

THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH): DARK SIDES OF VIRTUE

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[The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act') has been much in the limelight of late. In 2006 it was relied on by the Commonwealth Environment Minister in order to refuse a Victorian wind farm development proposal because of potential threats to the endangered orange-bellied parrot. While this episode has been much publicised in the media, it has tended to overshadow the quiet evolution of practices of environmental impact assessment under the EPBC Act. These developments are critically examined in this article, revealing both their environmental virtues, as well as their potential 'dark sides'. We discuss the extension of the EPBC Act's environmental impact assessment processes to cover the indirect and (possibly) cumulative impacts of development on valued environments like the Great Barrier Reef, and the wider ramifications this may have in improving the rigour of environmental decision-making processes in Australia. At the same time we note the many implementation difficulties that the EPBC Act has faced as a result of the vagaries of government administration and the limited resources available to environmental groups to scrutinise decision-making under the legislation. In some cases, these problems threaten to undermine the EPBC Act's effectiveness as an environmental protection tool. Hence we argue that further development of environmental impact assessment practices under the EPBC Act will require more attention to be paid to the so far largely unheeded activities of actors in the private sector — development proponents, their financial backers and legal advisers. These actors are emerging as amongst the most significant participants in the day-to-day routine of environmental impact assessment decision-making. Harnessing the power of the private sector to advance public law goals may offer a way to avoid the problems of the EPBC Act's dark sides, while at the same time instilling a more environmentally 'virtuous' culture and practice in the mainstream of Australian environmental impact assessment.]

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Customer: takes the parrot out of the cage, holds it to his mouth and shouts: “ELLO POLLY!!! POLLLLLLY!” He then thumps the parrot on the counter and says ‘Polly Parrot, wake up!’ and again thumps it on the counter and says ‘Polly!’ to its face, before throwing it up in the air and watching it plummet to the floor. ‘Now that’s what I call a dead parrot.’

Owner: ‘No, no ‘e’s stunned!’¹

I INTRODUCTION: OF PARROTS AND POLITICS

In mid-2006, furore over the fate of the orange-bellied parrot (and the chance that it might be more than stunned by the turbines of a proposed wind farm in Victoria) brought into the limelight the Commonwealth’s environmental impact assessment legislation, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).² In April 2006, the then Commonwealth Minister for the Environment, Senator Ian Campbell, found that threats to the endangered orange-bellied parrot posed by the Bald Hills wind farm project east of Melbourne, justified refusal of the proposal under the *EPBC Act*.³ The greenhouse benefits of promoting renewable energy technologies notwithstanding,⁴ the Minister determined that the risk to the parrot (scientifically assessed as very low)⁵ was a sufficient ground to withhold approval for the project.⁶ In the

¹ *Monty Python’s Flying Circus*, ‘Full Frontal Nudity’ (Series 1, Episode 8, 1969).

² The Bald Hills wind farm project was assessed under the *EPBC Act* and the *Environment Effects Act 1978* (Vic). The relevant assessment provisions of the *EPBC Act* were ss 18, 18A (listed threatened species and communities) and ss 20, 20A (listed migratory species). The Victorian assessment process for the proposal under the *Environment Effects Act 1978* (Vic) was accredited to address matters of national environmental significance under the *EPBC Act*: see Malcolm Forbes, Assistant Secretary, Environment Assessment and Approvals Branch, *Decision on Assessment Approach* (28 October 2002) <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=show_document;document_id=8634;proposal_id=730>.

³ Liz Minchin, Nassim Khadem and Peter Ker, ‘Feathers Fly over Wind Farm Ban’, *The Age* (Melbourne), 6 April 2006, 1.

⁴ Wind farms have emerged as a major source of renewable energy, which is linked to the goal of reducing the impact of climate change. See, eg, *Renewable Energy (Electricity) Act 2000* (Cth) s 3, which sets out three main objectives:

- (a) to encourage the additional generation of electricity from renewable sources; and
- (b) to reduce emissions of greenhouse gases; and
- (c) to ensure that renewable energy sources are ecologically sustainable.

For a review of the controversial aspects of wind farms: see Alexandra Wawryk, ‘Planning for Wind Energy: Controversy over Wind Farms in Coastal Victoria’ (2004) 9 *Australasian Journal of Natural Resources Law and Policy* 103.

⁵ Ian Smales, Stuart Muir and Charles Meredith, ‘Modelled Cumulative Impacts on the Orange-Bellied Parrot of Wind Farms across the Species’ Range in South-Eastern Australia’ (Project No 4857, Department of Environment and Heritage, 2005) 34.

⁶ Minchin, Khadem and Ker, above n 3.

wake of the decision, the Minister and the Victorian government engaged in political invective that, at times, took on *Monty Python*-esque proportions.⁷ This was followed shortly after by a Victorian government-initiated judicial review of the Minister's decision in the Federal Court, on the basis that his apparent concern with the health of parrots was a 'political sham'.⁸ The Minister later agreed to approve the Bald Hills wind farm, subject to the relocation of six turbines originally within two kilometres of the coast to ensure that there is no impact on the orange-bellied parrot's migratory path.⁹ While 'dead parrot' jokes and righteous environmental rhetoric have been at the forefront of political debate in this episode, in the background remain serious questions about the operation of the *EPBC Act* and its potential as a tool for improving environmental impact assessment in Australia.¹⁰

On the positive side, the *EPBC Act* — mainly through judicial interpretation of its decision-making requirements — is proving to be an environmental tool with real teeth, capable of exerting significant influence over both the culture and practice of environmental impact assessment in Australia. This may have come as a surprise to the Commonwealth government, which had much more modest objectives for the legislation when it was introduced in 1999.¹¹ Indeed, the *EPBC Act* was initially widely criticised by environmental groups for unduly narrowing the scope of federal environmental impact assessment.¹² Yet in the

⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 6 April 2006, 1027–8 (Rob Hulls, Attorney-General) criticising 'the decision of the yellow-bellied pollie from Western Australia in relation to the orange-bellied parrot': at 1028.

⁸ Minister for Planning, 'State to Launch Legal Challenge over Federal Wind Farm Stand' (Press Release, 27 April 2006). The proponent of the Bald Hills wind farm project also launched an action in the Federal Court: Duncan Hughes, 'Wind Farm Case Goes to Court', *Australian Financial Review* (Sydney), 2 May 2006, 8. The cases were settled after Senator Campbell agreed to review his decision on the wind farm project.

⁹ Ian Campbell, Minister for the Environment and Heritage, *Decision to Approve the Taking of an Action* (21 December 2006) <http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=show_document;document_id=24348;proposal_id=730>. See also Jewel Topsfield, 'Backflip on Wind Farm', *The Age* (Melbourne), 22 December 2006, 1.

¹⁰ The adequacy of environmental impact assessment under the *EPBC Act* is a matter that has generated significant debate in the literature: see generally Brendan Bateman and Nick Thomas, 'The Need for More Clarity in Environmental Impact Assessment' (2004) 3(2) *Local Government Reporter* 25; Andrew Macintosh, 'Why the *Environment Protection and Biodiversity Conservation Act*'s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environmental and Planning Law Journal* 288; Andrew Macintosh and Debra Wilkinson, '*EPBC Act* — The Case for Reform' (2005) 10 *Australasian Journal of Natural Resources Law and Policy* 139; Chris McGrath, 'Swirls in the Stream of Australian Environmental Law: Debate on the *EPBC Act*' (2006) 23 *Environmental and Planning Law Journal* 165. Macintosh and Wilkinson, in particular, make strident criticisms of the *EPBC Act*: at 163–7. They suggest that the *EPBC Act* has not performed the fundamental tasks required of a regulatory regime in 'deal[ing] with market failure by preventing certain activities or changing [their character]': at 142.

¹¹ Commonwealth, *Parliamentary Debates*, Senate, 2 July 1998, 4796–7 (Senator Robert Hill, Minister for the Environment) outlining the specific focus of the *EPBC Act* on 'matters of national environmental significance' and its initial limitation to six such matters.

¹² For summaries of environment groups' concerns: see 'Labor Senators' Findings', 'Minority Report by the Australian Democrats', 'Report by the Australian Greens And The Greens (WA)' in Senate Environment, Recreation, Communications and the Arts Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998* (1999).

wake of key decisions of the Federal Court,¹³ including the most recent concerning the protection of endangered species such as the swift parrot in Tasmania's Wielangta Forest, the *EPBC Act* has assumed a new prominence, both in relation to the scope of the environmental impact assessment it requires and as a model for state-based schemes for the assessment of development-related, environmental impacts.¹⁴ As increased attention has focused on the *EPBC Act*, environmental groups have been drawn to explore its potential, with some prophesising the emergence of a 'new environmental activism'.¹⁵ Whether the *EPBC Act* could spearhead a new phase of biodiversity protection in Australia is the question underlying a spate of claims pitting endangered species against proposed developments across the country.¹⁶ Thus, the orange-bellied parrot episode and the recent victory for the swift parrot and other endangered species in the Wielangta Forest may be just the first in a 'flock' of *EPBC Act*-related cases.

Whatever 'virtues' the *EPBC Act* may have, however, its 'dark sides' are also emerging as experience with the Act grows. Foremost amongst the limitations of the Act are the restricted number of triggers for environmental impact assessment, and provisions for exemption from its requirements, which in turn constrain the circumstances in which the Commonwealth government will be involved in decision-making regarding the environmental assessment and approval of projects. This result is consistent with the general trend to define a narrower role for the Commonwealth in environmental protection; a trend that stems back to notions of cooperative federalism that first emerged in the early 1990s.¹⁷ Pertinent examples of the limited reach of the Act's environmental impact assessment process are the exclusion of any federal requirement for the assessment of projects with climate change impacts,¹⁸ and the exemption for forestry operations carried out in accordance with regional forest agreements.¹⁹

¹³ See, eg, *Booth v Bosworth* (2001) 114 FCR 39 ('Booth'); *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24 ('Nathan Dam Case'); *Brown v Forestry Tasmania [No 4]* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) ('Wielangta Forest').

¹⁴ See generally Jacqueline Peel and Lee Godden, 'Australian Environmental Management: A "Dams" Story' (2005) 28 *University of New South Wales Law Journal* 668.

¹⁵ Damien Gardiner, 'Mining in Greenhouses — Digging Deeper into Environmental Impact Assessment' (Paper presented at the 29th Annual AMPLA Conference, Sydney, 27 August 2005) (copy on file with the authors).

¹⁶ ABC Television, 'Government Vetos Wind Farm Development', *The 7:30 Report*, 17 April 2006 <<http://www.abc.net.au/7.30/content/2006/s1617642.htm>>, citing the potential for the orange-bellied parrot and broilgas to stymie two other proposed wind farms in Victoria, the pitting of the night parrot against an iron ore mine in WA, and other cases in which the swift parrot, the legless lizard and the golden sun moth have 'entered the political arena as potential major players.'

¹⁷ Peel and Godden, above n 14, 675–8; Dean Richard Love, 'Cooperative Federalism: An Analysis of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth)' (2000) 27(8) *Brief* 13, 18.

¹⁸ Lisa Ogle, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): How Workable Is It?' (2000) 17 *Environmental and Planning Law Journal* 468, 469–70. The failure to implement a 'greenhouse trigger' under the *EPBC Act* is consistent with the Commonwealth government's more general reluctance to legislate directly in the field of climate change. Instead, it has adopted a range of voluntary and cooperative measures: see, eg, Department of the Environment and Water Resources, *The National Greenhouse Strategy* (1998), developed through a cooperative process involving the Commonwealth, state and local governments.

¹⁹ *EPBC Act* s 38. The effect of this provision was recently considered in *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) [206]–[212].

In addition to its constrained area of operation, other potential deficiencies of the *EPBC Act* include a variable record of government application of its environmental impact assessment provisions,²⁰ coupled with the substantial costs to environmental groups of litigating cases under the legislation in an attempt to ensure government and proponent accountability. Further, recent amendments to the *EPBC Act*, rushed through the federal Parliament in late 2006, seem designed to reduce the breadth and transparency of environmental decision-making under the legislation in order to enhance the ‘efficiency’ of the assessment process for development proponents.²¹ Divisions over the orange-bellied parrot may also signal the resurgence of inter-governmental tensions with respect to the environment between the Commonwealth and states, increasing the likelihood of instrumental use of the *EPBC Act* for political ends.²² These deficiencies raise questions about whether the *EPBC Act* is indeed the most appropriate mechanism for advancing best practice environmental impact assessment in the mainstream of development and approval processes throughout Australia.

In light of the attention currently being focused on the *EPBC Act* by a wide range of stakeholders — the commercial sector, governments, environmental groups, communities and the media — this article takes stock of trends in the legislation’s interpretation and implementation, and seeks to provide indications of possible future developments. To fully gauge these trends, it is necessary to review the scope of environmental impact assessment to date in Commonwealth legislation. Consequently, in Part II we provide a short history of the evolution of the *EPBC Act*, explain the model of environmental impact assessment it adopts, and examine the effect of recent amendments to the legislation. We then turn to an assessment of the legislation’s virtues, as well as its potential dark sides in Parts III and IV. Finally, Part V contains our analysis of likely trends in the implementation of the *EPBC Act*, and the scope for the legislation to transform the culture and practice of environmental impact assessment in Australia. We argue that the *EPBC Act* has great potential as a mechanism for improving environmental impact assessment processes at both the federal and state levels, and therefore for making a tangible contribution to broader sustainability goals that seek the integration of environmental concerns in development-related decision-making.²³ Nonetheless, the success of the *EPBC Act* in this role over the longer term will require attention to the legislation’s dark sides, as much as to

²⁰ Macintosh, ‘Why the *Environment Protection and Biodiversity Conservation Act*’s Referral, Assessment and Approval Process is Failing to Achieve Its Environmental Objectives’, above n 10, 293–4.

²¹ Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill [No 1] 2006 (Cth) 8.

