



# **Environment Protection and Biodiversity Conservation Act**

## **An Ongoing Failure**

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### **1. Introduction**

In July 2005, the Australia Institute published a discussion paper on how effective the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) had been in the first five years of its operation. The paper concluded that the Act's environmental assessment and approval (EAA) regime had 'failed to produce any noticeable improvements in environmental outcomes' (Macintosh and Wilkinson 2005, p. vii). More specifically, it found that the actions that were having the greatest detrimental affects on the matters of national environmental significance were rarely referred to the Federal Environment Minister and, when they were, the Minister had failed to take adequate steps to ensure appropriate conservation outcomes. Further, despite evidence of widespread non-compliance, the Commonwealth had only taken two enforcement actions in relation to the EAA regime in five years.

This paper reassesses the statistics on the operation of the Act on the sixth anniversary of its commencement to determine whether there are any signs of improvement. The task of analysing the EAA regime has been made more difficult because since the Australia Institute's discussion paper was published the Commonwealth has failed to publish regular statistics on the operation of the Act. Consequently, the data presented here is drawn primarily from the Commonwealth Department of the Environment and Heritage's (DEH) public notices website.<sup>1</sup> Due to difficulties associated with the website, the statistics may contain minor errors.

### **2. Operation of the Assessment and Approval Regime**

Data drawn from the DEH website indicate the following.

#### *Controlled action decisions*

Since the EPBC Act commenced in July 2000, approximately 1,913 decisions have been made on whether development proposals require approval under the EAA

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<sup>1</sup> See <http://www.deh.gov.au/epbc/publicnotices/index.html> (18 July 2006).

regime (called ‘controlled action decisions’) – an average of approximately 27 controlled action decisions per month.

The Australia Institute’s 2005 discussion paper focused primarily on the operation of the EAA regime between July 2000 and December 2004 (Macintosh and Wilkinson 2005). Since December 2004, there has not been a significant change in the average number of controlled action decisions being made by the Minister. If anything, the average number of controlled action decisions appears to have declined slightly, falling from approximately 26.8 per month to approximately 25.8 per month.<sup>2</sup>

Of the 1,913 development proposals that were referred to the Minister, approximately 462 were declared to be controlled actions (i.e. they require approval under the EAA regime), 1,172 were declared to be exempt from the EAA regime (i.e. not a controlled action), and 279 were declared to be exempt if they were carried out in a particular manner (called ‘manner specified’). That is, 24 per cent of proposals were declared to be controlled actions, 61 per cent were declared to be exempt and 15 per cent were declared to be exempt if they were carried out in a particular manner.

Prior to January 2005, 25 per cent of proposals were declared to be controlled actions, 61 per cent were declared to be exempt and 13 per cent were declared to be manner specified. Since then, 21 per cent of proposals have been declared to be controlled actions, 61 per cent have been declared to be exempt and 18 per cent have been declared to be manner specified. The rise in the proportion of manner specified decisions and decline in the proportion of actions that have been declared to be controlled actions is probably due to amendments that took effect in January 2004 that made manner specified conditions directly enforceable.

### *Approvals and refusals*

Approximately 149 development proposals were approved and four were refused under Part 9 of the EPBC Act between July 2000 and July 2006. Two of the developments that were refused were small-scale residential housing proposals, one was a major wind farm development (Bald Hills) and the other involved the culling of flying-foxes at a fruit farm in north Queensland. This means that in the six years the EAA regime has been operating, it has only prevented four development proposals from proceeding and at least one of these probably would not have proceeded anyway due to state planning restrictions.

