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**Environment Protection and
Biodiversity Conservation Act**
A Five Year Assessment

Andrew Macintosh

Debra Wilkinson

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The opinions presented and conclusions drawn remain the responsibility of the authors.

Summary

When the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was passed in June 1999, the Federal Government and several environment groups promised it would revolutionise the Commonwealth's involvement in environmental issues and improve conservation outcomes. The World Wide Fund for Nature Australia went as far as calling it 'the biggest win for the environment in 25 years' (WWF 1999). It is now five years since the EPBC Act commenced and the evidence suggests the Act has fallen well short of these expectations.

This paper analyses whether the environmental assessment and approval (EAA) process under the EPBC Act is fulfilling its environmental objectives. In particular, it considers whether:

- there has been any improvement in the condition of the environmental issues covered by the EAA regime;
- the activities that are threatening the environmental issues covered by the EAA regime are being appropriately regulated;
- the lists of threatened species, threatened ecological communities and national heritage places, which are linked to the EAA regime, have been appropriately maintained;
- the Commonwealth has taken adequate steps to ensure people comply with the EAA regime; and
- the bilateral agreements have resulted in improvements in state and territory environmental laws and reduced unnecessary duplication.

In almost all areas, the regime has failed to produce any noticeable improvements in environmental outcomes. The activities that pose the greatest threat to the Act's 'matters of national environmental significance' are rarely being referred to the Minister and, when they are, the Minister is not taking adequate steps to ensure appropriate conservation results. In five years, the EAA provisions have been responsible for stopping only two activities out of potentially thousands and the conditions that have been imposed on developments under the regime have largely been ineffectual, unenforceable or a mirror of those already imposed under other processes.

The failure of the EAA regime is illustrated by the statistics on land clearing. When the EPBC Act was passed, the groups that supported the legislation suggested it would help in the 'fight against landclearing' (Beynon 1999). But since the EAA regime commenced, the annual clearing rates in Queensland have actually *increased*. This is notwithstanding the fact that the areas with the highest clearing rates contain several matters of national environmental significance.

Despite overwhelming evidence of widespread non-compliance, the Commonwealth has taken only two enforcement actions in relation to the EAA regime in five years. The first was dismissed at the committal hearing while the second resulted in the imposition of substantial civil penalties on a farmer and company based in northern New South Wales. The successful civil action, which has become known as the Greentree Case,

was hailed by the Federal Government and certain environment groups as a victory for the environment. One long-time supporter of the EAA regime even suggested the case was evidence that '(t)he times, they really are a' changin'' (Graham 2003a). This upbeat assessment of the events failed to recognise that the Commonwealth bungled the case. Evidence of illegal clearing by the defendants was given to the Commonwealth approximately ten months before the case was initiated and 80 per cent of the clearing occurred while the Commonwealth was trying to negotiate a settlement with the defendants. This type of case management does not engender confidence that the Commonwealth is committed to improving compliance.

The administration of the lists that are linked to the EAA regime has also been unsatisfactory. Numerous species and ecological communities that are eligible for listing as threatened have not been listed for what appear to be political reasons. For example, no commercial marine fish species has been listed, despite the fact that the evidence suggests that a number (including the southern bluefin tuna) meet the listing criteria. Similarly, in the five years since the Act commenced, the Minister has listed only ten ecological communities when the available evidence suggests the total number of threatened terrestrial ecosystems and ecological communities alone is in the vicinity of 3000. There are strong grounds for arguing the Minister is in breach of his statutory duty to 'take all reasonably practical steps' to maintain the lists of threatened species and ecological communities appropriately.

John Mulvaney (a former member of the Australian Heritage Commission) has suggested that the National Heritage List has become a 'political plaything' (Mulvaney 2005). In a year and a half only 13 places have been listed and it appears the Minister is avoiding making listing decisions that could upset the Coalition's core constituents and is using the listing process to score political points against state Labor governments. Rather than the new heritage regime being a 'major advance' over previous Commonwealth heritage laws (Graham 2003b), it appears to be little more than an exercise in political marketing.

Finally, supporters of the EPBC Act made much of the notion that the bilateral agreement process could be used to 'leverage' improvements in state and territory environmental laws. Only four assessment bilateral agreements have been signed and none of them has resulted in anything other than minor changes to state and territory processes.

On the basis of the available evidence, it is hard to describe the EAA regime as anything other than a waste of time and money. Industry has been forced to shoulder large compliance costs, and somewhere between \$55 million and \$150 million of taxpayer funds have been spent on the regime. The environmental return on this investment has been negligible. While governments legitimately regulate industry in pursuit of social and environmental objectives, they should ensure society receives value for money. In this case, since the EAA regime commenced, the condition of Australia's natural and cultural heritage has continued to decline and the EAA provisions have not made a noticeable contribution to stopping or reversing this trend.

1. Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was passed in June 1999 and commenced 13 months later on 16 July 2000. At the time, members of the Government described the Act as ‘landmark legislative reform’ (Hill 2000), ‘a gigantic step forward for Australia’ (Washer 1999) and ‘the most significant legislation dealing with environmental issues that has ever been presented to the Commonwealth Parliament’ (Stone 1999a). Government statements were matched by lavish praise from environment groups involved in brokering the deal that led to the Bill’s passage through the Senate. For example, the World Wide Fund for Nature Australia called it ‘the biggest win for the environment in 25 years’ (WWF 1999). Five years later, the evidence suggests this enthusiasm was misplaced.

The bulk of the EPBC Act is a consolidation of several statutes that were passed between the 1970s and the early 1990s, including the *National Parks and Wildlife Conservation Act 1975* (Cwlth), *Whale Protection Act 1980* (Cwlth), *World Heritage (Properties Conservation) Act 1983* (Cwlth) and *Endangered Species Protection Act 1992* (Cwlth) (Bateman 2001; McGrath 2001; Macintosh 2004). However, the Act contains a number of novel elements, the most important being the environmental assessment and approval (EAA) provisions which are supposed to protect the matters of national environmental significance and promote the conservation of biodiversity.

Disappointingly, the EAA provisions have not been responsible for any notable improvements in environmental outcomes and have failed to prevent the continued decline of Australia’s natural and cultural heritage. They have also cost the Australian taxpayer somewhere between \$55 million and \$150 million.¹

This paper presents information on the operation of the EAA regime which, it is argued, has failed to produce any noticeable improvements in conservation outcomes. Section 2 provides a brief outline of the EAA provisions. Section 3 analyses what the EAA process has achieved since it commenced in July 2000 and Section 4 draws a conclusion.

¹ The cost of administering the EAA process is difficult to determine. The only publicly available information on this issue is found in the annual reports of the Department of the Environment and Heritage (DEH 2002, 2003 and 2004a) and the budget statements issued by the Minister (Hill 2001; Kemp 2002, 2003a and 2004). These sources suggest the annual cost of administering the EAA regime has varied between approximately \$5 million and \$15 million. However, by the ministers’ own admission, some of these figures are incomplete (Hill 2001; Kemp 2002). A former member of Dr Kemp’s staff has suggested that the total annual cost of administering the regime is probably in the order of \$30 million (Ahern, L. pers comms 2004).

2. The EAA process

The EAA process is divided into three distinct parts: referral, assessment and approval.²

Referral

If a person is taking an action that may have a significant impact on a matter protected under Part 3 of the EPBC Act, they are required to refer details of the action to the Commonwealth Minister for the Environment and Heritage (the Minister).³ The matters protected under Part 3 are:

- the so-called ‘matters of national environmental significance’;
- the environment on Commonwealth land; and
- the environment generally where the relevant action is carried out on Commonwealth land or is undertaken by the Commonwealth or a Commonwealth agency.

There are seven matters of national environmental significance: World Heritage Areas, Ramsar wetlands, listed threatened species and ecological communities, listed migratory species, nuclear actions, the Commonwealth marine area, and, after recent amendments to the Act, national heritage places.

