation.

   Under ss 88(3) and 89(3) of the *Nature Conservation Act* 1992 (Qld) it is a defence to a charge of taking[10] protected fauna or flora when clearing land that the taking could not have been reasonably avoided. Killing a protected animal by destroying its habitat generally did not constitute an offence under that Act.[11]

[7] See for instance the recent decision in *Schneiders v Queensland* and *Jones v Queensland* [2001] FCA 553 (Dowsett J) (the Fraser Island Dingo case).

[8] (1983) 158 CLR 1 (the Tasmanian Dam Case).

[9] As at 4 August 2001, Draft Guidelines on the Application of the EPBC Act and the *Great Barrier Reef Marine Park (Aquaculture) Regulations* 2000 are available for public comment from Environment Australia.

[10] "Take" is defined widely in s 7 of the *Nature Conservation Act* 1992 (Qld) to include, in relation to an animal: hunt, shoot, wound, kill, skin, poison, net, snare, spear, trap, catch, … injure or harm the animal. In relation to a plant: gather, pluck, cut, pull up, destroy, dig up, fell, remove or injure the plant.

[11] See J McDonald and R Buckley, "The Taking Offence and Lawful Activity Defence Under the Nature Conservation Act 1992 (Qld): When is Habitat Disturbance a Taking?" (1993) 10 (3) EPLJ 198.

However, under the Act, a person's action in clearing land will automatically be unlawful and subject to criminal or civil liability if it is likely to have a significant impact on species listed as critically endangered, endangered, vulnerable or migratory under the Act, unless the action is performed under one of the approval mechanisms contained in the Act.

There is great potential for the Act to have a significant effect on actions within the States and Territories that affect the environment, particularly for listed threatened and migratory species. However, it seems unlikely that the Commonwealth will administer the Act in an expansive way. Certainly, this has been the experience during the first 12 months of the operation of the Act, despite the listing in April 2001 of 15 new threatened species, five threatened ecosystems and land clearing as a key threatening process.

While the Commonwealth has not flexed its muscles by prosecuting individuals for offences relating to actions having a "significant impact" on matters of national significance, it remains to be seen whether public interest groups will seek to enforce the Act.

The Involvement of Public Interest Groups

Although the Act limits merit review by the Administrative Appeals Tribunal (AAT) to challenging the Minister's advice on contravention of conservation orders,[12] there is significantly widened scope under the Act to seek judicial review in the Federal Court of decisions under the Act. This arises out of the standing now granted to conservationists and conservation groups.[13]

The Act also creates broader opportunities for public interest groups to enforce the law by seeking an injunction to prevent offences against the Act.[14] It creates criminal offences for knowingly, recklessly or negligently providing false or misleading information for an application or pursuant to an approval under the Act or to a servant of the Commonwealth acting under the Act.[15] The Act enables public interest groups to seek an injunction to remedy or restrain "an offence or other contravention" if false or misleading information is included in an application or environmental impact statement (EIS) during the application process.[16] As such, it is likely that public interest groups could obtain a mandatory injunction from the Federal Court requiring the applicant to correct any false or misleading

[12] Section 473.
[13] Sections 487-488.
[14] Sections 475-480.
[15] Sections 489-491.
[16] Section 475.

information. In this regard, the Act provides considerable potential for public interest groups to act as watch dogs over actions that are subject to the Act.

In addition, the usual common law obligation to give an undertaking as to damages when seeking an interlocutory injunction has been removed by the Act.[17] This allows meritorious claims to be heard by a court without the imposition of onerous financial obligations. These new allowances under the Act were tested in the first litigation involving the Act, *Booth v Bosworth*.[18] This case involved an application for an interim injunction to restrain the mass culling of flying foxes by a fruit farmer in North Queensland.[19] At common law, the applicant had no proprietary interest in the flying foxes and therefore no standing to seek an injunction to restrain the killing of them.[20] Spender J stated the following in dealing with the issue of standing:

> "I am satisfied that the applicant, Dr Carol Jeanette Booth, has standing to bring the principal proceedings and this application for interim injunctive relief. It is apparent from the material that the applicant is concerned about the well-being of the flying fox population in the Wet Tropics World Heritage Area (the Heritage Area), as well as the well-being of the environment in the Heritage Area. It appears, from the evidence before me, that Dr Booth is currently employed as the Gulf Regional Policy Officer for the Worldwide Fund for Nature Australia and, in addition, does voluntary work for the North Queensland Conservation Council and is secretary of the Magnetic Island Nature Care Association. Amongst other activities she has cared for young flying foxes that have been orphaned, with the caring being directed at their return to the wild. I am satisfied that the requirements of s 475(6) of the Act are fulfilled and that the applicant has standing."

Spender J accepted that not giving an undertaking as to damages was no longer a barrier to the grant of an interim injunction, although his Honour considered it a relevant consideration to be weighed against the public interest in the protection of the environment when determining the balance of convenience. This approach was followed in the second litigation under the Act, *Schneiders v Queensland* and *Jones v Queensland*.[21] That litigation involved two

[17] Section 478.

[18] (2000) FCA 1878 (Spender J) (the Flying Fox case).

[19] See C McGrath, "Casenote: Booth v Bosworth" (2001) 18 (1) EPLJ 23.

[20] *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493 but note *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70 (Davies J), *North Coast Environment Council v Minister for Resources* (1995) 127 ALR 617 (FCA) (Sackville J) and *North Queensland Conservation Council Inc v The Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (Chesterman J).

[21] [2001] FCA 553 (Dowsett J) (The Fraser Island Dingo case).

applications for interim injunctions to restrain a large cull of dingoes within the Fraser Island World Heritage Area by the Queensland Government. The cull was initiated in response to a fatal attack by two dingoes on a nine-year-old boy.

The result is that public interest groups now have much greater powers to restrain potential environmental offences under the Act. Such groups are now more likely and more able to challenge project approvals and compliance with conditions attached to such approvals.

When are Approvals not Required?

The Act provides that a number of specific activities require Commonwealth Approval.[22] The requirement for approval serves as a trigger for other processes such as environmental assessment of the actions.[23] One of the circumstances in which approval is able to be obtained is by the application of Pt 9 of the Act.

Otherwise Pt 4 of the Act authorises the taking of actions in certain circumstances without approval under Pt 9. Part 4 outlines four different circumstances in which approvals are not required. They are as follows:

(a) where the action is declared (by a bilateral agreement between the Commonwealth and the relevant State or self-governing Territory) not to require approval because it has been approved by the State or Territory;
(b) where the Environment Minister has declared that the action is one that does not require approval because it has been approved by the Commonwealth or a specified Commonwealth agency;
(c) where the action is a forestry operation and is carried out in accordance with a regional forest agreement or in particular regions where regional forest agreements are being negotiated;[24]
(d) where the actions are taken in the Great Barrier Reef Marine Park in accordance with one of the various plans or permits made or given under the *Great Barrier Reef Marine Park Act* 1975.[25]

In each of the above circumstances, the action may be carried out without approval from the Commonwealth. As a result, the trigger for the Commonwealth to require some assessment of the environmental impact of the action is removed.