²² In addition to the Bald Hills wind farm, Environment Protection and Biodiversity Conservation-related (‘EPBC’) tensions between Commonwealth and state governments emerged with respect to the Victorian government’s ban on cattle grazing in the Alpine National Park, a large residential project at Eynesbury in Victoria that may threaten endangered species, including the golden sun moth, mining projects in WA with potential impacts on endangered species, and the Queensland government’s proposal for a dam in the Mary River region, which is home to the last populations of the Queensland lungfish.

²³ Such integration is consistent with the broader principles of ‘ecologically sustainable development’ embraced under the *Inter-Governmental Agreement on the Environment* (1992) and the *National Strategy for Ecologically Sustainable Development* (1992).

its particular virtues. Overcoming the *EPBC Act*'s darker prospects, we believe, will be dependent to a large extent on the ways in which it influences the practices of the wide variety of actors involved in environmental impact assessment. Particularly important in this regard will be actors in the private sector — development proponents, their financial backers and legal advisers — who are emerging as amongst the most significant participants in the day-to-day routine of environmental impact assessment decision-making. Harnessing the power of the private sector to advance public law goals may offer a way to avoid the problems of the *EPBC Act*'s dark sides, while at the same time instilling a more environmentally virtuous culture and practice in the mainstream of Australian environmental impact assessment.

II EVOLUTION AND SCOPE OF ENVIRONMENTAL IMPACT ASSESSMENT UNDER THE *EPBC ACT*

A Development of the EPBC Act

After a lengthy consultation period, the *EPBC Act* was introduced in 1999, combining a new Commonwealth environmental impact assessment framework with an associated regime for the conservation of biodiversity.²⁴ Driving the introduction of the new environmental impact assessment process were the perceived inadequacies of the earlier *Environment Protection (Impact of Proposals) Act 1974* (Cth) (*EPIP Act*), which included a test for assessing impact which was heavily dependent upon discretionary referrals by Commonwealth Ministers.²⁵ Under the *EPIP Act*, impact assessment was only triggered where the relevant 'action Minister' determined that an activity was likely to affect the environment 'to a significant extent'.²⁶ Accordingly, the action then had to be referred to the Environment Minister, who determined the required level of environmental assessment.²⁷ Problems associated with the *EPIP Act* were a narrow and outdated impact assessment process,²⁸ the inability of the Environment Minister to trigger an assessment,²⁹ and the Act's lack of enforcement

²⁴ Drafting of the *EPBC Act* began following the Council of Australian Government's review of Commonwealth and state roles and responsibilities for the environment. A public consultation paper was released on 25 February 1998: see Senator Robert Hill, Minister for the Environment, *Reform of Commonwealth Environment Legislation: Consultation Paper* (1998). This was followed by the introduction of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) to the Senate on 2 July 1998 and the initiation of a Senate inquiry into the new legislation on 8 July 1998. The Senate inquiry received 632 submissions and held public hearings in all major capital cities between August 1998 and March 1999. The Senate inquiry delivered its final report on the Bill on 27 April 1999: see Environment, Recreation, Communications and the Arts Legislation Committee, Senate, above n 12.

²⁵ See *EPIP Act* s 5: the Act applied to decisions taken by the Commonwealth government and 'authorities of Australia', and private developments that required a form of Commonwealth approval (for example, projects with a foreign investment element).

²⁶ *EPIP Act* s 5.

²⁷ This was determined in accordance with administrative procedures issued under the *EPIP Act* by the executive government: see *EPIP Act* s 6.

²⁸ Commonwealth, *Parliamentary Debates*, Senate, 2 July 1998, 4795–6 (Senator Robert Hill, Minister for the Environment).

²⁹ Ogle, above n 18, 469.

powers.³⁰ New legislation thus afforded an opportunity for all stakeholders to substantially revise environmental impact assessment processes and for the Commonwealth to set a best practice standard for impact assessment.³¹ Therefore, many groups and individuals made submissions to an inquiry considering the draft EPBC legislation,³² and major amendments were proposed during the passage of the Bill through the federal Parliament.³³ However, the eventual legislation did not meet the reform expectations of many sectors of the community.

One aspect of the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) ('EPBC Bill') that attracted substantial criticism was its provisions exempting certain categories of project from the Act's environmental assessment and approval requirements.³⁴ The two main types of project exempted are those which come within the auspices of Commonwealth–state 'bilateral agreements',³⁵ and forestry operations undertaken in accordance with a regional forest agreement.³⁶ The Act's bilateral agreement mechanism allows the Commonwealth, where a bilateral agreement is in place, to delegate either the assessment process ('assessment bilaterals'),³⁷ or the assessment *and* approval process ('approval bilaterals'),³⁸ for projects within the scope of the *EPBC Act* to authorities of the state or territory in which the project occurs. These projects are then exempted from the *EPBC Act's* requirements for an assessment overseen by the Commonwealth Department of the Environment and Water Resources,³⁹ or an approval issued by the federal Environment Minister,⁴⁰ depending on the scope of the bilateral agreement concerned. The bilateral agreements mechanism was included in the *EPBC Act* in line with the Commonwealth government's desire to 'minimis[e] duplication' in environmental impact assessment processes operating at the federal and state levels.⁴¹ Yet the minimal level of detail specified in the EPBC Bill regarding the content of bilateral agreements worried many environmental groups, who feared there would be inadequate safeguards to ensure that the interests of development-focused states would not take priority

³⁰ Ibid.

³¹ Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998 (Cth) 10.

³² The Bill was referred to the Senate Environment, Recreation, Communications and the Arts Legislation Committee, which received 632 submissions and reported in April 1999; see above n 24.

³³ Following the 1998 federal election, the Bill was reintroduced into the Senate on 12 November 1998, together with some 900 proposed amendments, 568 of which were sponsored by the government and the Democrats: see Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth); Explanatory Memorandum, Environmental Reform (Consequential Provisions) Bill 1999 (Cth).

³⁴ These exemptions are set out in *EPBC Act* pt 4.

³⁵ *EPBC Act* s 29(1).

³⁶ *EPBC Act* s 38.

³⁷ *EPBC Act* s 47.

³⁸ *EPBC Act* s 46.

³⁹ *EPBC Act* s 83. Note that the former name of the Department was the Department of the Environment and Heritage.

⁴⁰ *EPBC Act* s 29.

⁴¹ *EPBC Act* s 3(2)(b).

over the national interest in environmental protection.⁴² Critics also questioned the rationale for federal environmental impact assessment legislation which went to the effort of identifying a role for the Commonwealth in environmental protection but, in the assessment and approval process, proposed to devolve relevant powers back to state and territory governments.⁴³

Similar concerns with respect to the potential for state-based development interests to triumph over national environmental protection goals were voiced with respect to the exemption for regional forest agreement forestry operations. Regional forest agreements, of which there are now 10 covering forest areas in four states,⁴⁴ are the outcome of an inter-governmental forestry management process that was initiated in the early 1990s by the National Forestry Policy Statement and associated Comprehensive Regional Assessment of Australian forests.⁴⁵ Regional forest agreements are intended to specify 20-year plans for the use and management of covered forest areas that will meet goals of ecologically sustainable forestry management.⁴⁶ The regional forest agreement process, however, has been subject to criticism on many grounds, including:

- the assumption of the need to ensure internationally competitive forestry activities in Australia;
- the inadequacy of data available on the environmental impacts of forestry practices;
- the haste with which some agreements have been concluded;
- the lack of provision for meaningful public involvement; and
- the limited opportunities for enforcement and review of the agreements.⁴⁷

Against this backdrop, the provision in the EPBC Bill exempting forestry operations under regional forest agreements was viewed with concern as it was

⁴² Ogle, above n 18, 473. Hence critics were concerned that bilaterals would effectively 'rubber stamp' inadequate state environmental impact assessment legislation: see Murray Raff, 'Environment Protection and Biodiversity Conservation Act and the Draft Bilateral Agreement with the State of Victoria' (2000) 17 *Environmental and Planning Law Journal* 369; Chris McGrath, 'The Queensland Bilateral' (2002-3) 8 *Queensland Environmental Practice Reporter* 145.

⁴³ See, eg, Ogle, above n 18, 473.

⁴⁴ Department of Agriculture, Fisheries and Forestry, *Regions* (19 January 2007) Australian Government Department of Agriculture, Fisheries and Forestry <<http://www.daffa.gov.au/rfa/regions>>. The forest regions covered are the Eden, north-east (upper and lower) and southern regions in NSW; the East Gippsland, Central Highlands, North East, Gippsland and western regions in Victoria; the south-west forest region in WA; and the whole of the state of Tasmania. The Commonwealth and state governments completed a Comprehensive Regional Assessment for the south-east Queensland region, but did not sign a regional forest agreement.

⁴⁵ *National Forestry Policy Statement* (1992).

⁴⁶ See *Regional Forest Agreements Act 2002* (Cth) s 4 (definition of 'regional forest agreement'); Department of Agriculture, Fisheries and Forestry, *Regional Forest Agreements Home* (19 January 2007) Australian Government Department of Agriculture, Fisheries and Forestry, <<http://www.daffa.gov.au/rfa>>.

⁴⁷ See, eg, Tony Foley, 'Negotiating Resource Agreements: Lessons from ILUAs' (2002) 19 *Environmental and Planning Law Journal* 267, 273-4; Jan McDonald, 'Regional Forest (Dis)agreements: The RFA Process and Sustainable Forest Management' (1999) 11 *Bond Law Review* 295; Jill Redwood, 'Sweet RFA' (2001) 26 *Alternative Law Journal* 255; Jane Tribe, 'The Law of the Jungles: Regional Forest Agreements' (1998) 15 *Environmental and Planning Law Journal* 136.

seen to remove a significant category of potentially environmentally harmful activities from Commonwealth oversight, thereby leaving forest management essentially in the hands of the states.⁴⁸

Another area of concern that was the subject of many submissions in the inquiry process was the low number of ‘matters of national environmental significance’ that were included in the Bill, with only six such matters adopted out of a suggested 30.⁴⁹ The identification of ‘matters of national environmental significance’, which themselves must fall within the ambit of the Commonwealth’s constitutional heads of power,⁵⁰ sets the jurisdictional scope of the Act by determining which types of development project with an environmental impact will require approval by the Commonwealth Environment Minister.⁵¹ Where the *EPBC Act*’s assessment and approval process is ‘triggered’ by a particular project through its impact on ‘matters of national environmental significance’, the Commonwealth will not only be involved in decision-making, but have ultimate power to determine whether a proposal is approved or refused for the purposes of the Act.⁵² While some amendment recommendations were accepted during the later passage of the EPBC Bill,⁵³ there continued to be significant criticism of this narrow scope of Commonwealth involvement.

B *The EPBC Act’s Environmental Impact Assessment Triggers*

Currently, the *EPBC Act* specifies seven ‘matters of national environmental significance’, including one protected matter which was added by way of

⁴⁸ McDonald, above n 47, 308, 314. See also Macintosh, ‘Why the *Environment Protection and Biodiversity Conservation Act*’s Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives’, above n 10, 298, for a more recent reiteration of this concern.

⁴⁹ Ogle, above n 18, 470. This issue has again arisen in the Senate inquiry into the Environment Protection and Heritage Legislation Amendment Bill [No 1] 2006 (Cth): see Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Provisions of the Environment and Heritage Legislation Amendment Bill (No 1) 2006 (Cth)* (2006). Submissions calling for an expansion of the environmental impact assessment triggers to include one covering climate change were made by the Australian Network of Environmental Defenders’ Offices Inc, the Australian Conservation Foundation and Birds Australia: at 57–8.

⁵⁰ Relevant constitutional heads of power with respect to external affairs, trade and commerce, and corporations have been broadly construed by the High Court: see, eg, *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Commonwealth v Tasmania* (1983) 158 CLR 1; *New South Wales v Commonwealth* (2006) 231 ALR 1. In practice, such expansion has given the Commonwealth Parliament ‘the Constitutional power to regulate ... most, if not all, matters of major environmental significance anywhere within the territory of Australia’: Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *Commonwealth Environment Powers* (1999) [2.19]. See also Justice Catherine Branson, ‘The *Environment Protection and Biodiversity Conservation Act 1999* — Some Key Constitutional and Administrative Issues’ (1999) 6 *Australasian Journal of Natural Resources Law and Policy* 33.

⁵¹ *EPBC Act* ch 2.

⁵² *EPBC Act* s 133.

⁵³ Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, above n 12, [1.2]–[1.4].

amendment after legislation's enactment.⁵⁴ The specified 'matters of national environmental significance' are:

- 1 declared world heritage properties;⁵⁵
- 2 National Heritage places;⁵⁶
- 3 declared wetlands of international importance;⁵⁷
- 4 nationally-listed threatened species and ecological communities;⁵⁸
- 5 nationally-listed migratory species;⁵⁹
- 6 nuclear actions;⁶⁰ and
- 7 the Commonwealth marine environment.⁶¹

A number of these 'matters of national environmental significance' give effect to Australia's obligations under international environmental treaties. For instance, the world heritage trigger implements obligations assumed under the *Convention Concerning the Protection of the World Cultural and Natural Heritage* ('*World Heritage Convention*'),⁶² the wetlands trigger implements obligations assumed under the *Ramsar Wetlands Convention*,⁶³ and the threatened species trigger implements obligations assumed under the *Convention on Biological Diversity*.⁶⁴ In addition, the Act requires Commonwealth approval for actions taken on Commonwealth land, actions taken outside Commonwealth land that will have a significant impact on the environment of Commonwealth land, or actions taken

⁵⁴ This amendment was effected by the *Environment and Heritage Legislation Amendment Act [No 1] 2003* (Cth).

⁵⁵ *EPBC Act* s 12. To trigger this provision, the impacts of a proposal must relate to the 'world heritage' values of the property that are defined in terms of the natural and cultural heritage values for which the property is listed on the World Heritage List. A 'declared' world heritage property also extends to properties which have been proposed by the Commonwealth government for listing: at ss 13–14.

⁵⁶ *EPBC Act* s 15B. A 'National Heritage place' is one included on the 'National Heritage List' due to 'national heritage values' pertaining to its natural heritage, indigenous heritage or historic heritage significance: at ss 324C–324D.