Upon receiving a referral, the Minister must determine whether the action requires approval under the Act (this is often called the ‘controlled action’ decision). This requires the Minister to decide whether the action is likely to have a significant impact on a matter protected under Part 3 of the Act.

In making the controlled action decision, the Minister has three options: the action requires approval, the action does not require approval, or the action does not require approval if it is undertaken in a manner specified. The ‘manner specified’ process is intended to enable the Minister to set conditions on how an action can be taken so it does not have a significant impact on a matter protected under Part 3. Until recently these conditions were not enforceable, a situation that was reversed after the Australian Democrats drafted amendments that were subsequently tabled by Senator Meg Lees during the negotiations concerning the so-called Heritage Bills in 2003.⁴

² For a more detailed discussion of the nature of the EAA process, see McGrath (2001) and Macintosh (2004).

³ There are a number of exemptions from this general requirement. See Macintosh (2004) for more details.

⁴ See, *Environment and Heritage Legislation Amendment Act (No.1) 2003*, Schedule 4, Item 1E. This amendment was originally drafted by the Australian Democrats and it formed part of a larger package of amendments that were the subject of negotiations between the Australian Democrats and the Government. The majority of the amendments drafted by the Australian Democrats were misappropriated by the Government and given to Senator Lees, who then tabled them as her own in a slightly altered form (Humane Society International 2003a). Most of the changes were made so as to ensure the Australian Democrats could not oust Senator Lees’ amendments by tabling a set of amendments that were exactly the same as hers. In addition, the amendments tabled by Senator Lees did not include provisions to ensure the listing process for national heritage places was based solely on heritage issues, which was the key

Assessment

If the Minister decides an action requires approval under the Act it moves to the assessment phase. The Act sets out five methods of assessment: public inquiry, environmental impact assessment, public environmental report, preliminary documentation and accredited assessment process.

An accredited assessment process is a state or territory assessment procedure that is accredited by the Minister for the purpose of assessing a particular action. The Act also contains a procedure for the exemption of actions from assessment if they are assessed under another Commonwealth process or under a state or territory process that is designated in an assessment bilateral agreement.

Approval

After the assessment process has been completed, the Minister must decide whether to approve the action. When making this decision, the Minister is required to have regard to a broad range of issues, including economic and social matters related to the action. If the action is approved, the Minister can attach enforceable conditions to the approval to protect, repair or mitigate damage to the matter that triggered the approval requirement.

Bilateral agreements

The Act contains provisions that enable the Commonwealth to enter into agreements (called ‘bilateral agreements’) with the states and territories to accredit their environmental assessment and approval processes. An action that is assessed or approved under a process that is accredited under a bilateral agreement is exempt from the equivalent process in the EAA regime.

The bilateral agreement provisions were intended to minimise unnecessary duplication between Commonwealth, state and territory environmental assessment processes (Commonwealth of Australia 1998). Supporters of the Act also claimed the bilateral agreement provisions provided a means of ‘leveraging’ improvements in state and territory environmental assessment processes (Beynon 1999; Glanznig and Kennedy 2001).

sticking point in the negotiations between the Australian Democrats and the Government. The ‘Heritage Bills’ are the *Environment and Heritage Legislation Amendment Bill (No.1) 2003*, *Australian Heritage Council Bill 2003*, and the *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2003*.

3. The achievements

If the EAA regime were operating effectively and being administered appropriately, one of three scenarios would be evident.

Scenario 1 - The EAA process has deterred most activities that could adversely affect the matters protected under Part 3

The available evidence suggests strongly that there have been a large number of actions that have had a significant detrimental affect on the condition of the matters supposedly protected under Part 3, particularly those related to land clearing and commercial fishing (DNRM 2005; Macintosh 2004; Caton and McLoughlin 2004; DNRM 2003). Consequently, this possible scenario can be discarded.

Scenario 2 - Actions that could adversely affect the matters protected under Part 3 have been appropriately regulated under the EAA provisions

Given the political, constitutional and administrative realities faced by the Commonwealth, the EAA provisions will never be able to protect completely those aspects of the environment that are supposed to be protected under Part 3. However, the EAA regime should be able to play a constructive role in improving conservation outcomes. Evidence to support this scenario would include:

- a relatively large number of referrals, particularly from industries that have a major detrimental impact on the relevant environmental matters (i.e. agriculture, fisheries and forestry);
- a reasonable number of refusals; and
- a reasonable number of cases where effective and enforceable conditions have been imposed on the relevant actions.

The lists that are linked to the EAA provisions, such as the lists of threatened species, threatened ecological communities and national heritage places, would also be kept up-to-date and contain those species, communities and places that are in greatest need of federal protection.

If non-compliance with the EAA regime were to be identified as a problem, an appropriate regulatory response would include a reasonable number of enforcement actions and programs to raise awareness about the EAA requirements.

Scenario 3 – The majority of proponents of damaging actions have refused to comply with the EAA regime and the Commonwealth has taken decisive steps to enforce the Act and raise awareness about its requirements

There is a possibility that most people have chosen to ignore the statutory requirements under the EAA provisions. If this were occurring, there would be a relatively small number of referrals, perhaps a few refusals and only a small number of cases where the imposition of conditions has been considered necessary. Yet, if the EAA regime was being administered appropriately, the Government would have initiated a reasonable number of enforcement actions and demonstrated a commitment

to improve compliance. It would also have created programs to raise awareness and understanding about the EAA regime and its objectives. As in the case of Scenario 2, the proper maintenance of the lists that are linked to the EAA provisions would be expected.

The following sections review the available evidence to determine whether the EAA regime and bilateral agreement provisions are being administered appropriately and are achieving their conservation objectives. To do this, the paper considers:

- the referrals, controlled action decisions and refusal decisions that have been made since the EAA regime commenced;
- the number and types of conditions that have been imposed on actions under the regime;
- whether appropriate enforcement actions have been taken against people who have breached the EAA requirements;
- whether the lists that are linked to the EAA provisions have been maintained appropriately; and
- whether the bilateral agreement provisions have been used to improve state and territory environmental assessment and approval processes and to reduce unnecessary duplication.

3.1 Referrals

Table 1 contains the latest available statistics on the number of referrals, controlled action decisions and approvals.

Table 1 Referrals, controlled action decisions and approval decisions (July 2000 - December 2004)

Referrals	
Total number of referrals	1420
Referrals withdrawn or lapsed before a controlled action decision was made	23
Controlled Action Decisions	
Controlled action decisions made*	1360
Approval required	324
Approval not required – manner specified	184
Approval not required	852
Still being processed at the end of December 2004	37
Approval Decisions	
Approval decisions made	101
Approved without conditions	9
Approved with conditions	90
Approval refused	2

Source: DEH (2005a)

*This includes decisions that have been remade.

In four and a half years, 1420 referrals were received by the Minister under the EAA provisions. As the evidence discussed below suggests, this figure appears to be relatively low given the extent of the land clearing and environmental degradation that has occurred since July 2000. However, there is insufficient evidence to draw definitive conclusions on the adequacy of the total number of referrals that have been made.

The Department of the Environment and Heritage (DEH) allocates all referrals to one of 18 categories based on the nature of the action. A list of the categories and data on the referrals and controlled action decisions made in relation to these categories are provided in Appendix A. Most referrals have been allocated to the urban development (new and re-development), tourism, recreation and conservation management, and mining categories (DEH 2005a). A reasonably large number of referrals have also been received in the land transport, resource exploration and energy categories (DEH 2005a). There is no doubt that actions that fall within these categories could have profound impacts on the matters protected under Part 3 of the EAA regime. However, if the regime were operating effectively, it is likely that the Minister would be receiving a greater number of referrals from those sectors that are having the greatest impacts on biodiversity: agriculture, fisheries and forestry (Williams *et al.* 2001).