[22] See ss 12, 16, 18, 20, 21, 23 and 25 of the Act.
[23] See Pt 8 of the Act.
[24] See also Regional Forest Agreements Bill 1998.
[25] But see recent guidelines and ministerial assessment which provide that from 1 August 2001 a single administrative system applies.

Turning specifically to bilateral agreements, these have the effect of removing the requirement for Commonwealth approval of actions and remove affected actions from the approval and assessment regime provided by the Act. Such actions are instead governed by whatever regime is provided for by the bilateral agreement. It is therefore appropriate to look to the terms at which the Commonwealth's powers are devolved to the States.

The Making of Bilateral Agreements

Section 45 of the Act is the principal section for the making of bilateral agreements. This section provides the Minister with the power to make bilateral agreements on behalf of the Commonwealth. The section defines a bilateral agreement as a written agreement between the Commonwealth and a State or self-governing Territory that:

"(a) provides for one or more of the following:
  - (i) protecting the environment;
  - (ii) promoting the conservation and ecologically sustainable use of natural resources;
  - (iii) ensuring an efficient, timely and effective process for environmental assessment and approval of actions;
  - (iv) minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa); and

(b) is expressed to be a bilateral agreement."

Section 46 of the Act provides that a bilateral agreement may declare that certain actions do not require approval under Pt 9 of the Act for the purposes of a specified provision of Pt 3 of the Act if the actions have been approved in accordance with a bilaterally accredited management plan.

A bilaterally accredited management plan is a management plan that is in force under the laws of the State or Territory that is party to the agreement and is identified in or under the agreement and has been accredited in writing by the Minister.

The Minister may accredit a management plan for the purposes of a bilateral agreement if satisfied that the management plan and the law of the State or Territory under which the management plan is in force, meets the criteria prescribed by the regulations, there has been or will be adequate assessment of the impacts of the actions approved in accordance with the management plan on each matter protected, and that actions approved in accordance with the

management plan will not have an unacceptable or unsustainable impact on a protected matter.

Section 48A of the Act requires (subject to certain limitations) that a bilateral agreement include an undertaking by the State to ensure that the environmental impacts of the action are assessed "to the greatest extent practicable". Subsection 48A(4) requires that bilateral agreements must include a provision "recognising" the power under the *Auditor-General Act* 1997[26] to audit the operations of the Commonwealth public sector as they relate to the bilateral agreement. Presumably, the extent to which the term "to the greatest extent practicable" is applied to the assessment of impact assessments is able to be audited by this provision.

Section 50 of the Act provides that the Minister may enter into a bilateral agreement only if satisfied that the agreement accords with the objects of the Act and meets the requirements (if any) prescribed by the regulations.

Sections 51-54 require, amongst other things that the Minister is satisfied that bilateral agreements and accredited management plans are "not inconsistent" with Australia's obligations under the relevant international agreements, these include for world heritage properties the World Heritage Convention; for Ramsar wetlands the Ramsar Convention; for listed threatened species and ecological communities the Biodiversity Convention, the Apia Convention and CITES; for migratory species the Bonn Convention, CAMBA and JAMBA.[27] In addition, in relation to listed threatened species, listed threatened ecological communities and migratory species, the Minister must be satisfied that the plan or agreement will promote the survival and/or enhance the conservation status of each species or community to which it relates.[28]

Other procedural requirements apply to the making of bilateral agreements. These include that notice be given as soon as practicable after the start of the development of a bilateral agreement[29] and that public notice be given of a draft agreement and submissions on that draft be considered.[30]

Whilst there are some significant matters that the Minister must be satisfied of prior to entering into a bilateral agreement or accrediting a management plan, these should be reviewed in light of Australia's

[26] See s 18 of the *Auditor-General Act* 1997.

[27] Convention on Conservation of Nature in the South Pacific signed in Apia Western Samoa (Apia Convention); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); Agreement with China for the Protection of Migratory Birds and their Environment (CAMBA) and the Agreement with Japan for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment (JAMBA).

[28] See ss 53(1)(b), 2(b), 54(1)(b), 2(b).

[29] See s 45(3).

[30] See s 49A.

international obligations under the agreements referred to. Such obligations are general in nature and therefore it is suggested that it would not be a difficult task to be satisfied that an agreement is "not inconsistent" with those obligations.

The Act appears to have been drafted so as to allow the approval and assessment power to devolve to the States and Territories. Although the Act imposes a significant number of requirements in relation to the process for the Commonwealth to divest itself of approval and assessment power, few requirements present obstacles to this outcome. Despite this, there is little in the legislation to require the Commonwealth to divest itself of this power. It is certainly possible, if the Minister so chose, to ensure that there was no devolution unless State processes and standards provided a strict, nationally uniform system for approval and assessment. However the Act does not mandate one or the other approach and undoubtedly allows both.

Constraints on State Approvals where Actions Covered by Bilateral Agreements

Where a bilateral agreement is in place it may require the State to act in accordance with a bilaterally accredited management plan and not to approve actions which are inconsistent with the plan.[31] Therefore, the extent to which the decisions of the States and Territories are constrained largely depends upon the terms of the bilateral agreement and the accredited management plan. In the absence of any policy directives to be applied it is not possible to say whether or not any particular action will be able to be approved under a bilateral agreement and an accredited management plan. The higher the level of generality at which bilaterals and accredited management plans are made, the more difficult it will be to determine what can be approved under them. Similarly, even if they are specific in terms of their subject matter, the drafting may be such that broad discretions are given to State authorities. Even where objective criteria are included (such as consistency with Australia's international obligations), because of the general nature of those obligations, compliance or non-compliance will only be able to be determined with any certainty in the courts.

The Commonwealth's Control Over State Approvals

If a decision is validly made under a bilateral agreement and an accredited management plan, the Commonwealth has limited power

[31] See s 46(10).

to recall that decision. The starting point is the Minister's power to suspend or cancel the bilateral agreement.

Section 58 of the Act requires the Commonwealth Environment Minister to consult with the appropriate Minister of the State or Territory in relation to an alleged failure to comply with the bilateral agreement or failure to give effect to the agreement so as to accord with the objects of the Act or Australia's international obligations. There is no detail as to the level of consultation required but it clearly requires more than merely giving notice to the State or Territory.