⁵⁷ *EPBC Act* s 16. To trigger this provision, the impacts of a proposal must relate to the 'ecological character' of the wetland. This term has the same meaning as in the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('*Ramsar Wetlands Convention*').

⁵⁸ *EPBC Act* s 18.

⁵⁹ *EPBC Act* s 20.

⁶⁰ *EPBC Act* s 21. A 'nuclear action' includes the establishment of nuclear reactor facilities or facilities for the storage or disposal of radioactive wastes: at s 22.

⁶¹ *EPBC Act* ss 23–4. The Commonwealth marine area is defined as those waters extending beyond state and territory coastal waters to the limits of the Australia's exclusive economic zone: at s 24.

⁶² *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

⁶³ *Ramsar Wetlands Convention*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

⁶⁴ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993).

by the Commonwealth (or one of its agencies) that have a significant impact on the environment either inside or outside the Australian jurisdiction.⁶⁵

Under the *EPBC Act*, there is capacity for further ‘matters of national environmental significance’ to be identified and added, whether by way of amendment or via regulations issued under the Act.⁶⁶ Other potential ‘matters of national environmental significance’ that might be added to the Act through such processes include:

- reducing emissions of greenhouse gases and protecting and enhancing greenhouse sinks;
- regulation of ozone depleting substances;
- conservation and protection of native vegetation and fauna, including the protection and management of forests;
- genetically modified organisms which may have adverse environmental effects;
- management of hazardous wastes;
- nationally significant feral animals and weeds; and
- prevention of land and water degradation.⁶⁷

To date, however, most proposals to amend the Act to introduce further environmental impact assessment triggers have not been successful.⁶⁸ One such proposal of particular relevance to the orange-bellied parrot and wind farm scenario was the preparation of a consultation paper on the possible incorporation of a ‘greenhouse trigger’ under the *EPBC Act*, made available in December 1999.⁶⁹ Draft regulations to implement the proposal were released on 16

⁶⁵ *EPBC Act* ss 26, 28.

⁶⁶ *EPBC Act* s 25. New ‘matters of national environmental significance’ triggers added by way of regulation under s 25 must follow the Act’s mandated processes for consultation with state and territory governments. Prior to its amendment in late 2006, s 28A of the Act also required the Commonwealth Environment Minister to review the impact assessment triggers every five years and to prepare a report as to whether further ‘matters of national environmental significance’ should be included. However, this review requirement has now been repealed.

⁶⁷ Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997) attachment 1 pt II.

⁶⁸ See, eg, Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002 (Cth), which put forward a Commonwealth scheme for invasive species control, although it did not explicitly incorporate a requirement (lobbied for by environmental NGOs) that invasive species be a ‘matter of national environmental significance’ under the *EPBC Act*. The Bill was withdrawn following consideration by a Senate Committee that recommended against its adoption: Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *Report on the Regulation, Control and Management of Invasive Species and the Environment Protection and Biodiversity Conservation Amendment (Invasive Species) Bill 2002* (2004) [7.59]. More recently, following the review of the legislation as required by the *EPBC Act* s 516, the Commonwealth government determined that no revisions to the Act’s ‘matters of national environmental significance’ triggers would be made: Department of the Environment and Water Resources, *Department of the Environment and Heritage Annual Report 2005–06* (2006) <<http://www.deh.gov.au/about/publications/annual-report/05-06/legislation-epbc.html>>.

⁶⁹ Commonwealth Department of the Environment and Water Resources, ‘Possible Application of a Greenhouse Trigger under the *Environment Protection and Biodiversity Conservation Act [EPBC] 1999*’ (Consultation Paper, Environment Australia, 1999). See also the accompanying

November 2000, under which major new developments that would be likely to result in greenhouse gas emissions of more than 0.5 million tonnes in any 12-month period would trigger the *EPBC Act*, requiring Commonwealth approval. Nonetheless, the proposal, drafted within the relevant Commonwealth Department, apparently did not meet with approval at the ministerial level, and there has been no further progress on this proposal.⁷⁰

Political enthusiasm at the Commonwealth level for expanding the scope of the *EPBC Act* will naturally wax and wane as different environmental matters receive more or less prominence in public debate. Nevertheless, it is fair to say that so far the approach of the present Commonwealth government to proposals for expansion of the ‘matters of national environmental significance’ triggers has been a very cautious one. A circumscribed role in environmental impact assessment for the Commonwealth might be seen as part of a fairly consistent pattern that has distinguished federal–state relations in the environmental field since the *Inter-Governmental Agreement on the Environment* in 1992.⁷¹ Pursuant to this approach of cooperative federalism, the Commonwealth generally takes on a supervisory role for policy and legal reform (often through providing financial incentives with relatively minimal implementation responsibilities on its part), while more substantive environmental regulation occurs at the state government level. Nonetheless, even if limited in scope by the matters to which it applies, environmental impact assessment at a national level under the *EPBC Act* has inherent political dimensions because it allows for another layer of government decision-making to be added to the development approval process. As the orange-bellied parrot episode illustrates, this greatly enhances the extent of influence which may be exercised by the Commonwealth over state-based processes of environmental impact assessment and more general environmental planning frameworks.

C *The Model of Environmental Impact Assessment under the EPBC Act*

In recent years, there has been significant experimentation with different models of impact assessment, ranging from social impact assessment, to risk management and strategic environmental assessments.⁷² Nonetheless, environ-

media release by the then Minister for Environment, Senator Robert Hill, ‘Input Sought on Greenhouse Trigger’ (Press Release, 10 December 1999).

⁷⁰ This may reflect the current Commonwealth government’s decision not to ratify the *Kyoto Protocol*, opened for signature 11 December 1997, 37 ILM 22 (entered into force 16 February 2005), which sets international targets for reducing greenhouse gas emissions. Without ratification of the Kyoto Protocol, it will be more difficult for the Commonwealth government to establish a constitutional basis for legislation regulating greenhouse gas production. See, eg, Nick Minchin, ‘Responding to Climate Change: Providing a Policy Framework for a Competitive Australia’ (2001) 24 *University of New South Wales Law Journal* 550, 550–1.

⁷¹ Peel and Godden, above n 14, 675–7.

⁷² On the emergence and growth of environmental risk management models: see Mark A Burgman, *Risks and Decisions for Conservation and Environmental Management* (2005). For a discussion of strategic environmental assessment: see Simon Marsden and Stephen Dovers (eds), *Strategic Environmental Assessment in Australasia* (2002). Other examples include a referral model (bringing in specialist expertise), planning panels under the *Environment Effects Act 1978* (Vic) (for example, used in wind farm analysis) and a wider use of expert opinion. See generally Ian

mental impact assessment within Australia remains primarily a process designed to assist decision-making related to project development control, and to allow for land use and resource allocation planning.⁷³ This focus is apparent in the scope and nature of the *EPBC Act*'s environmental impact assessment procedures,⁷⁴ although there have been attempts in the legislation to link environmental impact assessment with the broader practices and goals of 'ecologically sustainable development',⁷⁵ and some limited incorporation of wider-ranging assessment procedures, such as strategic environmental assessment.⁷⁶ Essentially, however, the procedure under the *EPBC Act* adopts a linear trajectory for development assessment that includes: referral of potential projects; the designation of projects comprising a 'controlled action' (linked to an assessment of their potential for 'significant impacts' on 'matters of national environmental significance');⁷⁷ the delineation of terms of reference for any required assessment; an evaluation and decision on assessment; and finally, an eventual decision related to approval.⁷⁸ From the perspective of development proponents, the major legislative incentive to comply with this process is provided by robust offence provisions for undertaking 'controlled actions' without the appropriate approval.⁷⁹

The overall procedure starts with an initial 'filtering' stage to determine whether potential actions fall within the jurisdiction of the *EPBC Act*. Indeed, one of the virtues of environmental impact assessment under the *EPBC Act* is the relatively early stage at which the potential need for project assessment is identified, facilitating the adoption of 'routine' due diligence processes related to impact assessment. It has become an almost invariable practice for legal advisers acting for clients undertaking development at whatever scale to seek a referral to the Minister as to whether *EPBC Act* assessment is required.⁸⁰ This practice reflects the statutory requirement that where a person considers that a proposed action is, or may be, a 'controlled action', the proposal must be referred to the

Thomas and Mandy Elliott, *Environmental Impact Assessment in Australia: Theory and Practice* (4th ed, 2005) ch 3.

⁷³ For example, areas of health and energy impact analysis are rarely highlighted in the typical assessment process. For a discussion of the more usual scope and content of environmental impact assessment in Australia: see Thomas and Elliott, above n 72, ch 7.

⁷⁴ *EPBC Act* ch 2 pt 3. The Act's restricted range of environmental impact assessment procedures may have been influenced by pressures from the development industry to contain the timeframes and costs of the assessment. This goal is apparent in the Act's objectives: at s 3(2)(b), (d).

⁷⁵ *EPBC Act* ss 3A, 136(2)(a).

⁷⁶ *EPBC Act* ch 4 pt 10.

⁷⁷ *EPBC Act* ch 2 pt 3.

⁷⁸ *EPBC Act* ch 4 pts 8–9.

⁷⁹ Ogle, above n 18, 476–7. For example, in the case of *Minister for the Environment and Heritage v Greentree [No 3]* (2004) 136 LGERA 89, a prosecution of a farmer for taking a controlled action affecting a Ramsar wetland site without approval resulted in the imposition of a total fine of \$450 000.

⁸⁰ This is evident from the high number of referrals made under the *EPBC Act*: see Department of the Environment and Water Resources, *Environment Protection and Biodiversity Conservation Act 1999 Activity Report — 30 June 2006* (2006). It may be, however, that this 'diligence' is limited to urban and commercial development sectors: see Macintosh and Wilkinson, above n 10, 151, who note that referrals in relation to agriculture and fisheries sectors have been very low.

Commonwealth Environment Minister.⁸¹ Following referral, the Minister must advise whether the proposal is one that falls under the assessment and approval requirements of the Act. This is determined by considering whether there is an identifiable ‘action’⁸² — whether undertaken by a private actor or government body⁸³ — that has, will have or is likely to have, a ‘significant impact’ on one or more of the Act’s specified ‘matters of national environmental significance’.⁸⁴ A test of this kind, subjecting only development projects with ‘significant’ environmental impacts to assessment, is a common feature of environmental impact assessment legislation in Australia and internationally.⁸⁵ Nonetheless, the concept of ‘(likely) significant impact’ is rarely defined and its lack of elaboration in the *EPBC Act* has meant that the task of explication has been left principally to the Federal Court.

While adopting a fairly standard model of environmental impact assessment, the exact scope of the *EPBC Act*’s assessment requirements turns on the relationship between an action’s ‘likely significant impacts’ and any ‘matters of national environmental significance’. As many ‘matters of national environmental significance’ relate to protected areas with defined boundaries (for example, world heritage properties), the *EPBC Act* could potentially operate within fairly narrow bounds if the relevant effects of a project on ‘matters of national environmental significance’ were to be construed as restricted to ‘direct’ impacts. ‘Direct’ impacts in this sense would refer to immediate, physical effects felt within the protected area that result from action taken within the boundaries of the area, for instance, cutting down trees in a world heritage area.

On the other hand, the breadth of environmental impact assessment required by the Act will expand to the extent that interpretation of the concept of ‘(likely) significant impact’ embraces notions of ‘indirect impact’.⁸⁶ As discussed further in Part III below, judicial interpretation of the nature and scope of the impacts test has precipitated (unexpectedly) a more expansive role for environmental impact assessment than the formal, relatively narrow requirements of the impact assessment model adopted by the Act might suggest at first glance. Undoubtedly, any expansion of the scope of the *EPBC Act*’s environmental impact assessment process via judicial interpretation represents a relatively modest move towards more comprehensive assessment, given the integrated and wide-ranging alternative forms of assessment that are potentially available. Nonetheless, any such

⁸¹ *EPBC Act* s 68.

⁸² An ‘action’ for the purposes of the *EPBC Act* is broadly defined to include projects, developments, undertakings, activities or a series of activities, or alterations to any of those: at s 523(1).

⁸³ As the *EPBC Act* is binding on ‘the Crown in each of its capacities’ the legislation extends to ‘actions’ taken by government bodies: at s 4. However, unlike the former *EPIC Act*, the *EPBC Act* does not cover as relevant ‘actions’, Commonwealth or state grants of funding or governmental authorisations ‘however described’ for another person to take an ‘action’: *EPBC Act* s 524. The scope of the exception for ‘governmental authorisations’ was considered by the Full Federal Court in the context of an application for an interlocutory injunction in *Save the Ridge Inc v National Capital Authority* (2004) 143 FCR 156.

⁸⁴ *EPBC Act* s 67. In the case of actions involving Commonwealth land or agencies, the ‘significant impact’ of the action must be on the ‘environment’, in turn defined at s 528.

⁸⁵ Thomas and Elliott, above 72, 140.

⁸⁶ Chris McGrath, ‘Key Concepts of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)’ (2005) 22 *Environmental and Planning Law Journal* 20, 31–8.

expansion is noteworthy due to its potential to influence routine practice and day-to-day decision-making of a broad range of actors operating within the development and land use planning sectors.⁸⁷ In this regard, revised administrative guidelines issued by the Department of the Environment and Water Resources in May 2006 are an important indicator of shifts towards a broader understanding of the Act's scope, with flow-on effects for development proponents. These guidelines are provided by the Department

to assist any person who proposes to take an action to decide whether or not they should submit a referral ... for a decision by the Australian Government Environment Minister ... on whether assessment and approval is required under the *Environment Protection and Biodiversity Conservation Act 1999*.⁸⁸

In particular, the guidelines advise proponents to consider the proposed action at its broadest scope,⁸⁹ extending the assessment of potential adverse impacts to 'indirect and offsite impacts', including 'downstream', 'upstream' or 'facilitated' impacts of a proposal.⁹⁰

An initial evaluation of the likely significant impacts on 'matters of national environmental significance' of a referred project takes place as part of the Minister's 'controlled action' decision pursuant to s 75 of the *EPBC Act*. If a proposal is caught by the definition of a 'controlled action' under the Act then it will be subject to environmental impact assessment of various types. For 'controlled actions', the Commonwealth Environment Minister must specify the 'matters of national environmental significance' potentially impacted,⁹¹ which in turn determines the particular impacts that must be considered in the subsequent assessment. The Minister is then required to decide upon the necessary environmental impact assessment process, whether this is on the basis of the referral information, preliminary documentation submitted by the proponent, a public environment report, an environmental impact statement or a public inquiry, all of which will be overseen by the Commonwealth Department of the Environment and Water Resources.⁹²

Alternatively, the assessment process might take place under a bilateral agreement if one has been concluded with the relevant state or territory government where the project is taking place. All current bilateral agreements in place under the *EPBC Act* are assessment bilaterals which accredit the particular state or

⁸⁷ See, eg, John Taberner et al, 'Review of 2003 *EPBC Act* Cases' (2004) 19(3) *Australian Environment Review* 5. Reviewing the outcome of several *EPBC Act* cases, the authors (all prominent planning and environmental lawyers at leading law firms) note 'the onus upon developers and project proponents to be prudent, and on occasion perhaps conservative, in assessing their responsibilities under the *EPBC Act*': at 6.