At the end of December 2004, no referrals had been received from the fisheries sector (excluding aquaculture)⁵ and around 34 actions had been received and allocated to the 'agriculture and forestry' category.⁶ Approximately three of the 'agriculture and forestry' referrals related to forestry activities and 31 concerned agricultural developments. By 1 July 2005, the number of agricultural referrals in the 'agriculture and forestry' category had grown to 38, but there had been no change in the number of referrals from the fisheries or forestry sectors. Given the environmental damage caused by these industries, these figures are extremely low and suggest there is widespread non-compliance with the EAA requirements in at least the agricultural and fisheries sectors.⁷

The damage caused by these sectors since the EAA regime commenced is illustrated by the statistics on land clearing in Queensland. Between July 2000 and July 2003, almost 1.5 million hectares of woody vegetation was cleared in Queensland alone, of

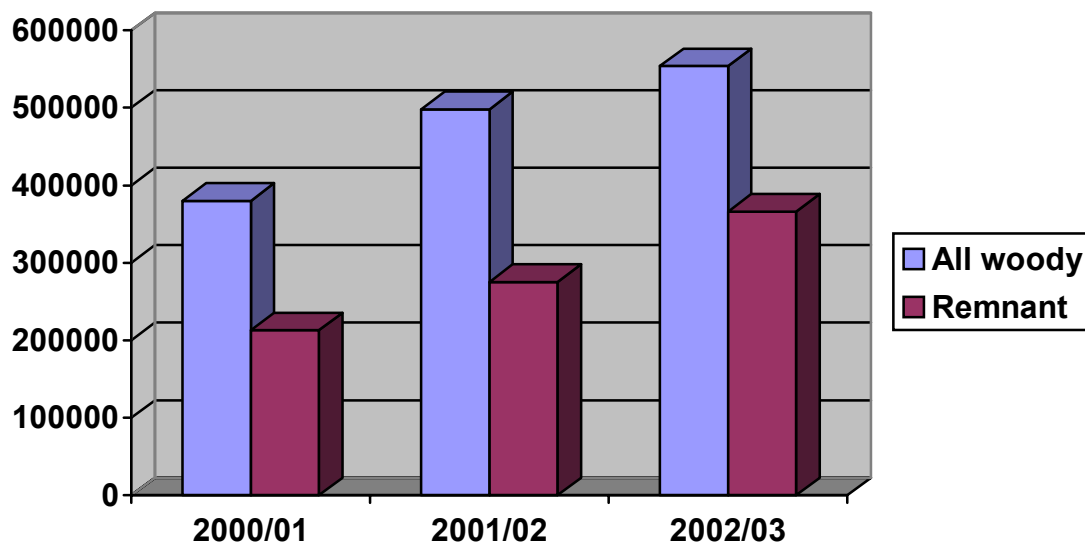
⁵ The lack of referrals from the fisheries sector may be a result of the fact that when the strategic assessment of fisheries management plans are complete under Part 10 of the Act, it is likely that the majority of commercial fishing activities in Commonwealth managed fisheries will be exempt from the operation of relevant EAA provisions. DEH has also given an assurance to fisheries that it would not support the prosecution of fishers for contraventions of certain provisions of the Act until the strategic assessment process has been completed (Australian Fisheries Management Authority 2000). Despite requests from the Australian Democrats, the Minister has refused to table a copy of the letter that was written to the Director of Public Prosecutions in relation to this matter in Parliament (see Kemp 2003b).

⁶ There are a relatively small number of agricultural referrals that are not allocated to the 'agriculture and forestry' category. The vast majority of these concern water-related developments (for example, see EPBC 2003/1069, EPBC 2004/1365, EPBC 2005/2060 and EPBC 2169). At least one agricultural related referral was also marked as having been allocated to a non-existent category known as 'vegetation clearance' (EPBC 2001/482). This information was obtained from the DEH website (www.deh.gov.au) (12 December 2004, 1 April 2005, 11 May 2005 and 1 July 2005). Due to problems associated with the DEH website, there is a possibility of slight statistical errors.

⁷ Section 38 of the Act provides that the EAA provisions do not apply to an 'RFA forestry operation' that is undertaken in accordance with a Regional Forestry Agreement. This exemption has ensured that a significant proportion of forestry activities are excluded from the EAA requirements.

which around 850000 hectares were classified as remnant vegetation (DNRM 2005). Over 95 per cent of this clearing was for agricultural purposes (DNRM 2005). As Figure 1 below illustrates, the annual rate of woody vegetation clearance in Queensland actually increased between July 2000 and June 2003. The increase was evident in both total woody and remnant vegetation clearance.

Figure 1 Annual rate of clearing woody vegetation in Queensland – all woody vegetation and remnant woody vegetation (hectares)



Source: DNRM 2005

The majority of the clearing in Queensland between 2000 and 2003 occurred in bioregions that contain a significant number of species and ecological communities that are supposedly protected under Part 3 of the EPBC Act (for example, Brigalow Belt North and South and the Mulga Lands) (DNRM 2005). Despite this, in the five years since the EAA regime commenced, only 11 referrals have been received in relation to agricultural actions in Queensland. Ten of these concerned clearing relatively small areas of vegetation.⁸ Yet, as discussed below, only two of the 11 referrals received in relation to agricultural actions in Queensland were declared to be controlled actions and only one of these involved any land clearing.⁹ These figures completely discredit the claim made by a number of environment groups that the EAA regime would help in the ‘battle against landclearing’ (Beynon 1999).

If the EAA regime were operating effectively, it is likely that the Minister would also be receiving a significant number of referrals in relation to water management and use. Between 16 July 2000 and 1 July 2005, approximately 93 referrals were received and allocated to the ‘water management and use’ category. The overwhelming majority of these concerned the construction or modification of water infrastructure (for example, dams, weirs, stormwater drains and pipelines). Approximately four concerned the

⁸ See referrals known as EPBC 2002/725, EPBC 2003/924, EPBC 2003/962, EPBC 2003/1090, EPBC 2004/1335, EPBC 2004/1473, EPBC 2005/1982, EPBC 2005/2137 and EPBC 2005/2152.

⁹ See referrals known as EPBC 2002/571 (which concerned the culling of flying-foxes) and EPBC 2005/2152 (which involved land clearing).

construction of new farm dams¹⁰ and only a very small number related solely to water extraction and the use of existing water infrastructure.¹¹ On this basis, it appears the EAA regime may be capturing a reasonable proportion of new water infrastructure developments (with the exception of farm dams), but is failing to regulate unsustainable water use practices.

3.2 Controlled actions

The statistics concerning controlled action decisions are similar to those concerning referrals. At the end of December 2004, 1360 controlled action decisions had been made and 324 actions had been declared to be controlled actions (i.e. 24 per cent of actions referred were declared to be controlled actions). The relatively low proportion of referrals that are declared to be controlled actions could be attributable to a wide variety of factors. It could be that the actions being referred are not those which are having the greatest impact on the matters protected under Part 3 or that the Government is failing to enforce the EAA provisions in a manner that will lead to the conservation of the matters protected under Part 3. Without analysing all actions that have been referred, it is difficult to draw conclusions on the total number of controlled action decisions that have been made.

By 1 July 2005, the Minister had made approximately 34 controlled action decisions in relation to referrals that were allocated to the 'agriculture and forestry' category,¹² and concluded that ten (29 per cent) of the referred actions constituted controlled actions. Two of these ten were subsequently withdrawn, although one was later resubmitted in a slightly altered form.¹³ Only two of the remaining eight controlled actions involved any significant vegetation removal; one pertained to the clearing of approximately 100 trees in western Victoria while the other concerns a proposal to clear approximately 4.5 hectares of land for horticultural purposes near Kurrimine Beach in Queensland.¹⁴

The major deficiency in the controlled action decisions that have been made in relation to agricultural referrals is that there appears to be a reluctance to declare clearing proposals to be controlled actions. The treatment of referrals that have been made in relation to land clearing proposals in the Wimmera district in western Victoria and in the Brigalow Belt Bioregions (North and South) in Queensland provide good examples of this trend.