Section 59 then provides:

> "If, after the consultation,[32] the Environment Minister is not satisfied that the State or Territory:
> (a) has complied with, and will comply with, the agreement; and
> (b) has given effect, and will give effect, to the agreement in a way that:
>   (i) accords with the objects of this Act and the objects of this Part; and
>   (ii) promotes the discharge of Australia's obligations under all international agreements (if any) relevant to a matter covered by the agreement;
>
> he or she may give the appropriate Minister of the State or Territory a written notice [suspending or cancelling the agreement or part of the agreement]."

This is a broad power, not only because it refers to the objects and international agreements but most importantly because it relies upon the satisfaction of the Commonwealth Minister. Given the generality of the objects and the obligations under international agreements and the subjective approach to be applied by the Minister, it is not difficult to envisage a situation wherein the Minister would not be satisfied that obligations had been complied with. Compliance will no doubt depend upon whether bilateral agreements evolve in a limited or expanded sense. Nevertheless the Commonwealth clearly has significant power under this provision.

Whether s 59 operates effectively will depend on how the bilateral agreements for each of the States and Territories are settled. For example, it would be possible to require State and Territory governments to give notice to the Commonwealth of the terms and conditions of a proposed approval. If this was the case then the Commonwealth would have sufficient notice to enable it to revoke the bilateral agreement before a "bad" decision was made. However, given the absence of any legislative guidelines and the intention of

[32] Referred to in s 58.

the legislation to avoid "duplication" of approval powers it is unlikely that bilateral agreements will be settled in a manner that places the Commonwealth in such a position.

Notwithstanding the scope of the Commonwealth's power under s 59 of the Act, s 64 of the Act provides that once a decision has been made under a bilateral agreement it is protected from having to obtain Commonwealth approval.[33] Section 64 provides that where an action has been approved by a State or Territory under a bilateral agreement, the action may continue even where the agreement is suspended or cancelled. It further provides that if the bilateral agreement simply allows actions to be taken so long as they are taken in a specified manner (where approval is not necessary) the suspension or cancellation of the agreement does not affect them so long as the person was "already taking the action".

Attention should also be given to the operation of s 60, which provides that the Minister may suspend the effect of the agreement or specified provisions of the agreement. This power may be invoked if the Minister is satisfied that the State or Territory that is party to a bilateral agreement is not complying with it, or will not comply with it and, as a result of the non-compliance, a significant impact is occurring or is imminent on any matter to which the agreement relates.

Section 60 is flexible in that it relies on the Minister's subjective view rather than an objectively determined state of affairs. Although it applies in circumstances where the Minister is satisfied that the State or Territory "will not comply" with the agreement, it is difficult to predict how the section will operate in practice. If the significant impact has already occurred, then it must be presumed that a State approval has been granted and hence the activity is protected from the effect of suspension by the operation of s 64. If the action has not been approved, the Minister must be satisfied that the significant impact is "imminent". Reaching such satisfaction may be difficult when an approval has not yet been granted.

Clearly, if a State or Territory make decisions that breach a bilateral agreement, the agreement will not be effective in avoiding the requirement for Commonwealth approval and penalties will be able to be levied against those undertaking the activity without approval.

[33] Section 64 explains how this Act operates in relation to an action that a person was able to take without approval under Pt 9 for the purposes of a provision of Pt 3 because of Div 1 of Pt 4 and a provision of a bilateral agreement immediately before the cancellation or suspension of the operation of the provision of the agreement for the purposes of this Act or of any provision of this Act. If the action was able to be taken without approval under Pt 9 because its taking had already been approved in accordance with a management plan being a bilaterally accredited management plan for the purposes of the agreement, the Act continues to operate in relation to the action as if the suspension or cancellation had not occurred.

FORGING AHEAD: THE USE OF BILATERAL AGREEMENTS

The Tasmanian Bilateral Agreement

To date, the only assessment processes accredited by way of a bilateral agreement are the two Tasmanian assessment processes being:

(a) an EIS under the *State Policies and Projects Act* 1993 (SPP Act); and

(b) a Development Proposal and Environmental Management Plan (DP&EMP) under the *Environmental Management and Pollution Control Act* 1994 (EM&PC Act).[34]

The EM&PC Act provides that environmental impact assessment may be required in respect of an "environmentally relevant activity" which is defined as an activity which may cause environmental harm, and includes:

(a) Level 2 activities under the *Land Use Planning and Approvals Act* 1993 (LUPA Act) which include:
   - petroleum and chemical activities;
   - manufacturing and mineral processing;
   - waste treatment and disposal;
   - food production, and animal and plant product processing;
   - extractive industries;
   - materials handling; and
   - other activities including rural burning, racing venues, laundries and pre-mix bitumen plants.

(b) Level 3 activities under the LUPA Act (which are activities that have been declared to be of State significance under the SPP Act);

(c) Level 1 activities under the LUPA Act (which are activities that require a permit but do not fall within the definition of Level 2 or 3 activities); and

(d) an environmental nuisance (defined as the emission of a pollutant which unreasonably interferes with, or is likely to interfere with, the enjoyment of the environment).

All environmental impact assessments are governed primarily by the EM&PC Act except for an assessment of Level 3 activities which are primarily governed by the SPP Act.

[34] On 15 December 2000 the Commonwealth and Tasmania signed the first assessment bilateral – The Tasmanian Bilateral.

Level 2 activities must undergo assessment unless it is established that they will not have a material effect on the environment. There is discretion granted to the Director of Environmental Management and/or the board in relation to whether other activities will require assessment.

Level of Assessment in Tasmania

The EM&PC Act does not contain much guidance on the level of assessment required or the procedures that must be followed. Section 74(2) states:

> "The level of assessment which may be required is to be appropriate to the degree of significance of the proposed environmentally relevant activity to the environment and the likely public interest in the proposed activity."

Despite the lack of guidance, assistance can be found in the fact that it is usual for Level 2 activities to require a higher level of assessment than Level 1 activities.

A protocol has been developed in Tasmania to label the report prepared by the proponent in accordance with the EM&PC Act, a DP&EMP rather than an EIS. This appears to be an attempt to avoid the interpretations that go with describing a document as an EIS. It appears that a DP&EMP may be the equivalent of anything from an assessment on preliminary documentation to an EIS as described under the EPBC Act. However, the EM&PC Act does not provide the framework or the powers necessary for the equivalent of an inquiry under the EPBC Act.

The SPP Act and the *Resource Planning and Development Commission Act* 1997 (Tas) (RPDC Act) do however empower the Minister and the Resource Planning and Development Commission (RPD Commission) to order that an inquiry style assessment process is undertaken. The RPDC Act also sets out the procedure for hearings.

Accredited Processes to Date

As already mentioned two EIA processes have been accredited to date under the Tasmanian Bilateral.

The Tasmanian Bilateral imposes a number of requirements in addition to those specified under the Tasmanian legislation, including more stringent advertising and public comment requirements. In addition, it should be noted that the Tasmanian Bilateral states that

both of the accredited processes are the equivalent of preparing an EIS under the EPBC Act.