⁸⁸ Department of the Environment and Water Resources, Commonwealth of Australia, *EPBC Act Policy Statement 1.1: Significant Impact Guidelines: Matters of National Environmental Significance* (May 2006) 3. These guidelines replace the previous *EPBC Act Administrative Guidelines on Significance* issued in late 2000.

⁸⁹ Department of the Environment and Water Resources, above n 88, 5.

⁹⁰ *Ibid* 8.

⁹¹ *EPBC Act* ss 75(1)(b), 77.

⁹² In this process, the Minister must have regard to mandatory criteria: see Thomas and Elliott, above n 72, 108–9.

territory's environmental impact assessment process for the purposes of evaluating a project's impacts on 'matters of national environmental significance'.⁹³

State governments may also become involved on a case-by-case basis in the assessment of proposals designated as 'controlled actions' under the *EPBC Act* if the Commonwealth Minister for the Environment decides that assessment is to be by way of an 'accredited assessment process' under a state or territory law.⁹⁴ As highlighted above,⁹⁵ this scheme raises concerns that many projects will escape Commonwealth control during the assessment stage via delegation of environmental impact assessment to state governments.⁹⁶ Nonetheless, the Commonwealth still retains the capacity in such cases to determine the scope of the required assessment (through deciding which 'matters of national environmental significance' are potentially impacted), as well as the ultimate authority to refuse any project considered to have unacceptable consequences for protected matters.

Most types of assessment designated for a project under the *EPBC Act* will require: (1) the preparation and publication of draft environmental impact assessment documentation; (2) a period for public comment; and (3) finalisation of the terms of reference or scope of the assessment which incorporates those public comments.⁹⁷ The assessment itself, whether overseen by state or Commonwealth authorities, is undertaken by the proponent of the action — an aspect of environmental impact assessment which continues to generate intense controversy.⁹⁸

Typically, the assessment will be carried out on behalf of the proponent by consultants with specialist expertise in the areas designated for assessment by the *EPBC Act*'s 'matters of national environmental significance' trigger process. Over the last two decades, there has been an emergence of what might be termed an 'impact assessment industry' as the extent and reach of environmental impact assessment has penetrated further into the environmental planning and management sphere. This development has generated a group of environmental impact assessment specialists who form a receptive body for the adoption of privatised due diligence assessment processes. While the model of environmental impact assessment that operates under the *EPBC Act* is relatively circumscribed, the day-to-day activities of these private actors provide a means for informal expansion of the assessment process. Their routine practices — whether advising

⁹³ *EPBC Act* s 47. Assessment bilaterals have been concluded with WA, the Northern Territory, Tasmania, Queensland and New South Wales. No assessment bilateral has yet been concluded with Victoria, South Australia or the Australian Capital Territory.

⁹⁴ *EPBC Act* s 87(4). This is what occurred in the Bald Hills wind farm case.

⁹⁵ See above Part II(A).

⁹⁶ Indeed, the stringency and accountability of state assessments pursuant to bilaterals remain of concern to some commentators: see Raff, above n 42; McGrath, 'The Queensland Bilateral', above n 42. Others see bilaterals as having an overall positive effect on environmental impact assessment processes: Christopher Shaw, 'Impact of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) on the State Approval Process' [2001] *Australian Mining and Petroleum Law Association Yearbook* 82, 114.

⁹⁷ Regulations issued under the *EPBC Act* require the Commonwealth to be satisfied that similar requirements exist under state or territory laws accredited by bilateral agreements: *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs 3.03–3.04.

⁹⁸ See, eg, Thomas and Elliott, above n 72, 24–5.

on the referral process, drafting terms of reference or undertaking environmental impact assessments — thus augment, in various ways, the formalised, public processes of the *EPBC Act*.⁹⁹

D *Effect of Recent Amendments to the EPBC Act*

In early October 2006, a Bill proposing over 800 amendments to the *EPBC Act* was introduced into the House of Representatives.¹⁰⁰ The Bill was later referred to a Senate Committee for review, which allowed a two-week period for public submissions on the proposed amendments, before finalising its recommendations in November 2006.¹⁰¹ The Bill has subsequently been passed and received assent as the *Environment and Heritage Legislation Amendment Act [No 1] 2006* (Cth). The purposes of the amendments introduced by this *Act* included making the *EPBC Act* ‘more effective and efficient’ and providing ‘greater certainty in decision-making.’¹⁰² These goals reflect an overriding concern that the *EPBC Act* ought to be more developer-friendly. Indeed, one of the aims of the Bill was said to be that of ‘reduc[ing] processing time and costs for development interests’, although this was intended to occur ‘without weakening the protection that the Act provides for Australia’s important biodiversity and heritage.’¹⁰³

While it is beyond the scope of this article to address all of the amendments made to the *EPBC Act* in detail,¹⁰⁴ there are a number which affect the ambit and operation of the Act’s environmental impact assessment processes. One of the main amendments in this regard is an otherwise obscure provision introducing a new definition of ‘impact’ into the *EPBC Act*.¹⁰⁵ As we explain further in Part III, an expanded interpretation of this term by the courts to include the indirect impacts of actions on ‘matters of national environmental significance’ has played a significant role in broadening the scope of environmental impact assessment required under the Act. The new definition of impact, however, seems designed to constrain the notion of what amounts to an environmental impact relevant for environmental impact assessment by limiting impacts to the direct consequences of an action, or an event or circumstance that is an indirect consequence of an action, where ‘the action is a substantial cause of that event or circumstance.’¹⁰⁶ A second subsection of the definition goes on to state that

⁹⁹ It is conceded, however, that this ‘practice’ of environmental impact assessment may sometimes fall short of the objectives enshrined in environmental impact assessment legislation.

¹⁰⁰ Environment and Heritage Legislation Amendment Bill [No 1] 2006 (Cth).

¹⁰¹ Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Environment and Heritage Legislation Amendment Bill [No 1] 2006* (2006) [1.5] (‘*Senate Report*’).

¹⁰² Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill [No 1] 2006 (Cth) 1.

¹⁰³ *Ibid.*

¹⁰⁴ For summaries of the effect of the principal amendments: see Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill [No 1] 2006 (Cth); *Senate Report*, above n 101.

¹⁰⁵ *EPBC Act* s 527E.

¹⁰⁶ *EPBC Act* s 527E(1)(b).

where an indirect environmental effect is the result of a third party's actions, this will only be covered by the concept of 'impact' if:

- (e) the primary action facilitates, to a major extent, the secondary action; and
- (f) the secondary action is:
 - (i) within the contemplation of the primary person; or
 - (ii) a reasonably foreseeable consequence of the primary action; and
 - (g) the event or circumstance is:
 - (i) within the contemplation of the primary person; or
 - (ii) a reasonably foreseeable consequence of the secondary action.¹⁰⁷

As we discuss further in Part III, this notion of impact — with its emphasis on a substantial causal link and reasonable foreseeability of the consequences of an action — is more akin to the strict tests one usually finds in the area of torts law than the flexible approach that has been adopted by the Federal Court in cases under the *EPBC Act*.

The inclusion of a new definition of 'impact' in the *EPBC Act* would appear to be part of the package of amendments designed to 'streamlin[e] administration of the Act for efficiency and effectiveness, thereby cutting "red tape" in government'.¹⁰⁸ Other elements of this package include reducing application processing times through allowing projects with 'straightforward and well-understood impacts' on 'matters of national environmental significance' to be assessed on the basis of the information provided in the referral process;¹⁰⁹ excluding from the Commonwealth Environment Minister's controlled action decision any consideration of the adverse impacts of regional forest agreement forestry operations (for instance, where a factory will use timber harvested from a regional forest agreement region);¹¹⁰ allowing development proponents to put forward a number of alternative proposals to the Minister when proposing an action;¹¹¹ and provisions enabling an expanded use of bilateral agreements in order to 'free up the Commonwealth from having to approve those development proposals that can be managed at a state and/or territory level'.¹¹²

A similar concern with 'streamlining' (or perhaps, more accurately, reducing administrative burdens on the Department of the Environment and Water Resources) is evident in the new provisions relating to the listing of threatened species and ecological communities as protected 'matters of national environmental significance' under the *EPBC Act*. The amendments not only remove the obligation on the Commonwealth Environment Minister to ensure lists are kept

¹⁰⁷ *EPBC Act* s 527E(2)(e)–(g).

¹⁰⁸ *Senate Report*, above n 101, [1.22].

¹⁰⁹ The amendments to the *EPBC Act* have removed the former requirement in s 86 for preliminary information to be provided to the Minister prior to a decision on the assessment approach.

¹¹⁰ *EPBC Act* s 75(2B); Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill [No 1] 2006 (Cth) 30.

¹¹¹ *EPBC Act* s 72(3).

¹¹² *Senate Report*, above n 101, [2.8].

up-to-date,¹¹³ but initiate a new listing process that will rely more heavily upon ministerial discretion.¹¹⁴ Environmental groups strongly opposed these changes, fearing that the result would be politicisation of the listing process, with a resulting decrease in the effectiveness of the protection provided by the Act for threatened species and ecological communities.¹¹⁵

While ‘cutting red tape’ is an evident preoccupation of the amendments to the *EPBC Act*, there has also been an effort to clarify and strengthen aspects of the Act’s enforcement provisions. This includes amendments to introduce a strict liability standard for certain offences,¹¹⁶ and stronger provisions regarding the collection of information and detention of offenders that should prove most useful in fisheries’ enforcement activities.¹¹⁷ The focus on improved compliance and enforcement, however, only seems to extend to enforcement activities undertaken by the Department of the Environment and Water Resources and other regulatory authorities.

By contrast, highly controversial provisions of the amending Act removed rights of review to the Administrative Appeals Tribunal for a variety of decisions made by the Minister,¹¹⁸ and struck out the previous provision preventing the Federal Court from requiring an undertaking as to damages in cases where injunctions are sought by non-governmental actors to restrain contraventions of the *EPBC Act*.¹¹⁹ The latter amendment was justified on the basis that it would ‘work towards ensuring the elimination of vexatious injunctions by third parties’,¹²⁰ but sits oddly with a supposed commitment to ‘increased transparency’ in the environmental impact assessment and development approvals process.¹²¹ Moreover, as we highlight in Part IV, there are already many obstacles that face environmental groups seeking to enforce the *EPBC Act*, without the need to expose them to a risk of being required to provide an expensive financial surety in any attempted claim for injunctive relief.

III THE *EPBC ACT* IN A VIRTUOUS LIGHT

Given the standard model of environmental impact assessment the *EPBC Act* adopts, coupled with the narrow range of its triggers for impact assessment and the scope for exemption from its provisions, few in the environmental community would have predicted in 1999 that the *EPBC Act* might now be looked to for

¹¹³ This was effected by the repeal of the former s 185.

¹¹⁴ *EPBC Act* s 194.

¹¹⁵ *Senate Report*, above n 101, [5.31]–[5.43].

¹¹⁶ *Ibid* [4.23], [4.26].

¹¹⁷ *Ibid* [4.32]–[4.35].

¹¹⁸ It seems more than a strange coincidence that these amendments were introduced following a case brought in the Administrative Appeals Tribunal by the Humane Society International, which sought review of the Commonwealth Environment Minister’s decision to declare fishing operations in the Southern Bluefin Tuna Fishery an approved wildlife trading operation under the *EPBC Act*: see *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298 (Unreported, Olney DP, J Kelly and I R Way, 3 April 2006).

¹¹⁹ This provision was formerly found in *EPBC Act* s 478.

¹²⁰ *Senate Report*, above n 101, [2.19].

¹²¹ *Ibid* [2.23].

its potential virtues in promoting best practice environmental impact assessment.¹²² To the extent that this is the case today, much credit must go to actors outside the governmental sphere. Indeed, the recent round of *EPBC Act* amendments only appear to highlight the current federal government's 'shift from environment and heritage conservation towards facilitating developments and catering to development interests'.¹²³

The developments that have taken place in the interpretation of the *EPBC Act* can be attributed principally to the willingness of environmental non-governmental organisations ('NGOs') acting in the public interest to test the bounds of environmental impact assessment under the legislation in litigation, and the preparedness of courts to adopt expansive understandings of key terms like 'significant impact'. In these ways it has been possible to make out of the *EPBC Act*, 'a silk purse from a sow's ear', extending Commonwealth environmental impact assessment requirements to indirect (and potentially cumulative) impacts of proposals, and encouraging similarly expansive interpretative practices on the part of some state tribunals considering the environmental impact assessment requirements of state-based environmental and natural resource legislation.

Through the activism of these public actors, new boundaries for the scope of environmental impact assessment under the *EPBC Act* have been set, which provide the parameters for the day-to-day practice of impact assessment in the broader environmental planning and management sphere. In light of the recent amendments to the *EPBC Act*, the question of whether the boundaries and scope of environmental impact assessment can continue to be widened through actions initiated by environmental groups will need to be assessed as the bulk of these amendments come into operation during 2007.