The Wimmera district is home to several threatened species and ecological communities, including the endangered south-eastern red-tailed black-cockatoo (*Calyptorhynchus banksii graptogyne*) and the Buloke Woodlands of the Riverina and Murray-Darling Depression Bioregions. In recent years, a significant amount of clearing has occurred in this region to facilitate the installation of centre-pivot irrigation systems (Maron 2004). This has drastically reduced the foraging and breeding habitat of the red-tailed black cockatoo (Maron 2004). By 1 July 2005, at least five referrals had been made that involved clearing potential red-tailed black

¹⁰ See EPBC 2005/2169, EPBC 2005/2060, EPBC 2004/1365 and EPBC 2004/1428.

¹¹ For example, see 2002/885, 2004/1573 and 2005/2134. This may be partly attributable to the operation of the 'prior authorisation' (s.43A) and 'existing use' (s.43B) exemptions.

¹² This information was obtained from the DEH website (www.deh.gov.au) on 1 July 2005.

¹³ See EPBC 2001/480 and EPBC 2002/571.

¹⁴ See EPBC 2002/766 and EPBC 2005/2152.

cockatoo habitat in the Wimmera district.¹⁵ One of the five actions was declared a controlled action; the remainder were deemed not to be controlled actions provided they were carried out in a specified manner.¹⁶ The single action that was initially declared to be a controlled action was subsequently approved with conditions similar to those outlined in the four manner specified decisions. The conditions placed on these actions are discussed in Section 3.4 below.

A similar pattern is seen in relation to clearing proposals in the Brigalow Belt Bioregions (North and South). The Brigalow Belt Bioregions contain a number of threatened species and at least two endangered ecological communities: Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South); and Brigalow (*Acacia harpophylla* dominant and co-dominant). At least six clearing proposals have been referred to the Minister since the EAA regime commenced that could affect these ecological communities.¹⁷ None of the six identified in a search of the DEH website was declared to be a controlled action.¹⁸

Nineteen out of 89 referrals allocated to the 'water management and use' category were declared to be controlled actions (21 per cent). Twelve of these concerned the construction or modification of a dam or weir, although three were subsequently withdrawn and resubmitted in a modified form.¹⁹ The other eight controlled actions in the 'water management and use' category related to pipeline and drain construction,²⁰ waste treatment,²¹ water extraction²² and the modification of a wetland.²³

On the basis of the referral and controlled action statistics, it appears unlikely that Scenario 2 has occurred or is presently occurring. In other words, it is unlikely that the actions threatening the matters protected under Part 3 have been appropriately regulated under the EAA regime. Insufficient referrals have been made from the agricultural, fisheries and forestry sectors. Similarly, while a reasonable number of referrals have been made in relation to large water infrastructure developments, very few have related to water use practices and farm dams. In addition, only a very small number of actions in the 'agriculture and forestry' and 'water management and use' categories have been declared to be controlled actions.

3.3 Refusals

Over the first four and half years of the operation of the EAA regime, only two actions were refused approval by the Minister while 99 were approved. On the basis of the available statistics, less than 0.5 per cent of all actions that were referred to the Minister between July 2000 and December 2004 were stopped as a result of the EAA regime. Since December 2004, no further actions have been refused approval.

¹⁵ See EPBC 2004/1904, EPBC 2003/1069, EPBC 2003/975, EPBC 2002/849 and EPBC 2002/766.

¹⁶ EPBC 2002/766 was declared to be a controlled action.

¹⁷ See EPBC 2005/1982, EPBC 2004/1473, EPBC 2003/1090, EPBC 2003/988, EPBC 2003/962 and EPBC 2003/924.

¹⁸ Three were declared not to be controlled actions if they were carried out in a specified manner (EPBC 2004/1473, EPBC 2003/962 and EPBC 2003/924).

¹⁹ See EPBC 2001/188 (resubmitted as EPBC 2001/420), EPBC 2001/189 (resubmitted as 2001/422) and EPBC 2001/190 (resubmitted as EPBC 2001/385, EPBC 2001/388 and EPBC 2001/389).

²⁰ EPBC 2001/184, EPBC 2004/1319 and EPBC 2004/1588.

²¹ EPBC 2005/2028.

²² EPBC 2005/2134 and EPBC 2004/1573.

²³ EPBC 2000/14.

The first refusal involved a proposal by a lychee farmer to kill 5500 spectacled flying-foxes on a property in northern Queensland between November and December 2002. An electric grid had been constructed on the farmer's property above the lychee orchard in order to kill or deter flying-foxes. In the 2000/2001 lychee season alone, it was estimated that the grid killed around 18000 spectacled flying-foxes at a time when it was estimated that the total Australian population of this species did not exceed 100000.²⁴ Despite the size of the annual cull and the proximity of the property to the Wet Tropics World Heritage Area, the farmer did not initially refer the operation of the grid to the Minister and the Commonwealth did not take any steps to force him to do so. The actions of the farmer were only referred to the Minister after an injunction was obtained by an environmentalist in the Federal Court to prevent the operation of the grid until the farmer had complied with the EAA requirements.²⁵ Rather than moving quickly to make a decision on the application, the Minister waited until March 2003 to refuse the action – after the time for the action had passed. Much of the credit for stopping the operation of the grid must go to the environmentalist, Dr Carol Booth, for obtaining the injunction. The Commonwealth also deserves some credit for making it clear to the proponent that it is not prepared to approve the operation of the grid.

The second action that was refused involved a proposal to construct a residential home on a property adjacent to the Kingston Arthurs Vale Heritage Area on Norfolk Island. This action triggered the EAA provisions on the basis of its potential impact on the heritage values of the area, which is owned by the Commonwealth. It appears that after the decision to refuse the action was made, the Commonwealth initiated negotiations to purchase the property from the proponent (Commonwealth of Australia 2005). It is unclear whether any agreement has been reached on the sale (Commonwealth of Australia 2005).

By any measure, the number of refusals is extremely low. Arguably, the low refusal rate may simply be a reflection of the fact that many of the actions that are being referred are unlikely to have a major detrimental impact on the matters protected under Part 3. There may be some truth to this, but it is not a complete explanation. A number of highly damaging proposals have been approved under the EAA regime. Examples include:

- the construction of the Paradise Dam near Bundaberg in Queensland, which is likely to have a significant adverse impact on the threatened Queensland lungfish, black-breasted button quail, Coxen's fig-parrot and *Cycas megacarpa* (EPBC 2001/422);
- the construction of the Peregian Springs Residential Development on the Sunshine Coast in Queensland, which will adversely affect at least three threatened species (EPBC 2001/164 and EPBC 2001/165);
- the construction of the Meander Dam in Tasmania, which will destroy important habitat of the threatened spotted-tailed quoll (EPBC 2002/565);
- the clearance of red-tailed black cockatoo habitat for a centre-pivot irrigation system in western Victoria (EPBC 2002/766);

²⁴ *Booth v Bosworth* [2001] FCA 1453, at [48] and [81].

²⁵ *Booth v Bosworth* [2001] FCA 1453.

- the destruction of habitat of the endangered mountain pigmy possum to make way for a new ski lift in Victoria (EPBC 2001/129);
- at least two projects in New South Wales that will result in the destruction or disturbance of habitat of the endangered swift parrot (*Lathamus discolor*) and regent honeyeater (*Xanthomyza phrygia*) (EPBC 2003/997 and EPBC 2000/87); and
- the decimation of a population of the endangered plant, *Tetratheca paynterae*, to accommodate a mining proposal (EPBC 2001/174).

Given this, it is highly likely that other factors, such as a lack of political will, potential constitutional problems,²⁶ and a willingness to place short-term economic concerns above conservation (Macintosh and Wilkinson forthcoming), have contributed to the low refusal rate.