The EIA framework in Tasmania is not broken up into "levels of assessment" as with the Commonwealth regime. This brings into question whether or not a DP&EMP will adequately meet the standards that the public, environmental consultants, the judiciary, government and other interested parties expect of an EIS, particularly considering the precedents established under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth). Without doubt this question will only be answered after the Act has had time to mature and it may well be the case that the meeting of expected standards will come down to the way the legislation is administered. State or Territory departments may have an entirely different view of the level of assessment required to that of their Commonwealth counterparts, even where the legislative requirements are substantially similar. Depending on the circumstances, the State or Territory may demand a higher or lower standard of assessment.

Despite the ability for administrative discretion to have a marked impact on the adequacy of the assessment, it is obvious that the more safeguards that are built into the legislation, the less likely that inadequate assessments will be undertaken.

EIA principles in Tasmania

An EIA prepared under the EM&PC Act, must be performed in accordance with the EIA Principles stated in s 74 of the EM&PC Act. When an EIA is prepared under the SPP Act, it is also prepared in accordance with the principles outlined in the EM&PC Act.

The EIA Principles include very general directions that:

(a) the proponent should prepare the assessment in accordance with the requirements of the assessing authority;
(b) the proponent should be given guidance on certain matters;
(c) an opportunity must be given for public comment;
(d) information should be disclosed publicly; and
(e) the EIA must contain certain information.

Preparation of the assessment

The proponent is responsible for the preparation of the EIA of the proposed activity.[35] The preparation must be undertaken in accordance with the requirements of the authority responsible for assessing the proposed environmentally relevant activity.[36] With

[35] EM&PC Act, s 74.
[36] EM&PC Act, s 74.

respect to the integrated assessments required under the SPP Act for projects of State significance, the RPD Commission must undertake the required assessment in accordance with such directions as may be given by the Minister of the Environment and approved by parliament.[37]

Guidance to proponent, public comment and information, and contents of the EIA

Specific directions are provided on a case-by-case basis with respect to the matters required to be addressed in the EIA by the assessing authority and the Director of Public Health.

The authority responsible for assessing the proposed environmentally relevant activity must provide the proponent of the proposed activity with guidance on:

(a) the potential environmental impacts arising from the activity;
(b) the issues arising from the activity which might give rise to public concern;
(c) the level of assessment required; and
(d) the timing for each stage of the assessment.[38]

The Director of Public Health may require an EIA to include an assessment of the impact of the proposed activity on public health.[39] In addition, there is a requirement that the public be provided with the opportunity to comment before assessment of an environmentally relevant activity is complete.[40]

Projects of State significance that are to undergo integrated assessment must be placed on public exhibition for not less than 28 days.[41]

The authority responsible for assessing a proposed environmentally relevant activity must publicly disclose all information relating to the environmental impact of the proposal. Exceptions exist where there is a legitimate commercial, national security or environmental reason for confidentiality.[42]

The EIA must also be referred to any relevant municipal councils and to all government agencies that in the opinion of the RPD Commission have an interest in the project.[43]

[37] SPP Act, s 20.
[38] EM&PC Act, s 74(4).
[39] EM&PC Act, s 74(5).
[40] EM&PC Act, s 74(6).
[41] SPP Act, ss 22, 23.
[42] EM&PC Act, s 74(7).
[43] SPP Act, s 21(1).

Who makes the decision?

Under the EM&PC Act, the board has control of the process. The board writes the assessment report on the basis of the proponent's report, and makes a recommendation to the planning authority that must be followed. Where no planning authority is involved, a proponent cannot proceed until it has received an approval (an Environmental Protection Notice) from the board.

Under the SPP Act, the RPD Commission has control of the process. It prepares the assessment report and gives it to the Minister for a decision. Although not mandatory, it would be usual for the RPD Commission to require the proponent to produce a report upon which its assessment report will be based.

Conclusions from the Tasmanian Bilateral

If the Tasmanian approach is indicative of what may be expected from the bilateral agreements being negotiated by the other States and Territories, then it appears that the style of the accredited process and the stipulation on the content of EISs will be substantially similar to the Commonwealth's requirements under the Act. Despite this, there is one area where the Tasmanian approach is likely to differ from the other States and Territories. In Tasmania, the accreditation of only one level of assessment limits the opportunity for Tasmania to provide total project assessment. The single level of accreditation means that if Tasmania decides not to use an accredited process, the matter will be out of its hands. Such an approach is unlikely to be acceptable to the States currently negotiating bilateral agreements with the Commonwealth.

ENVIRONMENTAL ASSESSMENT

When Does the Act Apply?

Whether a project or activity requires approval under the Act will depend on the following factors:

- the State or Territory in which the proposed development is located;
- the existence of a bilateral agreement between the Commonwealth and the State or Territory in which the proposed project or activity is located or a declaration by the Minister, that an approval is not required;

- whether the proposed action will significantly impact on a matter of "national environmental significance";
- whether the action is on Commonwealth land; and
- whether the action is proposed by the Commonwealth or its agencies.

Where there is no bilateral agreement in place between the Commonwealth and a State or Territory the only trigger for assessment of a project or activity under the Act is if the proposed development will have a significant impact on a matter of national environmental significance or if a nuclear activity or project is proposed.[44]

In such circumstances the proponents must, pursuant to s 68, refer the proposal[45] to the Minister to decide:

(a) whether the Minister's approval is required to take the action;
(b) how an assessment of the impacts of the action should be made so that the Minister is able to make an informed decision whether or not to approve the action; and
(c) what conditions should be attached to the approval.

Alternatively, the State[46] or a Commonwealth agency[47] may refer a proposed action to the Minister on behalf of the proponent, or the Minister may request that the proposal for the action be referred to him or her if he or she thinks that the action may be a "controlled action".[48]

A "controlled action" is an action that will or is likely to have a significant impact on a matter of "national environmental significance".[49]

Where the referral of the action is made by a State or a Commonwealth agency, s 73 of the Act requires that the informing person provide the Minister within 10 days of the request, with the relevant information about whether the action is a controlled action.

Once a proposal has been submitted to the Minister, the Minister must make the proposal available for public consultation on the Internet inviting comments within 10 business days from:

- Commonwealth Ministers to provide information who have administrative responsibilities relating to the proposal;[50] and

[44] Currently there are no actions prescribed by the Regulations.
[45] The form for the referral is set out in the Regulations.
[46] Section 69.
[47] Section 71.
[48] Section 70.
[49] See s 67.
[50] Section 74(1).

- appropriate State or Territory Ministers if the action has an impact on any matters protected by Div 1, Pt 3 of the Act.