A Inclusion of Indirect Impacts

It was the very first 'test' case of *Booth*,¹²⁴ launched soon after the *EPBC Act* came into force, that established the potential for more expansive environmental impact assessment at the Commonwealth level, extending beyond the site-specific impacts of proposals on a narrow range of 'matters of national environmental significance'. *Booth* involved an application by an environmental activist, Carol Booth, for injunctions under the *EPBC Act* to prevent a Queensland lychee farmer from operating electrified grids around his orchard to kill raiding flying foxes, including spectacled flying foxes.¹²⁵ At the time of the litigation, the spectacled flying fox was not a listed threatened species under the

¹²² Early assessments of the Act were lukewarm, if not pessimistic, as to its prospects for improving environmental impact assessment processes in Australia: see, eg, Laura Hughes, 'Environmental Impact Assessment in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (1999) 16 *Environmental and Planning Law Journal* 304; Beverly Kennedy, 'The Operation of the New *EPBC Act*' (2000) 74(8) *Law Institute Journal* 61.

¹²³ Evidence to Senate Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Canberra, 6 November 2006, 56 (Patrick Comben, Chair of the Australian Council of National Trusts).

¹²⁴ (2001) 114 FCR 39.

¹²⁵ *Ibid* 42 (Branson J).

EPBC Act,¹²⁶ so a case could not be mounted on the basis of the impacts on the species itself. Instead, the case turned upon whether a substantial reduction in spectacled flying fox numbers caused a significant impact on the world heritage values of the nearby Wet Tropics World Heritage Area.

In answering this question in the affirmative,¹²⁷ Branson J indicated that the Act's notion of impacts on 'matters of national environmental significance' would not be limited to 'direct' impacts in the sense of the physical consequences of activities undertaken within the boundaries of a protected area. Instead, *Booth* signalled that the *EPBC Act* could apply to the significant impacts of activities on a 'matter of national environmental significance', whether the activity causing the impacts took place within or outside the protected area.¹²⁸

The potential, intimated in *Booth*, for the *EPBC Act* to extend to the indirect impacts of development proposals on 'matters of national environmental significance' was reaffirmed and augmented by the Full Federal Court in the *Nathan Dam Case*.¹²⁹ The case involved a proposal for the construction of an 880 000 megalitre dam near Taroom on the Dawson River in central Queensland, which was designed to facilitate agricultural production and development in the region including 'cotton ginning' and 'expansion of the existing cotton growing industry'.¹³⁰ As in *Booth*, the *Nathan Dam Case* was initiated by an environmental NGO concerned by the likely broader effects of the proposed development on downstream 'matters of national environmental significance', such as the Great Barrier Reef World Heritage Area. However, the target of the action brought in the *Nathan Dam Case* was not the development itself, but rather a decision of the Commonwealth Environment Minister determining that any potential impacts on the Great Reef World Heritage Area from construction of the dam fell outside the scope of the *EPBC Act's* provisions. The Minister's proffered reason for this determination was that such impacts would be the result of third party action and hence were 'not impacts of the referred action, which is the construction and operation of the dam'.¹³¹

This narrow construction of impacts was rejected at first instance by Kiefel J of the Federal Court¹³² and then by the Full Federal Court on appeal.¹³³ The latter held that the notion of 'impact' under the *EPBC Act* 'can readily include the "indirect" consequences of an action and may include the results of acts done

¹²⁶ The public interest generated by the litigation led to the species being listed as a threatened species on 14 May 2002 following the case: see Department of the Environment and Water Resources, *EPBC Act List of Threatened Fauna* (2007) <<http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna>>; Amanda Hodge, 'Maligned Flying Fox Back in Favour', *The Australian* (Sydney), 21 May 2002, 5.

¹²⁷ *Booth* (2001) 114 FCR 39, 66 (Branson J).

¹²⁸ See D E Fisher, *Australian Environmental Law* (2003) 296.

¹²⁹ (2004) 139 FCR 24, 38–9 (Black CJ, Ryan and Finn JJ). The Full Federal Court upheld the decision of Kiefel J in the earlier case of *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003).

¹³⁰ *Nathan Dam Case* (2004) 139 FCR 24, 39 (Black CJ, Ryan and Finn JJ).

¹³¹ *Ibid* 30–1 (Black CJ, Ryan and Finn JJ) (reproducing the text of the Minister's reasons for his decision).

¹³² *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [38].

¹³³ *Nathan Dam Case* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).

by persons other than the principal actor'.¹³⁴ Hence, the impacts of an action on 'matters of national environmental significance' in this sense were found to include 'effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter'.¹³⁵ The Full Federal Court indicated that in the circumstances of the *Nathan Dam Case*, the requirement to assess 'all adverse impacts' of the proposal 'includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not'.¹³⁶ Nevertheless, the Court stressed that it was inappropriate to essay an exhaustive definition of 'adverse impacts', as this was a matter for case-by-case assessment by the Minister.¹³⁷

Judicial expansion of the scope of the *EPBC Act's* environmental impact assessment requirements so as to encompass the indirect effects of proposals on 'matters of national environmental significance' has done much, at a legal level, to redress the limitations imposed by the legislation's narrow range of protected matters. While there is still an eventual need to link environmental effects to a designated 'matter of national environmental significance', the courts have supported an approach whereby there may be a number of steps in the relevant chain of causation prior to the materialisation of environmental harm affecting a 'matter of national environmental significance'.

The only limitation imposed by the courts seems to be that of the plausibility of the postulated nexus between the action and any likely effects on 'matters of national environmental significance', with 'speculative' impacts excluded.¹³⁸ Yet even this leaves scope for further interpretation if, for example, it were held that account needs to be taken of the Minister's obligation to consider the 'precautionary principle' in determining the nature of impacts on 'matters of national environmental significance'. The precautionary principle (specified as a relevant factor for the Minister's 'controlled action' decision)¹³⁹ provides 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 environmental damage'.¹⁴⁰

It is difficult to predict how the Federal Court might respond to the new definition of 'impact' inserted in the *EPBC Act* as s 527E. Although the intention of the Commonwealth government in proposing the amendment seems to have been to restrict the scope for consideration of the indirect consequences of an action, the terminology used in the definition — 'substantial cause', 'to a major extent' and 'reasonably foreseeable' — is open to a range of constructions. In the

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid* 39 (Black CJ, Ryan and Finn JJ).

¹³⁷ *Ibid* 38 (Black CJ, Ryan and Finn JJ).

¹³⁸ *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Unreported, Kiefel J, 19 December 2003) [39]; *Mees v Kemp* [2004] FCA 366 (Unreported, Weinberg J, 31 March 2004) [107].

¹³⁹ *EPBC Act* s 391(1), (3).

¹⁴⁰ *EPBC Act* s 391(2).

area of tort law, there have been numerous attempts to define similar concepts in relation to the risk of harm and remoteness of damage. Australian courts have wrestled with the scope of such legal definitions in their application to factual circumstances. Tests in negligence law such as ‘not far fetched or fanciful’¹⁴¹ have come and gone as a semantic aid to gauging risk without producing an instrumental certainty of either definition or application. Beyond such concerns, the introduction of tortious concepts of causation seems a backward step in environmental law as such concepts are reminiscent of a period in which a heavy emphasis was placed on scientific data in determining causation and risk.¹⁴² With major scientific advances in the knowledge of the environment and recognition of the complexity and inherent uncertainty of ecological processes, the trend in environmental law has been away from deterministic tests of causation towards more precautionary approaches. In this regard, the *EPBC Act* has led the way in Australian environmental impact assessment legislation, endorsing the ‘precautionary principle’ as a mandatory consideration for ministerial decision-making in the impact assessment and approval process.¹⁴³

B *Inklings of an Extension to Cumulative Impacts*

Beyond the inclusion of impacts on ‘matters of national environmental significance’ linked indirectly to a single development proposal, both *Booth* and the Full Federal Court’s decision in the *Nathan Dam Case* hint at the prospect that the cumulative environmental impacts of multiple actions may also be covered.¹⁴⁴ Cumulative impacts may be described as environmental effects arising ‘either from persistent additions from one process or development or compounding effects involving two or more processes or developments’.¹⁴⁵

A notable aspect of Branson J’s judgment in *Booth* was the preparedness to make a finding that the farmer’s grids were likely to have a ‘significant impact’ on the values of the nearby World Heritage Area, despite minimal evidence that a lone farmer’s operations could be responsible for a ‘dramatic decline’ in spectacled flying fox numbers.¹⁴⁶ Likewise, in the *Nathan Dam Case*, the Full Federal Court seemingly had little difficulty with treating the potential third party activities of downstream irrigators and farmers (using water made available by the dam for irrigating crops, thereby washing off pesticides and other sediment into the river system) as part of the overall action of building the dam and hence encompassed within the proponent’s proposal.

While never specified in the courts’ decisions, these findings arguably reflect a sympathetic judicial stance to the notion that, in assessing the environmental impacts of human activities, it is inadequate to consider one project in isolation

¹⁴¹ *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 (Mason J).

¹⁴² Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (2005) 146.

¹⁴³ *EPBC Act* s 391.

¹⁴⁴ Chris McGrath suggests that another possible way to cover such impacts under the Act is through a broad interpretation of the term ‘action’: McGrath, ‘Key Concepts’, above n 86, 25–6.

¹⁴⁵ *Ibid* 37.

¹⁴⁶ *Booth* (2001) 114 FCR 39, 65 (Branson J).

from others to which it is linked.¹⁴⁷ Indeed, this understanding of the courts' decisions seems to have been accepted, in large part, by the Department of the Environment and Water Resources, whose May 2006 administrative guidelines directed the consideration of the 'facilitated' impacts of a proposal.¹⁴⁸ In this respect, the guidelines give the example of 'the construction of basic infrastructure in a previously undeveloped area [that] may, in certain circumstances, facilitate the urban or commercial development of that area.'¹⁴⁹

An even clearer statement of the coverage of cumulative impacts by the *EPBC Act* can be found in the recent judgment of Marshall J of the Federal Court in *Wielangta Forest*.¹⁵⁰ In this case, Senator Bob Brown of the Australian Greens alleged contraventions of the *EPBC Act's* provisions prohibiting significant impacts on listed threatened species without approval,¹⁵¹ as a result of Forestry Tasmania's operations in the Wielangta Forest.¹⁵² The Wielangta Forest is home to nationally-listed threatened species such as the Tasmanian wedge-tailed eagle, the broad-toothed stag beetle and the swift parrot, but is also covered by the Tasmanian regional forest agreement. Marshall J determined, however, that forestry operations in the area were not being carried out 'in accordance with' the regional forest agreement due to various management failures and hence did not enjoy an exemption from the ordinary environmental protection provisions of the *EPBC Act*.¹⁵³ Marshall J also found that forestry operations, current and future, were likely to have a significant impact on the wedge-tailed eagle,¹⁵⁴ stag beetle¹⁵⁵ and swift parrot.¹⁵⁶ Crucially, Marshall J found that impacts on threatened species may be 'significant' because of their cumulative nature. For instance, in relation to the wedge-tailed eagle, Marshall J remarked that proposed forestry operations

will cause a loss of breeding and foraging habitat for the eagle which is relatively insignificant in the context of other factors causing loss to such habitat, [yet] that loss can still be considered 'significant' in the context of legislation which is designed 'to protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) ...'. Loss of habitat caused by forestry operations, while small when compared to other causes, has

¹⁴⁷ *Nathan Dam Case* (2004) 139 FCR 24, 40 (Black CJ, Ryan and Finn JJ). See also *Mees v Roads Corporation* (2003) 128 FCR 418, 456 (Gary J).

¹⁴⁸ Indications of concern over cumulative impacts are also evident in the commissioning, by the Commonwealth Department of the Environment and Water Resources, of a study to assess risks to Australian bird species: see Biosis Research, *Wind Farm Collision Risk for Birds* (2006) Department of the Environment and Water Resources <<http://www.environment.gov.au/epbc/publications/wind-farm-bird-risk.html>>.

¹⁴⁹ Department of the Environment and Water Resources, above n 88, 8.

¹⁵⁰ *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) [94], [111], [146].

¹⁵¹ *EPBC Act* s 18(3).

¹⁵² *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) [3].

¹⁵³ *Ibid* [293].

¹⁵⁴ *Ibid* [102].

¹⁵⁵ *Ibid* [137].

¹⁵⁶ *Ibid* [162].

a significant impact on a threatened species where ‘to protect’ is seen as a duty not just to maintain population levels of threatened species but to restore the species.¹⁵⁷

Marshall J’s reasoning in this respect was based, in part, on the Full Federal Court’s discussion of the meaning of ‘impact’ in the *Nathan Dam Case*.¹⁵⁸ However, his Honour also referred to the *Convention on Biological Diversity* that the *EPBC Act* was intended to implement as an interpretative aid in construing the legislation.¹⁵⁹ Viewed in this context, Marshall J was of the opinion that the promotion of biodiversity conservation sought by the legislation

can only be achieved by favouring a construction of the *EPBC Act* which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened.¹⁶⁰

Beyond the judicial forum, an optimistic onlooker might discern complementary inklings at the ministerial level of a trend to extend assessments under the *EPBC Act* to the cumulative impacts of development proposals. The orange-bellied parrot scenario amounts, on one view, to an acknowledgement of the need to assess the biodiversity effects of a proposal in a holistic fashion, taking into account the additive impacts of the proposal together with similar, albeit unrelated, projects. Senator Campbell thus justified his initial decision to refuse the Bald Hills wind farm on the basis that the parrot species ‘was at such dangerously low levels in terms of population that any additional wind farm in this particular area would have an impact on the survival of the species’.¹⁶¹

If this decision is considered to set a precedent for future proposals referred to the Minister,¹⁶² it could encourage a much broader approach to determining the scope of assessments made under the *EPBC Act*, and establish a new high watermark for environmental impact assessment throughout Australia. Both the orange-bellied parrot decision and *Wielangta Forest* thus hold out significant promise to instil a more holistic approach to the assessment of the biodiversity effects of projects, helping to address the ‘death by a thousand small cuts’ phenomenon that has plagued biodiversityiversity protection and associated environmental impact assessment processes in the past.¹⁶³

¹⁵⁷ Ibid [94]; see also [102]. It was noted that ‘[l]oss of habitat is crucial to a species with very low population levels and densities and poor dispersal’: at [111] (broad-toothed stag beetle), [146] (swift parrot).