In addition to the two refusal decisions, two environment groups, the Queensland Conservation Council and the World Wide Fund for Nature Australia, successfully challenged the Minister's controlled action decision in relation to an action involving the construction of an 880000 megalitre dam on the Dawson River in central Queensland (the case is commonly known as the 'Nathan Dam Case').²⁷ The effect of the Federal Court's decision in the case was to force the Minister to have regard to how the construction of the dam would change land-use patterns in the surrounding area, a consideration that had been excluded in the original controlled action decision. More specifically, it made it inevitable that the action would trigger the approval requirement on the basis of its likely impacts on the world heritage values of the Great Barrier Reef World Heritage Area.

When the Federal Court's decision was handed down, the environment groups concerned hailed it as a victory for the environment and claimed that it 'confirmed the major expansion of environmental powers for the Australian Government' (WWF 2004a). It now appears the Nathan Dam will proceed unless the Minister refuses to approve the project, something that seems unlikely given the nature of the project and the Minister's track record in relation to approving developments under the EAA regime.²⁸

The combination of the low refusal rate and the statistics concerning referrals and controlled action decisions suggests that the actions that threaten the matters supposedly protected under Part 3 have not been appropriately regulated under the EAA regime and that Scenario 2 is not occurring.

²⁶ It is arguable that the operation of the EAA provisions could trigger a requirement for the Commonwealth to pay compensation to affected property owners due to the operation of section 51(xxxi) of the Commonwealth Constitution and section 519 of the Act. Justice Kiefel effectively dismissed this argument in a Federal Court decision in late 2004, stating that: 'the provision of the Constitution relied upon would not seem applicable because there is no acquisition of property by the Commonwealth involved' (*Bosworth v Booth* [2004] FCA 1623, at [9]). Whether the High Court agrees with this assessment has not yet been tested.

²⁷ *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 and *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190.

²⁸ See the new decision notice published by the Minister in relation to EPBC 2002/770 on 12 April 2005 (www.deh.gov.au/epbc).

3.4 Conditions

Between July 2000 and December 2004, the Minister approved 90 actions with conditions and decided 184 actions did not require approval on the basis they will be undertaken in a ‘manner specified’. On this basis, it could be argued that the EAA provisions have resulted in 274 actions being subject to conditions of some description. However, this figure is misleading.

Only 27 of the 184 ‘manner specified’ actions are subject to conditions that are directly enforceable.²⁹ This leaves 117 actions (27 under the manner specified process and 90 under approval decisions) that have been subject to legally enforceable conditions under the EAA provisions.

In addition, the conditions that have been imposed under both the manner specified and approval processes have often been ineffective. This is attributable to five factors.

- Many of the conditions have been exceedingly vague and ambiguous.³⁰ For example, the manner specified conditions placed on a road development in Victoria include a requirement that bridge piers and pylons ‘be designed and located to minimise impact on floodplain habitat ... and to minimise downstream scouring of floodplain areas and gully formation’.³¹ Similarly, the manner specified conditions imposed on an agricultural proposal merely required the proponent to undertake a survey for an endangered skink and provide it to DEH, ‘with the objective of ensuring that areas, if any, found to comprise important habitat ... will not be developed’.³²
- Many of the conditions have mirrored those already imposed under state and territory planning and environmental laws.³³
- The Commonwealth does not have the necessary administrative infrastructure and frameworks to monitor compliance with conditions (Macintosh 2004; ANAO 2003). In 2003, the Australian National Audit Office (ANAO) released a report on DEH’s administration of the EAA provisions, which concluded that ‘(t)he EPBC database does not currently support the monitoring and compliance function’ (ANAO 2003; para. 6.19) and ‘(manner specified) actions were not subject to any formal monitoring or audit’ (ANAO 2003; para. 6.30). Many of the flaws detected by the ANAO can be attributed to simple administrative failures. Yet, it is more likely that the root cause of DEH’s failings is the lack of administrative infrastructure with which to monitor compliance. The vast majority of DEH’s human and structural resources are located in Canberra and it has a very limited presence in the other states and territories (Macintosh and Wilkinson forthcoming). This results in

²⁹ Conditions imposed under the manner specified process only became directly enforceable in January 2004. Between 1 January 2004 and 31 December 2004, 27 manner specified decisions were made (source: DEH website (www.deh.gov.au) (11 May 2005)).

³⁰ For examples, see EPBC 2005/2099, EPBC 2005/2116, EPBC 2004/1846, EPBC 2004/1621, EPBC 2004/1473, 2004/1359 and EPBC 2002/885.

³¹ Decision notice in relation to EPBC 2005/2009.

³² Decision notice in relation to EPBC 2004/1473.

³³ For examples, see EPBC 2005/1913, EPBC 2004/1676, EPBC 2004/1708, EPBC 2004/1569 and EPBC 2004/1846.

DEH being reliant on state and territory agencies, the general public and the honesty of proponents to perform its monitoring responsibilities.³⁴

- Many of the conditions are legally questionable. For example, a number of conditions are based on the notion of ‘trade-offs’, whereby the proposed actions are allowed to proceed if the proponent undertakes specified measures to compensate for the likely detrimental impacts of the action.³⁵ Where trade-offs are used in relation to ‘manner specified’ decisions, it is arguable that these conditions are illegal because the Act prohibits the Minister from having regard to any beneficial impacts that the action may have on the matters protected under Part 3 in making controlled action decisions.³⁶ In addition, trade-off conditions arguably violate the statutory requirement that all conditions relate to the manner in which the actions are undertaken.³⁷
- Many of the conditions are based on dubious science. There is little scientific evidence to support the conclusion that many of the ‘trade-off’ and mitigation conditions will provide adequate protection for the relevant aspects of the environment. For example, in relation to land clearing proposals in the Wimmera region, the Commonwealth has often required proponents to plant new buloke seedlings in order to provide habitat for the endangered red-tailed black cockatoo.³⁸ However, the evidence suggests that it will take approximately 100 years before the new buloke seedlings are capable of providing suitable habitat for the cockatoo (Maron 2004; Maron and Lill 2004), at which time the species may be extinct. Similarly, a number of the conditions require proponents to set aside some existing habitat as a reserve to compensate for areas that will be cleared.³⁹ But improving the protection for one area of existing habitat does not compensate for the loss of another area of habitat. There is still a net decrease in habitat that is available to support the relevant species or ecological community.

The conditions that have been imposed under the approval process generally follow a standard formula that requires the proponent to carry out the action in accordance with a management plan. These management plans are not public documents. As a result, there is no means of evaluating the appropriateness of many of the approval conditions.

In summary, the available information suggests that the conditions imposed under the EAA process have not substantially improved the level of protection for the environment. This is a product of the conditions that have been imposed and the fact that the Commonwealth lacks the administrative frameworks and infrastructure that would enable it to monitor compliance appropriately. When this failure is added to those concerning the nature of the referrals, controlled action decisions and the rate of refusals, it appears highly unlikely that the EAA regime has made, or is making, any significant contribution to the protection and improvement of the environment.

³⁴ See ANAO (2003), paragraphs 6.25-6.30.

³⁵ For examples, see EPBC 2005/1997, EPBC 2005/1913, EPBC 2004/1904, EPBC 2004/1863, EPBC 2004/1708, EPBC 2003/1069, EPBC 2003/975, EPBC 2002/849, EPBC 2002/842 and EPBC 2002/733.

³⁶ See s.75 and Macintosh (2004).

³⁷ See s.77 and Macintosh (2004).

³⁸ See EPBC 2004/1904, EPBC 2003/1069, EPBC 2003/975, EPBC 2002/849 and EPBC 2002/766.

³⁹ See EPBC 2004/1904 and EPBC 2003/10/69.

Clearly, the EAA regime is not appropriately regulating the actions that are having, or could have, an important adverse impact on the matters supposedly protected under Part 3.