Therefore, in the course of deciding whether an action requires approval the Minister must:

(a) determine whether any referred proposed action is a "controlled action" and which provisions of Pt 3 (if any) are controlling provisions for the actions;[51]
(b) consider public comment in making a decision about the actions;[52]
(c) consider all adverse impacts (if any) the action has, will or is likely to have on the matters protected by Pt 3.[53] However, the Minister must not consider any beneficial impacts the action has, will or is likely to have on the matter protected by each provision of Pt 3;[54]
(d) if the Minister decides that the action is a "controlled action", the Minister must then designate a person as proponent for the action;[55]
(e) within 10 business days of deciding whether a referred proposed action is a controlled action or not, give written notice of the decision and publish notice of the decision in accordance with the Regulations;[56] and
(f) give reasons for the decision to a person who has been given the notice and within 28 days of being given the notice, has requested the Minister to provide reasons.[57]

The Minister may make an assessment of the impacts on the six matters of "national environmental significance" only on receipt of all information about the proposed controlled action. The Commonwealth may also assess other impacts if requested to do so by a State in which the proposed action is to be carried out.

Matters of national environmental significance

Matters of "national environmental significance" that will trigger an assessment are listed in Pt 2 of the Act.

To date these matters are:

(a) actions significantly affecting or likely to significantly affect:
    (i) the world heritage values of a "declared World Heritage property";[58]

[51] Section 75(j).
[52] Section 75(1A).
[53] Section 75(2)(a).
[54] Section 75(2)(b).
[55] Section 57(3).
[56] Section 75(5).
[57] Section 77.
[58] Section 12.

(ii) the ecological character of a "declared Ramsar wetland";[59]
(iii) a "listed threatened species" or "listed threatened ecological community";[60]
(iv) a "listed migratory species";[61]
(v) the environment in a "Commonwealth marine area";[62]

(b) the taking of a "nuclear action";[63]
(c) the taking of actions prescribed by the Regulations.[64]

If the proposed development does affect a matter of "national environmental significance", assessment and approval is required before the activity can be carried out unless:

- the project or activity is an action described in s 160(2) which describes actions whose authorisation is subject to a special environmental assessment process; or
- Part 4 of the Act which permits the proponent to undertake the action without approval under Pt 9 of the Act.

What is a "Significant Impact"

Although Administrative Guidelines for "significant impacts" have been provided by the Commonwealth Government it is suggested that reliance on these may leave an assessment open to criticism.

Judicial interpretation of the term "significant impact" in the EPBC Act is likely to be similar to the dicta of Hemmings J in *Jarasius v Forestry Commission (NSW)*,[65] an anti-logging case heard in the New South Wales Land and Environment Court. In relation to the interpretation of "likely to significantly affect the environment" within s 112 of the *Environmental Planning and Assessment Act* 1979 (NSW), Hemmings J stated.[66]

> "The respondent submits that because 'significantly' is not defined in the EP&A Act, the meaning in the Macquarie Dictionary should be applied, that is, 'important', and that word means 'more than ordinary'. Without deciding it, I am prepared in this case to assume that that is the appropriate test."

[59] Section 16.
[60] Section 18.
[61] Section 20.
[62] Section 23, note Commonwealth Marine Areas are generally outside of three miles from the coast.
[63] Section 21.
[64] Section 25.
[65] (1988) 71 LGRA 79.
[66] At 93-4. The test was followed by Hemmings J in *Bailey v Forestry Commission of New South Wales* (1989) 67 LGRA 200 (LEC (NSW)) at 211-212 and by Bignold J in *Rundle v Tweed Shire Council & Anor* (1989) 68 LGRA 308 (LEC (NSW)) at 331. Hemmings J's reasoning in *Jarasius* (at 94) also provides a useful and clear example of a factual situation of a "significant effect" in the context of logging.

In *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales*,[67] another case heard in the NSW Land and Environment Court that involved a claim that new traffic signs represented a significant effect to the environment, Stein J stated:[68]

> "I am prepared to suggest that a significant effect must be an important or notable effect on the environment, as compared with an effect which is something less than that, that is, non-significant or non-notable. But I must stress that the assessment of the significance must depend upon an assessment of the facts constituting the environment and the activity and *its likely effect on that environment."*

The reasoning of Stein J in the *Drummoyne* case was adopted in the leading case concerning the definition of "significant", *Tasmanian Conservation Trust Inc v Minister for Resources & Gunns Ltd*[69] which is particularly relevant to the EPBC Act because it was a Federal Court decision.[70]

That case involved judicial review of a decision granting a woodchip export licence. In finding that the Commonwealth Minister had failed to consider whether the proposed action "affected or was likely to affect the environment to a significant extent" and nullifying the purported decision, Sackville J held that:[71]

> "In considering whether the proposed action would have a significant effect on the environment, it is appropriate, in my view, in the words of Cripps J in *Kivi v Forestry Commission of New South Wales* to:[72]
>
> > '… look to the whole undertaking of which the relevant activity forms a part to understand the cumulative and continuing effect of the activity on the environment.'
>
> However, this does not mean that the significance of a particular activity can only be assessed by reference to its impact upon the whole area in which some aspect of the activity is to take place … site specific impacts can be significant, depending on the circumstances. …
>
> Despite the deficiencies of the evidence, I think it sufficiently established that Gunns' proposed action … would have had a significant effect on the environment. If the word 'significant'

[67] (1989) 67 LGRA 155.
[68] At 163.
[69] (1995) 127 ALR 580; 85 LGERA 296; 37 ALD 73; 55 FCR 516 (Gunns No 1).
[70] Followed (on the point of "significant") in *Re Truswell and Minister for Communication and the Arts* (1996) 42 ALD 275 (AAT decision) which (at 294-5) analyses cases which have considered the term "significant" including *McVeigh & Anor v Willarra Pty Ltd & Ors* (1984) 54 ALR 65 at 108 (McGregor J); 57 ALR 344 at 352 (Full Ct Fed Ct per Toohey, Wilcox and Spender JJ) which held (as obiter in the Full Ct) that the ordinary meaning of "significant" was "important; notable; of consequence".
[71] (1995) 127 ALR 580 at 603.
[72] (1982) 47 LGRA 38 at 47.

> needs elaboration in this context, I use it in the sense of 'an important or notable effect on the environment': *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales*.[73] In my view this is so whether one considers the proposed action as an entire undertaking or in terms of its effects on particular sites."

While both Stein J and Sackville J used a definition of "important or notable", it has been suggested by McGrath, that the better interpretation of this term in the context of the EPBC Act is "important or of consequence having regard to the context and intensity of the impact".[74]

McGrath bases this view on his analysis of Stein J's judgment which indicates that it was based on a definition of "significant" drawn from case law in the early 1980s and the Oxford Dictionary. Since that time the *Macquarie Dictionary* had become established as the official Australian dictionary. McGrath argues that as definitions and meanings can change over time the *Macquarie Dictionary* definition should be adopted for the EPBC Act rather than a slavish application to case law.