¹⁵⁸ Ibid [91], [92].

¹⁵⁹ Ibid [297].

¹⁶⁰ Ibid [300].

¹⁶¹ Amanda Hodge, ‘Bending in the Wind’, *The Australian* (Sydney), 21 April 2006, 13.

¹⁶² Hodge cannily remarks that ‘[i]n theory, to disprove accusations that his decision was political, [Senator Campbell] must show consistency and make similarly tough decisions on other development proposals under consideration’: *ibid*. The Bald Hills wind farm has now been given federal approval by Senator Campbell: see Topsfield, above n 9.

¹⁶³ The perception that the *EPBC Act* does not extend to the cumulative impacts of projects on ‘matters of national environmental significance’ has also been a source of criticism (and chagrin) on the part of commentators: see Macintosh and Wilkinson, above n 10, 164; McGrath, ‘Key Concepts’, above n 86, 37.

Indeed, on the most robust reading, the orange-bellied parrot episode and the *Wielangta Forest* decision signal the emergence of a new standard of ‘significant impact’ that is intolerant of very low levels of biodiversity risk.¹⁶⁴ In the former case, for example, the initial refusal issued for the Bald Hills wind farm was predicated on a predicted overall impact in relation to the orange-bellied parrot of one death per year as a result of collision with wind turbines.¹⁶⁵ If a similar analysis is applied by the Commonwealth Environment Minister in other cases, it may make *EPBC Act*-based claims a more attractive approach for pursuing species conservation, in comparison to the avenues available under state legislation.

Widespread destruction of natural habitat areas and the spread of urbanisation increase the likelihood that even relatively small projects may involve direct, indirect or cumulative impacts on species listed as threatened under the *EPBC Act*.¹⁶⁶ The *EPBC Act* not only makes such effects assessable through its processes of environmental impact assessment, but also specifies legal consequences for those undertaking activities likely to have significant adverse impacts, without approval.¹⁶⁷ The substantial penalties specified under the Act for contraventions of its requirements cast into the shade the much weaker enforcement possibilities available under many state biodiversity protection laws.¹⁶⁸ Indeed, *Booth* is a pertinent illustration of the better prospects federal avenues may often offer for protecting threatened species, compared with equivalent state mechanisms. Booth was successful in obtaining an injunction in the federal jurisdiction to prevent the farmer concerned operating electrified grids to kill spectacled flying foxes, whereas appeals to the Queensland Department of Natural Resources had not produced any protective action.¹⁶⁹

C Ensuring Government Accountability

While the inclusion of indirect (and potentially cumulative) impacts within the scope of environmental impact assessment under the *EPBC Act* is of undoubted importance in extending its ambit, this development is given real virtue by the opportunities the Act offers environmental NGOs, and others in the wider

¹⁶⁴ Some caution is warranted in extrapolating the rulings in *Wielangta Forest*. Not only are they currently the subject of an appeal, but the judge was also careful to confine his findings about the effect of forestry operations to the three species at issue in the case: see *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) [242].

¹⁶⁵ Smales, Muir and Meredith, above n 5, 33.

¹⁶⁶ A fact highlighted by Marshall J in *Wielangta Forest*.

¹⁶⁷ Successful prosecutions under the Act demonstrate its potential enforcement ‘teeth’: Matthew Baird, ‘The *EPBC Act* and Ramsar Wetlands: An Examination of the Greentrees Decisions’ (2004) 3 *National Environmental Law Review* 42; Shaun Harley, ‘\$450 000 Fine Shows *EPBC Act* Has Some Teeth’ (2004) 19(10) *Australian Environment Review* 8.

¹⁶⁸ For example, Victoria has implemented a Native Vegetation Framework under the *Planning and Environment Act 1987* (Vic), which despite a net gain policy objective, still operates within a process which permits the clearing of native vegetation by endorsing offsets for cleared areas.

¹⁶⁹ In fact, the Queensland Department of Natural Resources retrospectively authorised a permit for the culling of 500 spectacled flying foxes following the matter being brought to its attention by Carol Booth.

community, to hold governments and developers accountable for compliance with such broader assessment requirements.

Most notably, the *EPBC Act*, in contrast to much state-based environmental legislation, incorporates broad (albeit not open) standing requirements for actions taken to enforce the Act's provisions.¹⁷⁰ Restrictions on standing have been the bane of environmental groups in the past because of the general requirement to demonstrate an economically-based 'special interest' in the matter brought before the court;¹⁷¹ something which is difficult to prove where the claim invokes the public interest. The *EPBC Act*, however, allows actions by 'interested persons', defined broadly to include any person who '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 decision subject to challenge.¹⁷² These provisions also extend to organisations or associations who likewise engage in environmental protection, conservation or research activities.¹⁷³

The Act's generous standing requirements apply in respect of actions for injunctions to constrain breaches of its requirements (as, for example, where a developer undertakes a project with impacts on 'matters of national environmental significance' without approval)¹⁷⁴ or to seek judicial review of governmental decision-making under the Act (as in cases where, for instance, the Minister determines that there is no 'controlled action').¹⁷⁵

Judicial review actions are brought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') meaning that the other administrative law requirements of the *ADJR Act*, such as the obligation to furnish reasons on request, are also applicable to *EPBC Act* decision-making.¹⁷⁶ The provision of reasons by the Minister for a particular decision can be an invaluable tool for groups wishing to challenge the decision. Indeed, some applicants have been quite creative in taking advantage of the scope for ensuring greater government accountability offered by the combination of reason-giving requirements and generous standing provisions. In *Mees v Roads Corporation*, for example, a university professor was successful in obtaining a ruling that the Victorian government's referral documentation on a controversial freeway proposal was misleading and deceptive because it omitted to mention

¹⁷⁰ Gerry Bates, *Environmental Law in Australia* (6th ed, 2006) 155–63; *EPBC Act* ss 475(6)–(7), 487.

¹⁷¹ *Ibid* 148–55. See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J).

¹⁷² *EPBC Act* ss 475(6), 487(2).

¹⁷³ *EPBC Act* ss 475(7), 487(3). If an unincorporated association qualifies as a 'person aggrieved' under the latter test, a judicial review action may also be brought by an individual acting on behalf of the association: at s 488.

¹⁷⁴ *EPBC Act* s 475(1); see, eg, *Booth* (2001) 114 FCR 39.

¹⁷⁵ *EPBC Act* s 487; see, eg, *Nathan Dam Case* (2004) 139 FCR 24. While the Minister in this case determined that there was a 'controlled action', he did so only in relation to a narrow range of 'matters of national environmental significance' that excluded world heritage properties like the Great Barrier Reef: at 29–30 (Black CJ, Ryan and Finn JJ).

¹⁷⁶ *ADJR Act* s 13.

the strong chance that a freeway link would be built at some time in the future between the Eastern Freeway at Bulleen and the Metropolitan Ring Road at Greensborough, as a consequence of the building of the northern section of the Scoresby Freeway.¹⁷⁷

D Influence on State-Based Environmental Impact Assessment

Judicial interpretation of the *EPBC Act* is not only opening up possibilities for ensuring decision-making accountability in the federal jurisdiction, but also beginning to exercise an influence over the decision-making of state-based tribunals working with a range of environmental impact assessment and development-related legislation.¹⁷⁸ In this regard, one of the great virtues of the Full Federal Court's decision in the *Nathan Dam Case* is that it is based upon an 'ordinary meaning' interpretation of the word 'impact' — a term which is common to much environmental impact assessment legislation throughout Australia. Indeed, one of the consequences of the cooperative federalism efforts in the 1990s is a substantial degree of consistency in the focus of Commonwealth and state-based environmental impact assessment requirements on assessing environmentally 'significant effects/impacts' as part of development or resource-related decision-making.¹⁷⁹ This consistency may facilitate the uptake of indirect and cumulative impact assessment concepts by state tribunals, even where the legislative context differs.

Two cases before the Victorian Civil and Administrative Tribunal ('VCAT'), as well as a recent decision of the NSW Land and Environment Court illustrate this potential. The first VCAT case involved a proposal for expansion of the controversial coal-fired Hazelwood power station, thereby prolonging the life of this 'dirty' source of electricity for several more decades.¹⁸⁰ Morris P reasoned that a provision of the *Planning and Environment Act 1987* (Vic), allowing public submissions 'about an amendment' to a planning scheme¹⁸¹ could encompass a submission 'even if it relates to an *indirect* effect of the amendment, if there is a sufficient nexus between the amendment and the effect'.¹⁸² Morris J cited the *Nathan Dam Case* as support for this approach.¹⁸³ The result was to allow the consideration of public submissions regarding the potential climate change impacts of the power station expansion, despite the Victorian government's exclusion of such matters from the ambit of environmental impact assessment conducted under its major works legislation, the *Environment Effects Act 1978* (Vic).

¹⁷⁷ (2003) 128 FCR 418, 456.

¹⁷⁸ See, eg, McGrath, 'Swirls in the Stream of Australian Environmental Law', above n 10, 171, who notes the positive, flow-on effects of the *EPBC Act* processes for Queensland environmental law and biodiversity protection.

¹⁷⁹ Bates, above n 170, 316.

¹⁸⁰ *Australian Conservation Foundation v Minister for Planning* [2004] VCAT 2029 (Unreported, Morris P, 29 October 2004) ('*Hazelwood*').

¹⁸¹ *Planning and Environment Act 1987* (Vic) s 21(1).

¹⁸² *Hazelwood* [2004] VCAT 2029 (Unreported, Morris P, 29 October 2004) [41] (emphasis in original).

¹⁸³ *Ibid* [42].

The second VCAT case to apply the *Nathan Dam Case*-derived concepts did so in a way that transferred notions of ‘indirect impact’ from the planning and development situation to that of natural resource management. In determining whether to grant a water licence under the *Water Act 1989* (Vic) in the case of *Bates v Southern Rural Water*,¹⁸⁴ VCAT held that it could consider the broader environmental context, including the over-allocated status of the water resource concerned. Again, VCAT found support for an ‘emphasis on the broader potential environmental impacts’ of making a favourable licence determination in the Full Federal Court’s decision in the *Nathan Dam Case*.¹⁸⁵

The most recent decision to extend *EPBC Act*-style ‘indirect impact’ concepts to the interpretation of state environmental impact assessment legislation is the case of *Gray v Minister for Planning* (*‘Anvil Hill’*), decided by Pain J of the NSW Land and Environment Court.¹⁸⁶ The facts of this case were somewhat similar to *Hazelwood*, as they involved a challenge to the adequacy of the environmental impact assessment process carried out for a new coal mine on the basis of the failure to consider potential climate change impacts. The category of impacts at issue was indirect greenhouse gas emissions resulting from the burning of harvested coal at coal-fired power stations in NSW and overseas. Relying on the *Nathan Dam Case*, Pain J held that both the direct and indirect greenhouse impacts of the Anvil Hill project on the environment of NSW were relevant to the assessment process.¹⁸⁷ Consequently, her Honour found that:

there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A [of the NSW environmental impact assessment legislation].¹⁸⁸

This more holistic approach to the assessment of the effects of the project operated to make the potential climate change impacts of the mine relevant to environmental impact assessment, despite the global nature of the problem of climate change. Hence, as Pain J remarked, ‘[t]he fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process.’¹⁸⁹

IV DARK SIDES OF THE *EPBC ACT*

The emerging virtues of the *EPBC Act*, and its potential to influence interpretative practice beyond the Commonwealth jurisdiction, have renewed enthusiasm

¹⁸⁴ [2004] VCAT 2045 (Unreported, Martin P and Mainwaring M, 22 October 2004).

¹⁸⁵ *Ibid* [27] (Martin P and Mainwaring M).

¹⁸⁶ [2006] NSWLEC 720 (Unreported, Pain J, 27 November 2006).

¹⁸⁷ *Ibid* [91].

¹⁸⁸ *Ibid* [100].

¹⁸⁹ *Ibid* [98].

among environmental groups and others for exploring its use as a tool for enhancing biodiversity protection and instituting more rigorous practices of environmental impact assessment. Yet, as experience with the Act grows, many are also discovering that it has dark sides that may detract from, or even overshadow entirely, its possible virtues. As has been observed in Part III, a notable feature of the *EPBC Act's* rapid development over the past few years has been that the main impetus has come from the rulings of courts, combined with the activism of environmental groups, rather than through consistent government action (the orange-bellied parrot decision notwithstanding). This fact highlights three potential weaknesses of the *EPBC Act* which may constrain its future development as a mechanism for advancing best practice environmental impact assessment:

- 1 the vagaries of government administration of the Act (particularly at the 'political' level of ministerial decision-making);
- 2 the heavy reliance placed on environmental groups to scrutinise federal decision-making and to take action in response to government or developer lapses; and
- 3 the likely need to depend on the courts, rather than the federal government, for future progressive development of the environmental impact assessment requirements of the legislation.

Indeed, it is arguable that a number of the recent amendments to the *EPBC Act* reflect a concern that the legislation is beginning to be enforced via third party action a little too vigorously for the certainty of development.

As we go on to discuss in Part V, it may therefore need to be to the private sector, rather than public actors that we look for future expansion of the environmental impact assessment processes of the *EPBC Act*.

A Vagaries of Government Administration

Government decision-making, rather than that of courts, remains the primary site for giving effect to the provisions of the *EPBC Act* in respect to the large majority of proposals that attract federal scrutiny. The Department of the Environment and Water Resources is the Commonwealth government department that has principal administrative responsibility for overseeing assessments under the Act and advising the Commonwealth Environment Minister in relation to decisions such as whether a proposal amounts to a 'controlled action', the most appropriate assessment approach in such cases, and whether to grant approval for the development concerned.