3.5 Enforcement actions and compliance

There is little doubt a large number of actions are being carried out in breach of the EAA provisions. The statistics on land clearing and commercial fishing put this beyond doubt (DNRM 2005; Macintosh 2004; Caton and McLoughlin 2004; DNRM 2003). As described in Scenario 3 above, an appropriate regulatory response to the repeated violations of the EAA requirements would include initiating a reasonable number of enforcement proceedings against offenders and the commencement of one or more programs to raise awareness about the Act.

The Commonwealth has implemented some programs to help disseminate information about the EAA regime. An employee from DEH was seconded to the National Farmers' Federation for the purposes of raising awareness about the regime within the agricultural sector. The Government has also provided money to the World Wide Fund for Nature Australia to help raise awareness about the EPBC Act amongst environment and heritage groups.⁴⁰ In addition, the Government has published materials and run a number of public information sessions on the EPBC Act (DEH 2004a). There is insufficient evidence to draw definitive conclusions about the effectiveness of these programs. However, given the size of Australia and the geographic isolation of many people in key industries, the resources devoted to awareness-raising programs appear to be inadequate. Further, it is highly unlikely that improved awareness alone will resolve the non-compliance issues. For these programs to work, they must be complemented by effective enforcement actions.

To date, only two enforcement actions have been taken by the Commonwealth in relation to the EAA regime. The first concerned two Japanese citizens who were arrested for attempting to smuggle insects from Lord Howe Island (Kemp 2003c). The Commonwealth tried to prosecute the defendants for threatening the world heritage values of the Lord Howe Island Group World Heritage Area. However, the case based on the EAA provisions was dismissed at the committal hearing (Kemp 2003c; Macintosh 2004).

The second case, which is the only successful enforcement action that has been undertaken since the EAA regime commenced, was a civil proceeding against a wheat farmer and an associated company who were found to be responsible for completely clearing 100 hectares of an ephemeral Ramsar listed wetland on a property known as Windella near Moree in northern New South Wales (the 'Greentree Case').⁴¹ The

⁴⁰ The money is provided to employ two people to operate what is called the EPBC Unit, which is described as a joint project of the World Wide Fund for Nature Australia, Tasmanian Conservation Trust and the National Trust of Australia (WWF 2004b). Humane Society International was previously involved in the project. World Wide Fund for Nature Australia, Tasmanian Conservation Trust and Humane Society International all supported the EPBC Act in 1999 and the Heritage Bills in 2003, while the National Trust of Australia was a vocal supporter of the Heritage Bills.

⁴¹ See *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741 and *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317. There have been no successful criminal prosecutions under the EAA provisions.

Federal Court fined the farmer and the company involved a total of \$450000 and ordered them to carry out restoration work on the wetland.

Without looking at the background of the case, some may see it as a success and evidence of the Commonwealth's resolve to improve the administration of the EAA regime. This is precisely how a number of the environment groups that supported the EPBC Act in 1999 tried to depict the outcome. For example, following the Federal Court's decision, Alistair Graham from the Tasmanian Conservation Trust wrote:

... the political message is very strong: the Coalition government is prepared to take action, even in the heart of cotton country, to protect the environment. ... The times, they really are a'changin' (Graham 2003a).

Similarly, Glen Klatovsky from the World Wide Fund for Nature Australia stated:

The Federal Environment Minister has today stood up for the vast majority of landholders who uphold the law and care for the land ... This is an enormous victory for the majority of Australians who want to see our environment managed well (Klatovsky 2004).

This upbeat assessment of the outcome of the case is a distortion of what was, in truth, a prime example of regulatory failure.

The Commonwealth was first made aware of the clearing on Windella in early September 2002 when an employee of The Wilderness Society sent to DEH aerial photographs of what turned out to be preliminary clearing. On 30 September 2002, DEH sent a letter to the defendants about the alleged clearing and asked if it could inspect the property. The defendants refused. DEH then obtained a warrant to inspect the property.

On 15 October 2002, DEH conducted a site inspection and found 'that approximately 20 per cent of the Windella Ramsar site in the north-eastern portion had been cleared of all ground cover' and that dredging had occurred within the site.⁴² Despite finding this evidence, the Minister refused to commence legal proceedings against the defendants, preferring to attempt to negotiate an outcome. These negotiations dragged on for over six months, during which time the defendants continued to clear the property.⁴³ When DEH subsequently inspected the site in late July 2003, they found the entire site had been cleared of all ground cover and that the soil had been ploughed. Upon discovering this, civil proceedings were commenced in the Federal Court.

The Commonwealth's reluctance to initiate enforcement proceedings when it first became aware of the clearing may have been forgivable had the defendants not had a record of land clearing and DEH the capacity to keep an eye on what was occurring on the property. However, DEH does not have a physical presence in northern New South Wales. To monitor the property, it had to send officers from Canberra or rely on reports from members of the public. More importantly, one of the defendants in the case, Mr Ronald Greentree, has a record of clearing native vegetation and has been

⁴² *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741, at [96], per Sackville J.

⁴³ *Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741, at [43] and [93] – [108].

involved in a number of legal actions concerning land clearing in New South Wales.⁴⁴ Given this, the Minister and DEH should have been on notice that it was possible that the property might be cleared if it delayed enforcement proceedings. At the very least, it could have sought an injunction (like the one it later obtained) to prevent further clearing until the negotiations had been completed.⁴⁵ Questions may also be raised as to why the Commonwealth did not take criminal proceedings against the defendants.

Although the penalties imposed by the Federal Court were relatively severe, the case can hardly be described as ‘an enormous victory’ for the environment or evidence of a broad move by the Commonwealth to improve compliance with the EAA requirements. The facts involved a flagrant breach of the EAA requirements in circumstances where evidence of the breach was placed under DEH’s nose. Further, the management arrangements put in place with the property owners in relation to the Ramsar wetland had been trumpeted by the Commonwealth as an enormous success. The Secretary to the Minister for the Environment and Heritage, Dr Sharman Stone, described them as ‘a breakthrough for wetlands conservation in Australia’ and ‘an outstanding example of balance and cooperation that is a win for the environment and a win for local landholders’ (Stone 1999b). To find that these arrangements had failed was no doubt a slap in the face for the Minister and DEH. Finally, due to the Minister’s hesitation, the ecological character of the wetland on Windella has been fundamentally altered. If the Minister had responded appropriately in 2002, much of the environmental harm could have been avoided.

The mismanagement of the Greentree Case is indicative of the Commonwealth’s failures in relation to the enforcement of the EAA provisions. Ideally, enforcement actions should not be necessary. Yet, when it is apparent that non-compliance is widespread, enforcement actions are essential if the objectives of the regulatory regime are going to be realised. If the Government tolerates persistent non-compliance, the incentive to comply with the regime will be lost. In this case, the Commonwealth has made it clear that it is extremely reluctant to take enforcement actions in relation to contraventions of the EAA regime. Two enforcement actions in five years do not engender confidence that the Commonwealth is committed to improving compliance. Further, when the Commonwealth has taken enforcement proceedings, it has demonstrated a willingness to go to enormous lengths to accommodate the wishes of the perpetrator at the expense of the environment (unless, of course, the perpetrators are foreigners).

3.6 Maintenance of relevant lists

The administrative failures discussed above are also evident in the manner in which the lists that are linked to the EAA regime are being maintained. This fact is demonstrated in the Minister’s handling of the lists of threatened species, threatened ecological communities and national heritage places.

⁴⁴ See *Director-General of the Department of Land and Water Conservation v Greentree* [1998] NSWLEC 30, *Director-General of the Department of Land and Water Conservation v Greentree* [2001] NSWLEC 159, *Greentree v Director-General of the Department of Land and Water Conservation* [2002] NSWLEC 53, *Greentree v Director-General of the Department of Land and Water Conservation* [2002] NSWLEC 93, *Director-General of the Department of Land and Water Conservation v Greentree* [2002] NSWLEC 102, *Director-General Department of Land and Water Conservation v Greentree* [2004] NSWLEC 584, ABC (2003), Parliament of NSW (2003) and Parliament of NSW (2001).