Defining the words used with precision is important to understanding the extent and applicability of the Act. Two further cases assist the understanding of the meaning of "significant impact". First in *Environment Protection Authority v Mobil Oil Australia Ltd and Anor*[75] Talbot J found that a spill of 5000 litres of aviation fuel caused "a significant impact on the ground water and the soil, giving rise to heightened levels well beyond accepted guidelines".

Secondly in *Byron Shire Businesses for the Future Inc v Byron Council,*[76] a case involving an application to construct a tourist resort at Byron Bay, Pearlman J (as she then was) held that:

> "In my opinion, a fair reading of the material which the council had before it leads to the following conclusions: 33 species of endangered fauna were predicted to occur within or in the vicinity of the site. This in itself was not enough to draw a conclusion as to the likelihood of significant effect on their environment, because it was prediction only. But it was sufficient to alert the council to the necessity to gather further information about those 33 species and their environment so as to be able to make an informed decision as to the likelihood of significant effect. In respect of the comb-crested jacana, the only

[73] (1989) 67 LGRA 155 (LEC (NSW), Stein J) at 163.

[74] See C McGrath, "An introduction to the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth)" (2000) 6 (28) QEPR 103.

[75] [2000] NSWLEC 43.

[76] [1994] NSWLEC 159.

> reasonable conclusion was that its environment was likely to be significantly affected. As to other species of endangered fauna, the council was required to make a determination one way or the other as to significant effect on environment. Because the material before it in relation to these species pointed to the likelihood of significant effect, but was insufficient, it was not reasonably open to the council to conclude that there was no likelihood of significant effect on their environment. … In that context, the council's determination of the threshold question in a manner not reasonably open to it invalidates the very foundation of the development consent process."

This case is also an example of the information requirements that arise and the dangers in not addressing them properly.

A more recent decision heard in May of this year was the Fraser Island Dingo case. In response to the seeking of an injunction to stop a cull of dingoes on Fraser Island, the Federal Court was required to consider whether the cull may have or was likely to have a significant impact on the World Heritage values of Fraser Island. The court said that this question invited a consideration of what those values might be. It acknowledged that dingoes probably fall within the reference to "species of flora and fauna which have adapted to the comparatively nutrient poor, acidic, sands of the island". This description was an example of World Heritage values for which the property was inscribed on the World Heritage list in 1992.

The court confirmed that the question was not whether there is likely to be a significant impact on the dingo population itself but whether there will be a significant impact on the World Heritage values of Fraser Island.

Evidence was led that indicated that it was possible the proposed cull could have an impact on the dingo population. However, that concern did not compel the conclusion that the impact on the dingo population would constitute a significant impact on the World Heritage values of the island.

The court concluded that the evidence was that the cull would continue for a finite time and a limited number of dingos would be killed, and that this did not constitute a significant impact.[77]

Case law will continue to develop the definition of what is "significant impact" under the Act.[78] Until a useful level of case law has developed the interpretation of "significant impact" under other

[77] Notes distributed by the World Wildlife Fund attributed to Rob Stevenson, Solicitor, Environmental Defenders Office (Qld) Inc.

[78] Note that litigation under the Act was also heard by the Federal Court in July 2001in *Booth v Bosworth & Anor* (FCA No Q163 of 2000). (the Flying Fox case). An interpretation of key terms under the Act (such a "significant impact") is likely to result.

legislation will be called upon. Despite this, it is clear that the law requires that each case be assessed on its own facts.

Environmental Assessment and Approval

Environmental impact assessment is a means of establishing an information base for decision-making on:

(a) the environmental impacts of a proposed environmentally relevant activity;
(b) whether a proposed activity should proceed;
(c) any restrictions or conditions under which a proposed activity should proceed; and
(d) the management regime under which a proposed activity should proceed.

The purpose of an EIS is to identify the significant impacts of an activity before undertaking the activity enabling the implementation of appropriate measures to mitigate those impacts to an acceptable level (if this is possible). Because of the inherent uncertainty of environmental impacts, the EIS has been introduced through legislation as a means of ensuring that detailed consideration is given to identifying in advance likely impacts and to assessing methods of mitigating these.

The term "Environmental Impact Statement" evolved from the language of s 102(2)(C) of the *National Environmental Policy Act* 1969 (USA) (NEPA).[79] Two years later, in January 1972, the New South Wales Government adopted the environmental impact process by declaring an environmental impact policy.[80]

The degree of significance of an impact is not merely a correlation with the extent of the likely impact. Significance also depends on the intensity and quality or nature of the impact. With this in mind the Act provides that "controlled actions" require assessment and approval under one of the procedures in Ch 4 of the Act.

[79] For a summary of the genus of the NEPA see J Yannacone, "National Environmental Policy Act of 1969" (1970) 1 *Environmental Law* 8; M F Baldwin, "Environmental Impact Statements new legal technique for environmental protection" (1975) 1 *Earth Law Journal* 15; S A Dreyfus and H M Ingram, "the *National Environmental Policy Act*: A view of intent and practice" (1976) 16 *Natural Resources Journal* 243; K M Murchison, "Does any PA matter? An analysis of the historical development and contemporary significance of the *National Environmental Policy Act*" (1984) 18 *University of Richmond Law Review* 557.

[80] R J Fowler, *Environmental Impact Assessment, Planning and Pollution Measures in Australia,* (AJPS, Canberra 1982), p 9, n 27, quotes the then Premier of New South Wales, Sir Robert Askin as declaring: "it is also government policy that, before any action which could significantly affect the quality of the environment is undertaken, its implications shall be expressly identified and evaluated." See State Pollution Control Commission Handbook on *Environmental Control in New South Wales* (EC-2) (1975), pp 54-56 and NSW Planning and Environment Commission, Environmental Standard E1-4 (Principles and procedures for Environmental Impact Assessment in NSW), first issued 1 October 1974, amended June 1980.

Initially, s 68 of the Act creates an obligation on a person proposing to take an action "that the person thinks may be or is a controlled action" to refer the action to the Commonwealth Minister. A State, self-governing Territory or agency of a State or self-governing Territory may refer the action if it has administrative responsibilities relating to the action. Alternatively, the Commonwealth Environment Minister may "request" a person or State or Territory to refer an action if the Minister believes the action is a "controlled action".[81] The form and content of the referral are set out in regulations and the Minister will decide whether the action is a "controlled action".[82]

If a decision is made that the proposal is a "controlled action" the Minister must then decide how the proposal is to be assessed.[83] This will be by one of the following:

- an accredited State or Territory assessment process;[84]
- an assessment on preliminary documentation;[85]
- a public environment report;[86]
- an environmental impact statement[87] with public consultation; or
- a public inquiry with powers to call hearings, obtain search warrants and punish for contempt.[88]

Exceptions to the need for the Commonwealth Minister's assessment include situations where:

- an assessment or approval bilateral agreement exists for the action;[89]
- a ministerial declaration with an Accredited Management Plan exists for the action;[90]
- a ministerial declaration over a class of actions includes the action proposed;[91]
- the Minister has given an exemption in the "national interest" (for example, a defence, security or national emergency matter);[92] or

[81] See s 70.
[82] See ss 74-79.
[83] See s 87.
[84] See s 87(4).
[85] See ss 92-95.
[86] See ss 96-100.
[87] See ss 101-105.
[88] See ss 106-129.
[89] See ss 44-65A and 83.
[90] See ss 32-36.
[91] See s 84.
[92] See s 138.