Information available on the Department's website regarding assessments and approvals under the *EPBC Act* up to 30 June 2006 is not suggestive of a particularly robust approach to implementation of the legislation.¹⁹⁰ The Department

¹⁹⁰ Department of the Environment and Water Resources, *Environment Protection and Biodiversity Conservation Act 1999 Activity Report*, above n 80. For more comprehensive critiques in this regard: see Macintosh and Wilkinson, above n 10; Andrew Macintosh, 'Environment Protection

certainly does receive a large number of *EPBC Act* referrals for proposed developments, courtesy of the kind of due diligence practices that have developed on the part of proponents and their advisers in response to the Act's strict penalties for undertaking actions without approval.¹⁹¹ However, of the 1932 referrals received to 30 June 2006, only 424 were found by the Department to be 'controlled actions' within the scope of the *EPBC Act*.¹⁹²

Moreover, where proposals proceeded to the assessment stage, the most common option selected was the least onerous one of assessment on the basis of 'preliminary documentation' submitted by the development proponent.¹⁹³ This is perhaps not surprising as the Department of the Environment and Water Resources will often rely on its state counterparts to undertake a more thorough assessment of the project through state-based environmental impact assessment procedures.¹⁹⁴ Nonetheless, it means that for the vast majority of proposals proceeding through the *EPBC Act*'s environmental impact assessment process, any impacts on 'matters of national environmental significance' (which will not necessarily be the focus of decision-making in the state setting) are assessed only on the basis of documentary evidence prepared by the development proponent.¹⁹⁵

In addition, most projects that are assessed under the *EPBC Act* end in approval, albeit typically with conditions.¹⁹⁶ Of the 152 projects submitted for approval under the *EPBC Act* up to 30 June 2006, only four were refused.¹⁹⁷ The Bald Hills wind farm backflip reduces to three the total number of refusals issued over the Act's seven years of operation.¹⁹⁸

There is little in this record that indicates a generally low tolerance for environmental risk at the Commonwealth level, and indeed, it might seem to support the opposite conclusion. A recent independent review of the implementation and environmental achievements of the *EPBC Act* by the Australia Institute is scathing, describing the administration of the Act as an 'ongoing failure'.¹⁹⁹ In the 2006 Senate inquiry held to consider amendments to the *EPBC Act*, chronic under-resourcing of the Department of the Environment and Water Resources was identified as a major obstacle to effective administration of the environmental impact assessment process.²⁰⁰

and Biodiversity Conservation Act: An Ongoing Failure (The Australia Institute, 2006) <<http://www.tai.org.au/documents/downloads/WP91.pdf>>.

¹⁹¹ Macintosh and Wilkinson, above n 10, 151, observe, however, that referrals are not evenly spread across all development sectors, with fisheries, forestry and agricultural referrals very low.

¹⁹² Department of the Environment and Water Resources, *Environment Protection and Biodiversity Conservation Act 1999 Activity Report*, above n 80, 1.

¹⁹³ *Ibid* 5.

¹⁹⁴ This trend is likely to increase with amendments to the *EPBC Act* to expand the scope of bilateral agreements. John Scanlon and Megan Dyson, 'Will Practice Hinder Principle? — Implementing the *EPBC Act*' (2001) 18 *Environmental and Planning Law Journal* 14.

¹⁹⁵ This pattern was observable from early in the Act's implementation: see Sophie Chapple, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): One Year Later' (2001) 18 *Environmental and Planning Law Journal* 523, 529.

¹⁹⁶ Department of the Environment and Water Resources, *Environment Protection and Biodiversity Conservation Act 1999 Activity Report*, above n 80, 5.

¹⁹⁷ *Ibid*.

¹⁹⁸ Topsfield, above n 9.

¹⁹⁹ Macintosh, 'An Ongoing Failure', above n 190.

²⁰⁰ *Senate Report*, above n 101, [6.12]–[6.14].

Moreover, it is notable that on those occasions where the Commonwealth government has had an opportunity to support robust implementation of the *EPBC Act*, it has been unwilling to do so. For example, the Commonwealth Environment Minister opposed the imposition of an indirect impacts test in the *Nathan Dam Case*, arguing strenuously that such an extension of the *EPBC Act* would compromise the legislation's timely and efficient administration.²⁰¹ The Commonwealth also intervened in the recent *Wielangta Forest* case to argue in favour of the exemption of regional forest agreement forestry operations from the environmental protection provisions of the *EPBC Act*. In addition, reports in the media suggest that political considerations can plausibly explain many of the Commonwealth Environment Minister's 'environmentally-friendly' decisions under the Act. For example, a heritage declaration issued by Senator Campbell in respect of Victoria's Alpine region in 2005 followed close on the heels of intense lobbying of the Minister by mountain cattle grazers infuriated by the Victorian government's proposal to ban stock grazing in the Alpine National Park.²⁰² Even in the case of the Minister's intervention on behalf of the orange-bellied parrot, some have noted that this came in respect of a wind farm proposal that was strongly opposed by the local community in a marginal federal seat.²⁰³

It seems that where the Commonwealth government's political interests are less salient, the Commonwealth Environment Minister's powers under the Act are not exercised as stringently. In a decision following the orange-bellied parrot episode that concerned a proposal for a large residential estate at Eynesbury in Victoria, the Minister was noticeably less concerned by potential impacts on the critically endangered golden sun moth than had been the case when it came to endangered orange-bellied parrots. 'Significant impacts on the golden sun moth are not likely' was the conclusion reached by Senator Campbell and his Department in respect of the proposal, justifying a determination that the development was not a 'controlled action' for *EPBC Act* purposes.²⁰⁴ Interestingly, this determination came mere days after a national radio interview with Prime Minister John Howard who — when quizzed about whether his government was contemplating 'a very green approach' in respect of the Eynesbury proposal — reassured his interviewer that he would be taking a personal interest in the decision.²⁰⁵

²⁰¹ *Nathan Dam Case* (2004) 139 FCR 24, 33 (Black CJ, Ryan and Finn JJ).

²⁰² Melissa Fyfe and Farrah Tomazin, 'Alpine Heritage a "Hollow Gesture"', *The Age* (Melbourne), 11 June 2005, 3.

²⁰³ Hodge, above n 161. See also Australian Broadcasting Corporation, *Community 'Divided' over Bald Hills Wind Farm* (21 December 2002) ABC News Online <<http://www.abc.net.au/news/newsitems/200612/s1816552.htm>>.

²⁰⁴ Senator Ian Campbell, Minister for the Environment and Heritage, 'Eynesbury Development in Victoria Will Not Impact on the Golden Sun Moth' (Press Release, 11 April 2006).

²⁰⁵ ABC Radio, 'Moth at Centre of Political Slanging Match', *AM*, 8 April 2006 <<http://www.abc.net.au/am/content/2006/s1611666.htm>>.

B Limitations on Community-Based Enforcement Action

A pro-development bias on the part of the Commonwealth government (albeit not new)²⁰⁶ serves to reinforce the importance of the mechanisms that exist for enhancing decision-making accountability under environmental impact assessment legislation. The *EPBC Act* might be said to reflect best practice in terms of the range of mechanisms it offers for this purpose, from requirements for public advertising of, and comment on, referred proposals, to provisions allowing for third parties to seek injunctive action or judicial review of government decision-making. Nonetheless, pursuing accountability through legal means can come at a significant cost, particularly where court actions before the Federal Court are involved.

The Federal Court (which hears claims for injunctions and judicial review actions under the *EPBC Act*) is an expensive jurisdiction in which to litigate. The potential costs of such litigation have recently been compounded by the repeal of the provision in the *EPBC Act* forbidding the Court from imposing an undertaking as to damages where injunctive relief is sought.²⁰⁷ In addition to the risk of being required to post a financial surety before pursuing an injunction claim, there is a high likelihood of the issue of a substantial costs order against any environmental NGO which fails in a claim before the Court. While this might not dissuade impecunious community groups from bringing *EPBC Act*-related claims, the Federal Court is unlikely to countenance such claims in the absence of a security for costs order.²⁰⁸

For smaller community-based and environmental NGOs, this effectively requires any *EPBC Act* claim they bring before the Federal Court to be financially underwritten by larger environmental groups. In the *Nathan Dam Case*, for instance, the WWF backed the case brought by the smaller Queensland Conservation Council, essentially putting its 'money where its mouth is'.²⁰⁹ Yet, for cash-strapped environmental groups this only highlights the need to weigh up carefully the potential merits and benefits of an *EPBC Act* challenge, as against devoting resources to other, no doubt equally-worthy causes. Less costly challenges brought through the state system under state-based environmental impact assessment and planning laws may well be a more attractive option, particularly where state tribunals offer 'no costs' and relatively informal settings.²¹⁰ Hence, NGO action against governments or developers under the *EPBC*

²⁰⁶ The furore over the Hinchinbrook Island development in Queensland provides an apt illustration of this: see, eg, David J Haigh, 'Hinchinbrook: In Defence of World Heritage' (1999) 6 *Australian Journal of Natural Resources Law and Policy* 47.

²⁰⁷ The former protection in *EPBC Act* s 478 has been repealed. This restores the discretion of the Federal Court to demand an undertaking as to damages where an interlocutory injunction is sought under the *EPBC Act*.

²⁰⁸ *Federal Court Rules 1979* (Cth) O 28(3).

²⁰⁹ Environmental Defenders Office (Qld) Inc and Environmental Defenders Office of North Queensland Inc (2003) *Bulletin* — February 2003 2.

²¹⁰ VCAT is one such example where parties generally bear their own costs and self-representation is permitted: see *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 62(1)(a), 109(1). See also McGrath, 'Swirls in the Stream of Australian Environmental Law', above n 10, 171–2.

Act is only likely to take place in the rare case where the environmental benefits are seen to very clearly outweigh the financial costs of litigation.

Besides its obvious financial burdens, using litigation as a strategy for improving the rigour of environmental impact assessment processes may be one that carries with it a number of hidden costs for environmental groups. In preparing for an *EPBC Act* case there is generally a need to engage experts to provide assessments of the environmental impacts of a proposal, and also to secure the services of competent legal counsel. There are many individuals who regularly provide their services pro bono, or at a lesser cost, where litigation is brought in the public interest. Nevertheless, the specialised nature of the *EPBC Act*, and indeed the area of environmental management as a whole, means that NGOs necessarily have a limited band of potential experts to draw on. Individuals continually approached for aid with litigation under the *EPBC Act* may understandably experience ‘compassion fatigue’ at some point.

Quite apart from this problem is the invidious position in which NGOs may find themselves. The opposing parties in cases to enforce environmental impact assessment requirements are often the very same governments that environmental groups are lobbying, in other contexts, for reforms to environmental law or for contributions to funding their activities. In this way, the very success attributable to the effects of a ‘new environmental activism’²¹¹ in the *EPBC Act* context may prove to be self-limiting over the longer-term as governments may seek to rein in NGO activity. Arguably, it was this kind of thinking on the part of the federal government that saw the recent amendments to the *EPBC Act* to remove Administrative Appeals Tribunal review rights and the protections afforded by the ‘no undertakings as to damages’ provision.²¹²

C Perils of Reliance on ‘Activist’ Judicial Interpretation

Even where these practical hurdles to *EPBC Act* litigation can be overcome, public interest claimants are by no means guaranteed a warm reception for their arguments before the courts. The judiciary is an institution which tends to be conservative in nature, bound as it is to respect the doctrine of separation of powers²¹³ and so to strike a delicate balance between the interpretation of legislation enacted by democratically-elected parliaments and developing the law to meet ever-changing social needs.²¹⁴ Precedents, where set by the courts, can have wide ramifications throughout the legal system, but this may only make judges more cautious in issuing them.

Added to this is the trend towards ‘conservative’ appointments at the highest levels of the judicial system,²¹⁵ as well as a resurgence of literal approaches to

²¹¹ Gardiner, above n 15.

²¹² ‘Labor Senators’ Findings’, ‘Report by the Australian Greens And The Greens (WA)’ in *Senate Report*, above n 101, 60.

²¹³ See, eg, R A Hughes, G W G Leane and A Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (2nd ed, 2003) 155.

²¹⁴ See, eg, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 29–30 (Brennan J).

²¹⁵ Former Deputy Prime Minister Tim Fischer famously called for the appointment of ‘capital C conservatives’, a goal apparently achieved soon after in appointments to the High Court bench:

statutory interpretation evident even in the Full Federal Court's decision in the *Nathan Dam Case*.²¹⁶ Although a textual approach need not always connote a conservative stand on issues, and 'not infrequently [judicial] appointees disappoint the illegitimate expectations of those who appoint them',²¹⁷ nonetheless judgments labelled 'activist' are much thinner on the ground than was the case a decade ago. In this environment, calls for the judiciary 'to be bold spirits rather than timorous souls'²¹⁸ may not always be heeded.

It is by no means certain, therefore, that the *Nathan Dam Case*-style arguments taken before the Federal Court or state-based tribunals will be successful, particularly where controversial issues are at stake. In one recent VCAT case, indirect impacts claims presented on behalf of environmental groups who were objecting to a proposal for the establishment of a blue gum plantation were not accepted. Morris P ruled that in considering the application, the Tribunal was required to have regard to the effects of preparatory ploughing of the land, but not to the flow-on environmental impacts associated with the application of pesticides or the planting of blue gum trees.²¹⁹ In the federal jurisdiction, another important *EPBC Act* decision was recently handed down by Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* ('*Wildlife Whitsunday*').²²⁰ The case concerned a challenge by an environmental NGO to decisions of the Department of the Environment and Water Resources that two new Queensland coal mines could not be designated 'controlled actions' on the basis of the potential for resulting greenhouse gas emissions to adversely affect 'matters of national environmental significance' like the Great Barrier Reef World Heritage Area.²²¹ The Commonwealth Environment Minister's delegate in each case had found allegations of contributions to global warming, with flow-on effects for 'matters of national environmental significance', to be 'speculative'.²²² Dowsett J was also clearly not enamoured of the applicant's claims of environmental impact, even if assessed on a 'precautionary' basis,²²³ concluding that:

David Solomon, 'Power Grab by Stealth', *The Courier Mail* (Brisbane), 21 June 2000, 17; Cynthia Banham, 'Heydon Appointed High Court Judge', *Sydney Morning Herald* (Sydney), 18 December 2002, 3.

