

# **The Environment Protection and Biodiversity Conservation Bill 1998 (Cth)**

## **A new national environmental regulatory scheme**

### **Background**

The Environment Protection and Biodiversity Conservation Bill 1998 (the "EPBC") represents a major change to the manner in which environmental matters are dealt with at the Commonwealth level. The EPBC was passed by the House of Representatives on 29 June 1999, after over 400 amendments had been passed by the Senate (as requested by the Democrats).

In the context of mixed reactions from political parties, conservation and industry groups, the EPBC, when it commences, will result in landmark environmental legislation being introduced for Australia by overhauling existing Commonwealth environmental legislation, creating a new national environmental regulatory scheme.

### **What current environmental legislation will the EPBC replace?**

The EPBC will replace the *Environmental Protection (Impact of Protection) Act 1974*, *National Parks and Wildlife Conservation Act 1975*, *Whale Protection Act 1980*, *World Heritage (Properties Conservation) Act 1983*, and the *Endangered Species Protection Act 1992*.

The EPBC has not yet received royal assent. Commencement of the EPBC has been delayed to allow important ancillary documents to be drafted and negotiated, such as regulations and bilateral agreements.

It is expected that the EPBC will be proclaimed to commence in approximately 12 months.

### **What are the main objects of the EPBC?**

The EPBC covers a wide range of environmental issues. In summary, the objects of the EPBC include the protection of matters of "national environmental significance", the promotion of ecologically sustainable development, the conservation of biodiversity, assisting in the implementation of Australia's international environmental responsibilities, and recognising the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity.

"The key areas covered by the EPBC include the environmental assessment and approvals regime, biodiversity conservation, injunctions and environmental offences and liability (including derivative offences for executive officers of corporations)"

The EPBC seeks to achieve these objects by providing for a cooperative approach between the Commonwealth and State governments. The EPBC provides for intergovernmental accreditation of environmental assessment and approval processes and promotes an intergovernmental cooperation and partnership approach to environmental protection and biodiversity conservation. To these ends, the EPBC contains provisions dealing with bilateral agreements with States and Territories, conservation agreements with landholders, the recognition and promotion of indigenous peoples' role in and knowledge of the conservation and ecologically sustainable use of biodiversity, and the involvement of the community in management planning.

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## **What are the main provisions of the EPBC?**

The key areas covered by the EPBC include the environmental assessment and approvals regime, biodiversity conservation, injunctions and environmental offences and liability (including derivative offences for executive officers of corporations). This article provides a snapshot of these provisions — it does not cover all the features of the EPBC.

## **Environmental approvals**

One of the main changes implemented by the EPBC is a shift of some of the Commonwealth's responsibility for environmental impact assessment to the States and Territories by:

- introducing the "national significance test"; and
- providing for accreditation of assessments conducted by the States and Territories.

The EPBC lists 6 areas of "national environmental significance". Activities in relation to those areas will trigger the exercise of Commonwealth powers. These include activities with a significant impact on declared World Heritage Properties, declared Ramsar Wetlands, listed endangered or vulnerable species and communities, listed migratory species, activities relating to nuclear actions, and activities involving a Commonwealth marine area. Additional matters of environmental significance can be prescribed in regulations.

The requirement for an assessment will be triggered if an activity relates to a matter of national environmental significance. The process can be triggered either by the proponent of the activity referring it to the Commonwealth Environment Minister or unilaterally by the Environment Minister.

It is an offence under the EPBC for a person to undertake such actions unless a person has an approval to undertake the action.

However, there are exceptions to the approval requirements; approval is not required if the action is covered by a bilateral agreement, a declaration by the

Minister, a Regional Forest Agreement, or a plan of management of the Great Barrier Reef. These instruments are all defined in the EPBC.

Importantly, the EPBC effects a transfer of Commonwealth powers to the States through the "bilateral agreements" mechanism in the EPBC. The EPBC provides for the making of "bilateral agreements" and "bilaterally accredited management plans" under which the Commonwealth is able to vest authority in the States and Territories to conduct environmental impact assessments in relation to all matters outside the matters of national environmental significance. Bilateral agreements are intended to minimise duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa). Further, the Minister can declare that an action in a specified class of actions does not require approval under the EPBC if it is approved by the Commonwealth or a Commonwealth agency.

**"One of the main changes implemented by the EPBC is a shift of some of the Commonwealth's responsibility for environmental impact assessment to the States and Territories..."**

The EPBC contains detailed provisions relating to the assessment and approval process, including provisions on the Minister's consideration of whether a matter is of national environmental significance, whether an action requires approval and the consultation, notification and review processes.

If the Minister has determined that an activity will have an impact of national environmental significance the Minister must decide, subject to certain prerequisites and standards being met, which of the approaches prescribed in the EPBC should be used in assessing the relevant impacts of the action.

All approaches require a report to be provided to the Minister on the outcome of the assessment process to allow the Minister to make an informed decision about whether or not to approve the taking of the proposed action. All the options include some element of public participation, although the form of participation is not consistent between all the options.

In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister is required to consider a number of important matters (set out in the EPBC). In particular, the Minister must take into account the principles of

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ecologically sustainable development and must not act inconsistently with Australia's obligations under various international environmental laws.

## **The conservation of biodiversity**

Biodiversity is defined in the EPBC as meaning the variability among living organisms from all sources and includes diversity both within and between species and diversity of ecosystems. The EPBC provides for the identification and monitoring of biodiversity in Australia and requires the Minister to prepare inventories, surveys and registers in relation to listed threatened species, listed threatened ecological communities, and other matters.

The EPBC also provides for the making of bioregional plans and the entry into conservation agreements. The EPBC also contains various powers, obligations and offence provisions which seek to protect biodiversity.

## **Injunctions**

The EPBC provides for the granting of injunctions (on application by specified persons to the Federal Court)

where a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the EPBC or the regulations. The EPBC contains wide standing provisions, which in specified circumstances, qualify conservation groups as being able to take action under the EPBC.

## **Liability of executive officers for corporations**

The EPBC Bill makes provisions for civil and criminal liabilities for persons, including executive officers of a body corporate, who contravene certain provisions of the Act.

An executive officer can only be found liable for the contravention of a body corporate if the officer was in a position to influence the conduct of the body corporate in relation to the contravention and the officer failed to take all reasonable steps to prevent the contravention.

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