- the action is authorised under a Regional Forest Agreement[93] or the *Great Barrier Reef Marine Park Act* 1975 (Cth).[94]

Prior to approving an action the Commonwealth Environment Minister must receive a notice from the relevant State or Territory Government that "the certain and likely impacts of the action" on things other than matters of national environmental significance have been assessed "to the greatest extent practicable and explaining how they have been assessed". This requirement effectively fuses the Commonwealth assessment and approval process to the State or Territory processes. Therefore, once the assessment process decided by the Minister is complete and any necessary s 130(1B) notice has been obtained, the report of the assessment is used to grant or refuse the application[95] and impose conditions.[96] It is an offence to contravene any condition attached to an approval.[97]

The Assessment Approach by Way of Bilateral Agreements

In using the Tasmanian Bilateral Agreement as an example, when an activity is referred to the Commonwealth, the Tasmanian Bilateral Agreement provides that the Commonwealth will provide the Tasmanian Environment Minister with a notice that the activity is a "controlled activity".

Within 10 days of receiving this notice, the Tasmanian Environment Minister must advise the Commonwealth whether the action will be assessed in accordance with an accredited process under the Bilateral Agreement. As only one level of assessment has been accredited in Tasmania, this effectively means that the Tasmanian Minister must decide whether the equivalent of an EIS will be undertaken at the State level. No assistance is provided as to how the Tasmanian Minister will make this decision as the Tasmanian Bilateral is silent on how to decide whether an EIS equivalent is appropriate.

Presumably the requirement to base the decision about the level of assessment required on the equivalent of Commonwealth criteria has not been included in the Tasmanian Bilateral because there is only one level of assessment accredited, namely the equivalent of an EIS. If the Tasmanian Environment Minister decides that the equivalent of an EIS is not appropriate then the decision as to the level of assessment will fall back onto the Commonwealth.

[93] See ss 38-42.
[94] See s 43.
[95] See s 133.
[96] See s 134.
[97] See ss 142-142A.

Some of the draft Assessment Bilaterals propose accreditation of more than one level of assessment. These Bilaterals require the State or Territory to decide the level of assessment required based on the equivalent of criteria applicable under the Act, namely guidelines issued under s 87(6) of the Act.

The absence of a multilevel assessment approach in the Tasmanian Bilateral does not remove the fact that, if Tasmania determines that the activity will be assessed in accordance with the Bilateral, it is still making the decision about the level of assessment required.

As there is no guidance as to how the level of assessment is decided, it is presumed that Tasmanian procedure will be followed. That is, the Environmental Management & Pollution Control Board (Board) or the RPD Commission will make the decision based on the criteria in s 74(2) of the EM&PC Act.[98]

Remembering that the Tasmanian Environment Minister must make a decision about the level of assessment within 10 days of receiving notice that the activity is a "controlled activity", the question arises as to whether or not 10 days is sufficient time to make such a decision for all but very simple proposals.

An additional issue arising out of the fact that only one level of assessment has been accredited in Tasmania is that the Board or RPD Commission may determine that an EIS equivalent is the best standard to apply to the project on the sole basis that it will avoid duplication. This may enhance the standard of assessment for projects under the EM&PC Act, but may reduce the standard of assessment for projects assessed under the SPP Act.

A further concern is that although only one option for assessment is provided for under the Tasmanian bilateral, the Tasmanian Environment Minister still decides the level of assessment required. There is no requirement that this decision be based upon the equivalent of the Commonwealth criteria.

The Draft Assessment Bilaterals and the Accreditation of Future Processes

The draft Assessment Bilaterals were largely prepared in a standard form, with variations between the States contained in the Schedules. The Schedules outlined the State processes that the Commonwealth proposes to accredit as well as any additional requirements that would need to be fulfilled in order to obtain accreditation.

[98] The level of assessment which may be required is to be appropriate to the degree of significance of the proposed environmentally relevant activity to the environment and the likely public interest in the proposed activity.

The Commonwealth has accredited or proposes to accredit the following State assessment processes.

State and Territory Environmental Assessment Processes to be Accredited by Bilateral Agreements

State or Territory	Environmental Impact Assessment
Qld	Assessment under the *State Development and Public Works Organisation Act* 1971; *Integrated Planning Act* 1997
NSW	EIS or a Statement of Environmental Effects under the *Environmental Planning and Assessment Act* 1979
ACT	EIS under the *Land (Planning and Environment) Act* 1991
Vic	Environmental Effects Statement under the *Environmental Effects Act* 1978
Tas	Assessment under the *State Policies and Projects Act* 1993 (Tas) or an assessment under the *Environmental Management and Pollution Control Act* 1994
SA	an EIS under the *Development Act* 1993
WA	Environmental Review and Management Program under the *Environmental Protection Act* 1986
NT	an EIS under the *Environmental Assessment Act*

When announcing the draft Assessment Bilaterals, the Commonwealth indicated a desire to sign them as soon as possible. Accordingly it issued draft Assessment Bilaterals on the basis of uncontentious assessment processes, and indicated that further schedules could be added in respect of the more contentious assessments in the future.[99]

The draft Assessment Bilaterals propose that actions will not require Commonwealth assessment if:

(a) the Commonwealth Minister provides the State Minister with written notice that the action is a controlled action;

(b) within 10 days of receiving notice, the State gives the Commonwealth written notice that the action will be assessed in accordance with the adopted bilateral agreement;

(c) where there is a choice between assessment processes, the level of assessment is determined by the State on the basis of criteria equivalent to the criteria set out by the Commonwealth;[100]

(d) the State undertakes to ensure that all impacts of the action which are not matters of national environmental significance are assessed to the greatest extent practicable; and

[99] For example, the Queensland-Commonwealth draft Assessment Bilateral accredits some processes under the *State Development and Public Works Organisation Act* 1971 however negotiations are underway about assessment processes under the *Mineral Resources Act* 1989 and the *Integrated Resort Development Act* 1987.

[100] See guidelines issued under s 87(6) of the Act.