²¹⁶ The Court indicated that its interpretation based on the ordinary meaning of the term 'impact' was one also warranted by the objects of the Act: *Nathan Dam Case* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).

²¹⁷ Sir Ninian Stephen, 'Judicial Independence' (Speech delivered at the Inaugural Annual Oration in Judicial Administration, Queensland, 21 July 1989) 12.

²¹⁸ Justice Paul L. Stein, 'Are Decision-Makers Too Cautious with the Precautionary Principle?' (2000) 17 *Environmental and Planning Law Journal* 3, 3.

²¹⁹ *Great Southern Property Managers v Colac Otway SC* [2006] VCAT 706 (Unreported, Morris P, 21 April 2006) [9]. Arguably Morris P's decision was constrained by his earlier ruling that only the ploughing of the land (and not planting of trees or application of pesticides) were 'works' requiring a permit.

²²⁰ [2006] FCA 736 (Unreported, Dowsett J, 15 June 2006).

²²¹ *Ibid* [39]–[40].

²²² *Ibid* [18], [21], [30].

²²³ Dowsett J dismissed the applicant's arguments for reliance on the precautionary principle in *EPBC Act* s 3A (although it was not clear why the applicant sought to rely on this provision rather than s 391 which applies directly to the Minister's 'controlled action' decision). Dowsett J stated: 'It is not clear that this "principle" can be applied to the decision-making process prescribed by s 75. In any event it has not been established that either project will cause serious or

The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. The applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia. This case is far removed from the factual situation in *Minister for Environment and Heritage v Queensland Conservation Council Inc.*²²⁴

Dowsett J's interpretation of the indirect impacts test under the *EPBC Act* may not necessarily be followed or it may be able to be distinguished, as Pain J sought to do in *Anvil Hill*.²²⁵ Nonetheless, the aspersions Dowsett J cast on the applicant's 'assertion that greenhouse gas emission is bad' raise a legitimate question as to whether the legislation was ever intended to extend to the climate change consequences of development projects, given the explicit exclusion of a 'greenhouse trigger'.

The case thus serves to highlight the way in which the application of the legislation may still be hindered, in some situations, by the narrow focus of its specified 'matters of national environmental significance'.

Arguably, it is the responsibility of the legislature, and not the courts, to decide which matters are designated as 'matters of national environmental significance'. However, this leaves in place a legislative scheme which permits a somewhat lop-sided assessment of environmental impacts by the federal government in situations such as that raised by the Bald Hills wind farm project. Under the *EPBC Act*, the Commonwealth Environment Minister is obliged to ensure a serious consideration of impacts on endangered species like the orange-bellied parrot because it is a 'matter of national environmental significance'.²²⁶ However, other issues — arguably of similar national-level significance such as climate change — will not be weighed in the balance by the Minister because they are not included as 'matters of national environmental significance'. By contrast, if the *EPBC Act* designated a broader range of 'matters of national environmental significance', it would be possible for federal-level decision-making to evaluate multiple environmental considerations and, potentially, to reach more balanced decisions.

irreversible environmental damage': *ibid* [53]–[54]. Arguably, interpretations of the precautionary principle that take this kind of 'threshold' approach pay insufficient attention to the impact of scientific uncertainty on the ability of decision-makers to reach firm judgements about the nature and extent of possible harms: Peel, above n 142, 221–2.

²²⁴ *Wildlife Whitsunday* [2006] FCA 736 (Unreported, Dowsett J, 15 June 2006) [72] (citations omitted).

²²⁵ *Anvil Hill* [2006] NSWLEC 720 (Unreported, Pain J, 27 November 2006) [92]–[93].

²²⁶ *EPBC Act* s 18.

V INSTILLING A CULTURE AND PRACTICE OF VIRTUE

An appraisal of environmental impact assessment under the *EPBC Act* suggests that it has important dark sides in addition to any possible virtues garnered by the courts' expansive interpretation of its test of 'significant impact' on 'matters of national environmental significance'. For some, the deficiencies of the *EPBC Act*'s environmental impact assessment regime are now so extensive as to require another comprehensive overhaul of impact assessment processes at the federal level.

Proposals for substantial reform of environmental impact assessment processes under the *EPBC Act* were recently put forward by Andrew Macintosh and Debra Wilkinson,²²⁷ who suggest the consideration of alternative options to 'significant impact' assessment, such as a zoning process or ministerial call-in power.²²⁸ Macintosh and Wilkinson base their call for amendment of the *EPBC Act* on a detailed assessment of the operation of environmental impact assessment under the legislation, which focuses on the data made publicly available about its administration by the Department of the Environment and Water Resources.

However, the criteria chosen by Macintosh and Wilkinson for assessing the effectiveness of the *EPBC Act*'s environmental impact assessment procedures raise considerations of how well these procedures perform in the public sphere. For instance, Macintosh and Wilkinson consider the effectiveness of the *EPBC Act* in achieving its declared legislative objectives, its cost-effectiveness, and indications of its administrative feasibility and enforceability. While the force of many of their critiques of the decision-making processes overseen by the Department of the Environment and Water Resources is acknowledged,²²⁹ our overall assessment of the development of environmental impact assessment under the *EPBC Act* is not quite so bleak.²³⁰ An unexpected salvation for the Act's environmental impact assessment processes may yet be found in quite a different quarter than the public sector activities that are the focus of the critique by Macintosh and Wilkinson. We would argue that some of the most promising changes to the culture and practice of environmental impact assessment — that have themselves been spurred on by 'activist' interpretations of the *EPBC Act*'s 'significant impact' test — are presently centred in the private sector. Environ-

²²⁷ Macintosh and Wilkinson, above n 10, 170–7. See also Macintosh, 'An Ongoing Failure', above n 190.

²²⁸ See Macintosh and Wilkinson, above n 10, 173, where in respect of the former, the authors suggest the creation of zones over World Heritage, internationally-significant *Ramsar* wetland sites, and other protected areas, using a series of plans where certain activities are designated as permitted, prohibited and so on. While the authors see this as a more 'cost-effective' option for industry and development proponents, the public cost of carrying out and administering a zoning process would be very substantial and might lead to unnecessary duplication given existing local and state-based planning schemes: see also McGrath, 'Swirls in the Stream of Australian Environmental Law', above n 10, 179–81.

²²⁹ Indeed, their critiques point to some of the darker prospects of the *EPBC Act*, highlighted above, arising out of the vagaries of government administration: see above Part IV(A).

²³⁰ See also McGrath, 'Swirls in the Stream of Australian Environmental Law', above n 10, 170–6, who mounts a spirited defence of the Act and its environmental impact assessment processes, noting a number of examples, like the Donnybrook sand mine and Illuka Resources mineral sands mine, where *EPBC Act* involvement has produced more rigorous assessments of environmental impacts.

mental impact assessment practices in this sphere are necessarily more difficult to capture and quantify than numbers of *EPBC Act* referrals or the costs of the administration of the Act since they are occurring in the interstitial spaces between the more high-profile activities of public actors like governments and courts.²³¹

The tendency of environmental law (and environmental lawyers and other practitioners) to focus upon the public foreground in assessing environmental impact assessment effectiveness is understandable, given the conventional reference to this sphere as the one best suited to advance public interest objectives related to environmental protection.²³² In part, the reliance on public law — primarily grounded in statute-based regulatory regimes — reflects a view that governments have the ultimate responsibility for achieving environmental outcomes. Yet, as with so many other areas of traditional governmental responsibility, it needs to be recognised that governments themselves operate under many (and increasing) constraints in achieving such objectives.²³³ In addition, governments are not just law-makers and law-enforcers; they clearly operate in a political context of competing policy priorities as the orange-bellied parrot scenario so clearly demonstrates. Environmental impact assessment in Australia has always been dogged by its inherently political character,²³⁴ despite the concerted moves over time to establish assessments on a broad procedural and substantive legal basis. Such legal reforms — especially those to improve the transparency of government decision-making and provide avenues for court-based challenges — can act as an important check on the potential for politically-driven assessment outcomes. Yet, as our analysis has highlighted, reliance on NGOs and courts to spearhead a ‘new environmental activism’ may ultimately prove to be a self-limiting strategy.

While, in the sphere of public law, there would seem to be many difficulties standing in the way of the *EPBC Act* exerting a positive influence on the development of environmental impact assessment in Australia, we believe that the legislation still has great potential to bring about lasting changes to the culture of environmental decision-making and the way in which it is practised, both at the federal and state levels. Given limitations on government administrators, as well as other public actors like NGOs and courts, those crucial in promoting such changes are unlikely to be the stakeholders that conventional public law models would predict. If the *EPBC Act* is to continue to play a significant role in instilling a more environmentally virtuous culture and practice in the mainstream of Australian environmental impact assessment, there will be a need to draw also on activities of those in the private sector. The self-interested actions of these actors, taken to comply with the framework set by the *EPBC*

²³¹ Cf David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 *Sydney Law Review* 5.

²³² Indeed, we have done so ourselves in previous analyses of the *EPBC Act*: see Peel and Godden, above n 14.

²³³ Rosemary Lyster, ‘(De)regulating the Rural Environment’ (2002) 19 *Environmental and Planning Law Journal* 34, 41.

²³⁴ Examples of political controversies over the environmental impacts of development include the Franklin Dam, Hinchinbrook, Paradise Dam and wind farms scenarios.

Act, can provide the stimulus for an improvement in environmental impact assessment processes in Australia, albeit via an indirect route.²³⁵ Already, private sector actors, and their advisers, are showing their awareness of the *EPBC Act*'s extended scope and potential to effect changes to environmental impact assessment practices. For instance, one commentator from a commercial law firm observes:

proponents will no longer be able to satisfy the requirements associated with undertaking an environmental impact assessment by only considering the *direct* impacts of a proposal. Courts and tribunals are now demanding a more rigorous approach towards environmental impact assessment, and are insisting on an assessment of impacts that would, until recently, have been considered too remote to have been of relevance to the environmental impact assessment process.²³⁶

To the extent that broader notions of environmental impact assessment are internalised by private sector actors — development proponents, financial underwriters and commercial legal advisers — they could produce significant change in the day-to-day routine of commissioning and undertaking environmental assessments. These broader notions of environmental impact assessment might be adopted as an aspect of due diligence designed to safeguard proponents (and their generally highly risk-averse advisers and financiers) against legal and financial risk. Eventually, however, the need for comprehensive processes of environmental impact assessment as part of development planning might come to be seen as an element of a new environment-oriented ethics practised by lawyers and other professionals who owe duties beyond those simply to their developer clients. Thus the moral of the *EPBC Act* story could ultimately be one of the triumph of environmental virtue, albeit achieved primarily through the background work of private actors rather than dramatic court battles between environmental NGOs and governments.

We are not, however, so sanguine (or, we hope, naive) about the prospects for private sector-led augmentation of environmental impact assessment processes in Australia that we would advocate the relaxation of NGO and community vigilance over the accountability of government decision-making, or discourage further judicial or legislative expansion of the *EPBC Act*.²³⁷ Macintosh and Wilkinson's finding that referrals under the Act have been particularly low in the agricultural, forestry and fishery sectors — despite the significant potential for

²³⁵ This can be seen as an example of an emerging trend of 'indirect governance' in the environmental field in Australia. By 'indirect governance' we refer to modes of regulation and ways of influencing the behaviour of environmental actors that, rather than relying on government action and sanctioning, use incentives of various kinds to promote the adoption of behaviours with environmentally beneficial effects. See also Peter N Grabosky, 'Governing at a Distance: Self-Regulating Green Markets' in Robyn Eckersley (ed), *Markets, the State and the Environment: Towards Integration* (1995) 197.

²³⁶ Gardiner, above n 15. See also the client briefing documents issued in the wake of the *Anvil Hill* case such as Annette Hughes and Julie-Anne Pearce, 'Climate Change Litigation — Environmental Impact Assessment Must Properly Assess Greenhouse Gas Emissions' (December 2006) *Allens Arthur Robinson: Focus* <<http://www.aar.com.au/pubs/ldr/focrddec06.htm>>.

²³⁷ McGrath, 'Swirls in the Stream of Australian Environmental Law', above n 10, 177. We would also welcome inclusion of a new 'matters of national environmental significance' in the *EPBC Act* dealing with climate change impacts, which we believe could facilitate a more 'balanced' consideration of multi-faceted environmental problems at the federal level.

land-clearing and aquaculture projects to adversely impact ‘matters of national environmental significance’ — suggests there may be gaps in any private sector-led revolution in environmental impact assessment practice. Hence, we would not discount the possible grey cloud accompanying any silver lining offered by the emergence of due diligence practices of environmental impact assessment in the private world. If these practices are primarily driven (at least initially) by risk management considerations, then their scope of influence may also be limited to those for whom such considerations are of overriding importance.²³⁸ This in turn points to a broader challenge for any scheme of environmental impact assessment governance that seeks to harness private sector practices in the pursuance of public sector environmental goals.

The well-established safeguards of the public sphere, such as natural justice, freedom of information and access to review, currently do not penetrate very far into the private arena. Environmentalists, NGOs and scholars are only just beginning to think through how substantive accountability and transparency measures might be introduced into hybrid public–private governance structures.²³⁹ Thus, the coming challenge for those working in the public interest to improve impact assessment processes in the environmental field may well be to find ways to design and oversee mechanisms that better expose the deliberations and workings of the private sector to the public eye.

²³⁸ These may be primarily large corporate actors engaged in processes of urban or commercial development. For a discussion of how a risk management orientation may encourage ‘beyond compliance’ environmental performance see Daniel J Fiorino, *The New Environmental Regulation* (2006) 112–6; Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (2003) 149.

²³⁹ See, eg, Catherine Lyall and Joyce Tait (eds), *New Modes of Governance: Developing an Integrated Policy Approach to Science, Technology, Risk and the Environment* (2005).