### *Compliance and lack of referrals*

Not only has there been no noticeable improvements in the overall administration of the EAA provisions, it appears that major problems still remain in relation to the lack of referrals, particularly from the agriculture and fishery sectors. Many environmentally harmful activities are not being referred to the Minister and the Commonwealth is doing little to encourage compliance. Key facts that support this conclusion include:

- only around 50 agricultural developments were referred under the assessment and approval provisions between July 2000 and July 2006 despite evidence

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<sup>2</sup> This variation may be due to data errors associated with the DEH website.

that agricultural activities are having a profound impact on the so-called ‘matters of national environmental significance’;

- fewer than ten of the agricultural referrals involved any significant land clearing, yet the evidence indicates that millions of hectares of native vegetation has been cleared since July 2000 (Macintosh 2006);
- no commercial fishing activities (excluding aquaculture) were referred between July 2000 and July 2006;
- approximately 35 to 40 dam and weir developments were referred between July 2000 and July 2006, but none of these have been prevented from proceeding and enforceable conditions were imposed on fewer than ten of these developments; and
- only two enforcement actions have been taken under the EAA provisions since the EPBC Act commenced (one was successful and the other was dismissed at the committal hearing) and both were taken prior to July 2005.<sup>3</sup>

### **3. Implications**

There is no evidence that there has been a significant improvement in the operation of the EAA regime over the past 12 to 18 months. If anything, the cost-effectiveness of the EPBC Act has declined as a result of the Federal Environment Minister’s attempts to use the legislation for political purposes.

Most importantly, a large proportion of the activities that are having a significant adverse impact on the matters of national environmental significance are still not being referred to the Minister and the Commonwealth has done very little to address issues associated with non-compliance. Further, where development proposals have been referred under the EAA regime, the Minister has continued to shy away from using the powers under the Act to improve environmental outcomes.

In contrast to the two previous Federal Environment Ministers, the current Minister has demonstrated a willingness to use the EPBC Act proactively as a means of achieving political objectives. This was illustrated most vividly in the Bald Hills decision, which appears to have been motivated by a desire to placate local wind farm opponents rather than to protect biodiversity. Approximately 64 wind farm developments have been referred under the Act since July 2000 and all have been approved other than the Bald Hills proposal. Yet, the Bald Hills decision was not the only case where the EPBC Act has been used for political purposes. Similar instances have been seen in relation to listing decisions concerning the National Heritage List and the list of threatened species.

The readiness of the Minister to use the EPBC Act for political purposes has introduced an element of uncertainty, particularly in relation to wind farm proposals. Consequently, not only is the EAA regime not achieving its environmental objectives,

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<sup>3</sup> Although the Commonwealth has only taken two enforcement proceedings, DEH has stated that ‘there have been other investigations into alleged breaches of [the EAA provisions], one of which has resulted in a formal conservation agreement being reached’ (Neville Mathew, pers. comms., 20 July 2006).

but it is also now impeding economic growth in a manner that is likely to lead to inefficient outcomes.

The available data suggest that the EAA regime has cost taxpayers a minimum of \$72 million and that it may have cost up to \$180 million (DEH 2005; Macintosh and Wilkinson 2005). Given the minor nature of the environmental benefits that the EAA regime has generated, it appears that it remains a significant waste of taxpayers' resources. If the Government refuses to use the legislation constructively, it should be abolished and the money redirected to other areas.

The Government could consider a number of measures to improve the cost-effectiveness the EAA regime, including:

- restructuring the EAA regime so that the approval requirements hinge on the location and characteristics of development proposals (as applies under state and territory planning systems that are zoning-based) rather than being dependent on a 'significant impact' test that focuses on the nature of the likely effects of proposals;
- introducing more rigid decision guidelines;
- promoting greater transparency and accountability;
- introducing a merit-based appeals process; and
- transferring decision-making powers from the Minister to an independent statutory authority (similar to the Australian Competition and Consumer Commission).

## References

Department of the Environment and Heritage 2005, *Annual Report 2004-05*, Commonwealth of Australia, Canberra.

Macintosh, A. 2006, *Howard's Environmental Agenda: Preservation or Just Plain Politics*, Speech given to the National Parks Association of the ACT, March, Canberra.

Macintosh, A. and Wilkinson, D. 2005, *Environment Protection and Biodiversity Conservation Act: A Five Year Assessment*, The Australia Institute, Discussion Paper No. 81, July, Canberra.