(e) the relevant State assessment process and additional requirements set out in the Schedule to the bilateral agreement are completed.

The requirements contained in the Schedule to the bilateral agreement will relate to issues such as:

(a) requiring public comment to be sought nationally; and
(b) to describe, among other things, the issues relating to the matters of national environmental significance in the assessment report which is to be submitted to the Commonwealth.

Under the previous regime, the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) (EPIP Act) required two types of EIA: a public environment report for activities with a lesser impact and full EIS for activities with a greater impact. The rationale was explained by the then Minister for Arts, Heritage and the Environment, the Hon B Cohen, in the Second Reading Speech of the *Environment Protection (Impact of Proposals) Amendment Act* 1987:

> "The Act will continue to provide for the preparation, public review and submission to the Commonwealth Environment Minister of EIS for proposals of major environmental significance. Amendments will provide, however, for the preparation of Public Environment Reports for proposals with less complex or less important environmental implications. Experience has shown that many proposals of a localised nature or involving only one or two issues may not warrant the preparation of an EIS, which is normally a comprehensive document requiring considerable time and resources to prepare in draft and then final form. However, under current procedures, there is no provision for obtaining comment on the environmental aspects of proposals except through the procedures associated with an EIS. PER will be a simpler and less costly document but will still provide a sound basis for public comment and government consideration."[101]

It remains to be seen whether bilateral agreements will extend the multi level of assessment currently provided for under the Act to the States and Territories. If the process accredited in Tasmania is followed in the other States and Territories, then this would not appear to be the case.

Environmental Impact Statements and the Act

The Act begs the question, what is an EIS, and what distinguishes it from other levels of assessment? Despite there being no assistance

[101] See B Dunne, "Recent legislative reform" (1987) *Impact* (May) at 9. See also comments by RJ Fowler on the Bill and Act in (1985) 2 EPLJ 80 at 84-87 and (1986) 3 EPLJ 257-258.

under the Act as to what the terms "preliminary documentation", "EIS" and "public inquiry" define, when we look at the procedures set out in the Act, we can see that there is a clear distinction between an assessment based on each of these terms. Despite this, when comparing the previous regime with the present, the Act does not contain any material distinctions between a Public Environment Report (PER) and an EIS even though it is commonly understood that an EIS is a higher level of assessment than a PER.

The concept of a PER was introduced into the EPIP Act in 1984 as an intermediate level of assessment between a Notice of Intention and an EIS. Accordingly, it is reasonable to assume that a EIS must be more comprehensive than a PER, even though the content requirements of an EIS and a PER are the same under the Act.

Additionally, it appears that the processes followed in undertaking a PER or EIS are substantially the same. The only legislative difference between the process for a PER and the process for an EIS is that the various steps must be done within 20 days for a PER and 30 days for an EIS.

Accordingly, it is possible that proponents will prepare documents which comply with the procedural legislative requirements, yet may be "inadequate" in the sense that they are not comprehensive enough to constitute an EIS, despite the fact that they may satisfy the commonly accepted "lesser" standard required of a PER.

It appears that the only legislative basis for an EIS to be more comprehensive than a PER is the requirement that the report must be adequate for the purpose of making an informed decision whether to approve the taking of the controlled action. If an EIS has been required, it is assumed that the adequacy of the report will be judged more stringently than if a PER had been required due to the more serious nature of the environmental impacts that led the Minister to require an EIS in the first place.

Accordingly, it would seem likely that the level of adequacy required of an EIS will depend upon the culture that develops in the assessing body, rather than on the legislative requirements for what an EIS must contain and what processes must be undertaken to produce it.

The EIS and the Act's Regulations

The Act's Regulations prescribe what an EIS is to address, namely, a detailed description of the action which is to include:[102]

[102] See reg 5.04, Sched 4.

(a) the components of the action and the location and design of the works to be undertaken;
(b) an analysis of the relevant impacts of the action, including likely short and long term impacts;
(c) proposed safeguards and mitigation measures to deal with relevant impacts of the action including an outline of an environmental management plan;
(d) to the extent reasonably practicable, any feasible alternatives to the action, including if relevant, the alternative of taking no action;
(e) identification of affected parties, including a statement mentioning any communities that may be affected and describing their views;
(f) if the person proposing to take the action is a corporation, details of the corporation's environmental policy and planning framework; and
(g) the reliability of the information relied upon.

These requirements are substantially the same as the requirements for EIS under most Australian States and Territory environmental assessment acts. Consequently the requirements have already been examined by various courts.

In *Warren v Electricity Commission of NSW*[103] the New South Wales Land and Environment Court held that an EIS was just another aspect of the developer's decision-making process, requiring the developer to take a "hard look" at environmental factors.

In *Prineas v Forestry Commission of New South Wales*,[104] the New South Wales Land and Environment Court said:

> "an obvious purpose of the environmental impact statement is to bring matters to the attention of members of the public, the Department of Environment and Planning and to the determining authority in order that the environmental consequences of the proposed activity can be properly understood. In order to secure these objects, the Environmental Impact Statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. It should be written in understandable language and should contain material that would alert lay persons and specialists to problems inherent in the carrying out of the activity …
>
> But, in my opinion, provided an Environmental Impact Statement is comprehensive in its treatment of the subject

[103] [1990] NSWLEC 131.
[104] (1983) 49 LGRA 402.

> matter, objective in its approach and meets the requirement that it alerts the decision maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the Environmental Impact Statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations."

CONCLUSION

It is clear that the Act is an immensely important development in Australian environmental law, which has and will continue to fundamentally and radically change the Australian environmental legal system. The developing regime of assessment processes for controlled actions represent a new phase in Commonwealth involvement in environmental law. The bilateral agreement process also represents a significant step towards ensuring streamlined assessments and the avoidance of duplication. To date it is evident that the style of accredited processes and the stipulations on the content of the accredited EISs are substantively similar to the Commonwealth requirements. It is however disturbing to note that the only bilateral agreement adopted to date accredits only one level of assessment. Concern must therefore be held for projects that do not require the level of assessment required of an EIS. Despite this, the first step in integrating Commonwealth and State approval processes has commenced and in light of the positive objects of the Act, it is expected that this will only enhance existing approval processes.[105]

[105] The author would like to acknowledge the assistance gained from the papers of Chris McGrath including "An introduction to the *Environment Protection & Biodiversity Conservation Act* 1999 (Cth)" op cit n 74; "Bilateral Agreements – Are they Enforceable" (2000) 17 (6) EPLJ 485, as well as various other case notes and papers published by C McGrath. These publications led the author to a number of the conclusions expressed in this paper. Acknowledgment is also due to Sophie Chapple of the World Wildlife Fund who diligently summarises and publishes the referrals appearing on Environment Australia's website and whose work has made the compilation of this paper much easier than it would otherwise have been.

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