⁴⁵ See *Minister for the Environment and Heritage v Greentree* [2003] FCA 857.

Between July 2000 and the end of June 2005, approximately 133 species were added to the list of threatened species, bringing the total number of listed threatened species to 1682.⁴⁶ At first glance, the number of new listings may seem large. However, it is only a small proportion of the total number of species that are eligible for listing. The most glaring deficiency is the very small number of listings concerning invertebrates, non-vascular plants, micro-organisms and commercial fish species. There are currently no commercial marine fish on the list of threatened species, despite the fact that it is highly likely that several well-known varieties (for example, southern bluefin tuna) meet the listing criteria (Caton and McLoughlin 2000; Caton and McLoughlin 2004). While the failure to list invertebrates, non-vascular plants and micro-organisms can be blamed on a lack of information, the failure to list commercial fish species appears to be attributable to the Minister's reluctance to confront unsustainable practices in the commercial fishing sector.

On 1 July 2005, a total of 32 ecological communities were listed as threatened. Twenty-two of these were transferred across from the list that was maintained under the *Endangered Species Protection Act 1992*, leaving only ten that have been added since the EAA regime commenced. This is a tiny proportion of the total number of ecological communities that are threatened in Australia. The *Australian Terrestrial Biodiversity Assessment 2002*, which was published as part of the National Land and Water Resources Audit, identified almost 3000 threatened terrestrial ecosystems and ecological communities (Sattler and Creighton 2002). To date, no accurate assessment of the total number of aquatic communities that may be threatened has been carried out, but the number is likely to be significant.

The Minister's administration of the lists of threatened species and ecological communities may involve a breach of the statutory requirements in the EPBC Act. Section 185 of the Act requires the Minister to 'take all reasonably practical steps' to ensure the list contains all communities that are eligible for listing. Arguably this has not occurred.

The list of national heritage places is intended to include sites that are of 'outstanding heritage value to the nation' (DEH 2004b). Unlike the previous federal heritage regime, the Minister is responsible for deciding whether or not places are included on the National Heritage List and he/she can have regard to factors that are not related to heritage issues (including political concerns) when making these decisions. During the consultation process on the new heritage regime, a number of people warned that the politicisation of the listing process would result in a list that was unrepresentative and that did not include those places that are in greatest need of federal protection (Uren 2003; Yencken 2003). Although the new heritage regime is only a year and a half old, the available evidence suggests this prediction is being realised.

Between 1 January 2004 and 13 July 2005, 13 places were included on the National Heritage List. Even accounting for the infancy of the new heritage regime, this is still a very small number (Dick 2005). Further, from the nature of the places that have been listed, it appears that the Minister's listing decisions are heavily influenced by political

⁴⁶ This information was obtained from the DEH website on 1 July 2005 (www.deh.gov.au). Previous research suggests that the number of new listings may be around 115 (Macintosh 2004). Problems with the DEH website make it very difficult to verify the numbers. The higher number has been chosen to give DEH the benefit of the doubt.

factors (Mulvaney 2005; The Age 2005). In particular, it seems clear that the Minister is avoiding listing places that could upset the Coalition's core constituents and is using the process to score political points against state Labor governments. The emergency listing of the Alpine National Park in June 2005 demonstrates this point.⁴⁷

It has been well-known for a considerable period of time that cattle-grazing is incompatible with the conservation of the natural heritage values associated with Australia's alpine areas (Williams *et al.* 1997). In early 2005, the Victorian Government finally decided to exclude graziers from the Alpine National Park. A highly publicised campaign ensued in which the graziers turned to the Federal Government for assistance. The Minister seized on the political opportunity and decided to include the Alpine National Park on the National Heritage List in what was described as an attempt to stop the Victorian Government from destroying part of Australia's history (Campbell 2005a; Campbell 2005b). The political nature of the listing is highlighted by the fact that it is very unlikely that the Minister has the power to prevent the Victorian Government from putting an end to grazing in the park. These events illustrate why numerous individuals and groups opposed the new heritage regime and the vesting of responsibility for listings with the Minister.

The emergency listing of the Alpine National Park can be contrasted with the Minister's rejection of the emergency listing nomination of Recherche Bay in Tasmania. Recherche Bay is important for both its natural and cultural heritage values. As John Mulvaney (a former member of the Australian Heritage Commission) has explained:

- it is 'significant for French botanical, geophysical and surveying achievements by the D'Entrecasteaux expedition during 1792-93';
- it was the site where the French recorded one of the first interactions between Europeans and the Tasmanian Aborigines; and
- it contains the habitats of several threatened species (Mulvaney 2005).

Notwithstanding that Recherche Bay is targeted for logging and that the Australian Heritage Council found that it probably satisfied the listing criteria, the Minister has refused to include it on the National Heritage List under the emergency listing provisions.

Another noticeable flaw in the way the National Heritage List is being administered is that only one place (Dinosaur Stampede National Monument) has been listed on the basis of natural heritage values.⁴⁸ Similarly, no sites have been listed on the basis that they possess 'endangered aspects' of Australia's natural history or because they demonstrate 'principal characteristics' of a class of Australia's natural places or

⁴⁷ Another example concerned the emergency listing of the Kurnell Peninsula on the basis that its potential national heritage values were threatened by a sand mining proposal. At the time of the listing, the proposal was still being assessed under the New South Wales planning procedure and it was the subject of political debate (Kerr 2004). The development application for this proposal was subsequently refused by the New South Wales Minister for Infrastructure and Planning in April 2005 (Knowles 2005).

⁴⁸ It should be noted that it is likely that the Alpine National Park will ultimately be listed on the basis of its natural heritage values, as well as those concerning cattle-grazing.

environments.⁴⁹ This fact makes a mockery of the suggestions of some environment groups supporting the heritage legislation that the new regime would provide additional protection for biodiversity and that it constitutes ‘solid legal groundwork for natural heritage protection’ (Humane Society International 2003b).

The grounds that have been used to justify the inclusion of the four Indigenous heritage sites on the National Heritage List also raise doubts about the ability of the EAA regime to improve Indigenous heritage conservation. It is arguable that none of the Indigenous heritage sites that have been listed were included primarily because of their importance to a specific Indigenous community. Rather, the listing documents suggest the sites were mainly listed because of their archaeological and anthropological interest or, in the case of the Kurnell Peninsula, its importance to all Indigenous people (DEH 2005b; DEH 2005c; DEH 2005d; DEH 2005e; Wilkinson and Macintosh forthcoming). This suggests the new regime will not protect sites that are of significance only to individual Indigenous groups. To attract protection under the new regime, it appears the sites have to have broader appeal, either to mainstream Australia or to the wider Indigenous community. This is problematic because many Indigenous groups do not have a hierarchical system of heritage values and the significance of many Indigenous heritage sites is confined to the people of the particular group. As Mulvaney (2000) has explained, the significance of places like Uluru ‘was limited to the people of that region, and it was not more important to them than many less impressive places’. As a result, many critical aspects of the heritage of individual Indigenous groups will be ineligible for listing and their fate will be left to state and territory heritage regimes.

The way in which the lists that are linked to the EAA provisions are being maintained is unsatisfactory. The Minister is refusing to list species, communities and places that need federal protection and, in many cases, is arguably exploiting the listing processes for political purposes.

3.7 Bilateral agreements

By 1 July 2005, the Commonwealth had signed assessment bilateral agreements with Tasmania, Western Australia, Queensland and the Northern Territory. These agreements accredited state and territory environmental assessment processes in relation to actions that require approval under the EAA regime. Draft assessment bilateral agreements have been prepared in relation to the remaining states and territories, but there is no evidence that the negotiations concerning these agreements have progressed since July 2000. To date, no approval bilateral agreements have been made.

The two main issues associated with bilateral agreements are whether:

- they have been used to ‘leverage’ improvements in state and territory environmental assessment and approval processes, as supporters of the EPBC Act suggested they would; and
- they have reduced duplication between federal and state/territory environmental assessment and approval processes.

⁴⁹ *Environment Protection and Biodiversity Conservation Regulations 2000*, Reg. 10.01A.

The first four assessment bilateral agreements have not resulted in any substantial improvements in state and territory environmental assessment and approval processes. By and large, the bilateral agreements have merely accredited pre-existing state and territory processes. Where changes have been made in these processes, they have been confined to actions that are assessed for the purposes of the EPBC Act. No across-the-board changes have been made to state and territory assessment and approval processes as a result of the bilateral agreements.

The one positive to emerge from the bilateral agreements is the marginal reduction in wasteful duplication. As discussed in Section 2, if an activity or development is declared to be a controlled action, the Minister must decide which method of assessment is used to evaluate the likely environmental impacts of the action. At the end of December 2004, seven per cent of these assessment method decisions resolved that the relevant assessments would be carried out using the approach described in one of the four assessment bilateral agreements (DEH 2005a).

4. Conclusions

The available evidence strongly suggests that:

- the EAA regime has failed to deter people from taking actions that will degrade the matters that are supposed to be protected under the EAA regime;
- actions that are likely to degrade the matters that are supposed to be protected are not being appropriately regulated under the EAA regime;
- the Government has failed to take appropriate steps to enforce the EAA regime and, in doing so, is reducing the incentive for compliance;
- the lists that are linked to the EAA provisions are not being appropriately maintained in that the Commonwealth is refusing to list species, communities and places that are in need of federal protection and, in many cases, is arguably exploiting the listing processes for political purposes;
- none of the four assessment bilateral agreements that have been made have resulted in any broad improvements in state and territory environmental assessment and approval processes;
- the assessment bilateral agreements have resulted in some minor reductions in duplication; and
- the condition of important aspects of the environment that are intended to be protected under the EAA regime has continued to deteriorate since the regime commenced.

The greatest deficiencies in relation to the EAA process concern the small number of referrals that have been made from the agricultural, fisheries and forestry sectors, the small number of referrals that concern existing water management practices, and the Government's reluctance to declare developments to be controlled actions and to force people to comply with the EAA requirements. To these problems must be added the small number of refusals, weaknesses in the conditions imposed on actions, the lack of suitable administrative infrastructure, and the mismanagement of the lists of threatened species, threatened ecological communities and national heritage places.

It has become patently clear that the EAA process has not lived up to the sometimes grand expectations placed on it. Rather than being a 'dynamic new regime that enhances protection for the environment' (Hill 1999), as the then Minister promised it would be, it has proven instead to be a waste of time and money.

Very few, if any, positives can be drawn from the first five years of the EAA regime. The condition of relevant aspects of the environment continues to decline and the EAA provisions have proven to be incapable of making a noticeable contribution to stopping or reversing this trend. Across almost all areas, the regime has failed. The developments that should be regulated are not being referred to the Minister and, when they are, the Minister has refused to take adequate steps to ensure appropriate conservation outcomes. Only two actions have been prevented from proceeding as a

result of the operation of the EAA regime and most of the conditions that have been imposed on actions under the EAA process have been ineffectual, unenforceable or a mirror of conditions already imposed under other processes. Even where reasonable conditions have been imposed, the Commonwealth's lack of administrative infrastructure means it is unlikely they will be enforced.

One of the most noticeable failings of the EAA regime has been the Commonwealth's reluctance to enforce it. Yet, the environment groups that supported the EPBC Act as it passed through Parliament keep trying to convince us that '(t)he times, they really are a'changin'' (Graham 2003a). If the mistakes of the past are not to be repeated, these groups need to face the reality that their faith in the EPBC Act has been misplaced. The Government must also be held accountable for imposing considerable costs on industry and spending at least \$55 million, and possibly up to \$150 million, on a regime that has done virtually nothing to improve conservation outcomes.

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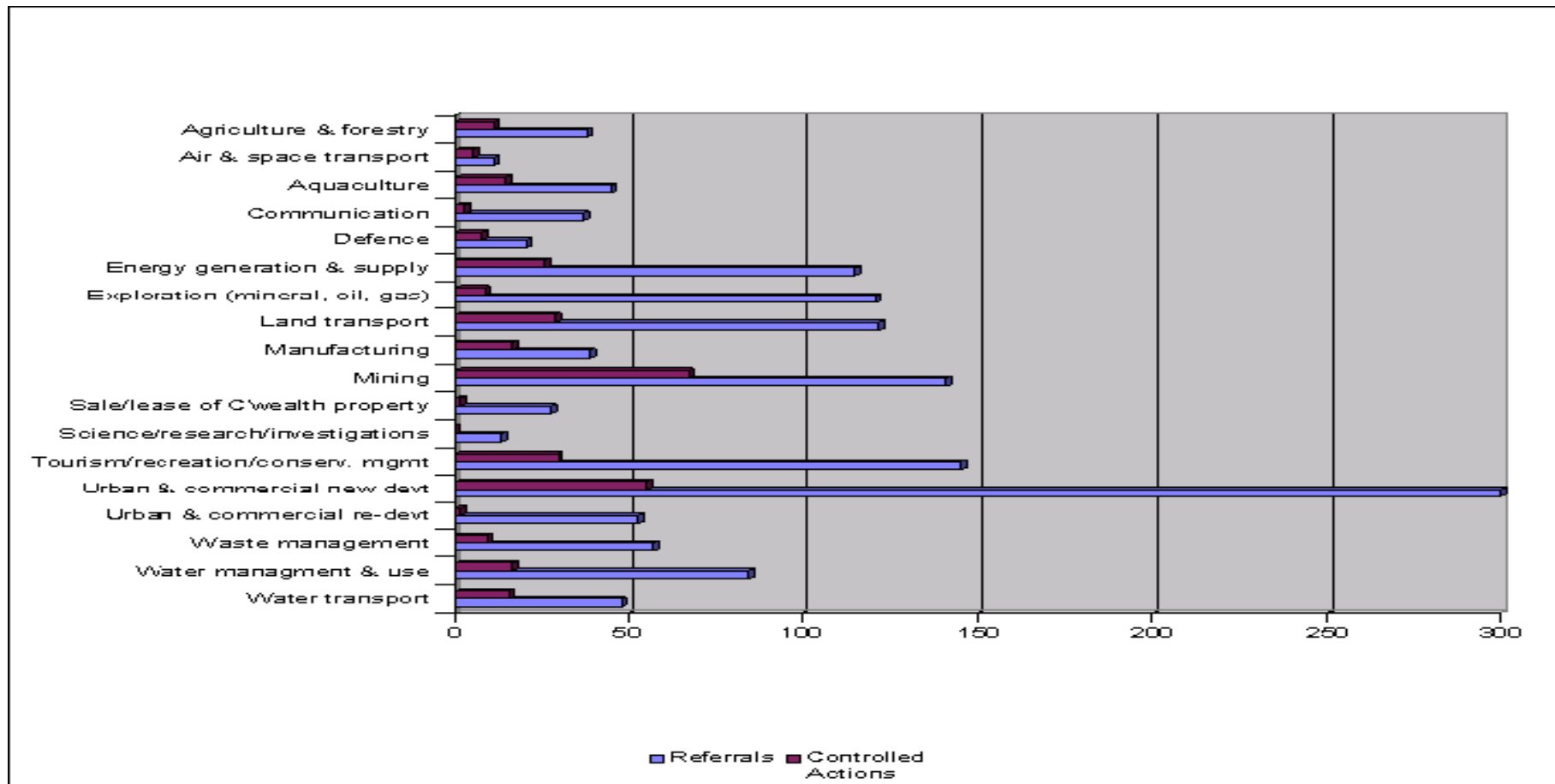
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Appendix Referrals received and controlled actions by Department category (July 2000 – December 2004)



Source: DEH 2005a



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