

# Handout for ENVM3103/7123 lecture 10 on 13 May 2015

## Simplified structure of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (“EPBC Act”)

**PRELIMINARY** Ch 1, Part 1, ss1-10  
Object (s3): Protection of the environment, conservation of biodiversity and ecologically sustainable development.

### ENVIRONMENT PROTECTION – Ch 2, 3 & 4

#### Controlled actions Ch 2, Part 3, ss12-28

##### Matters of “national environmental significance”

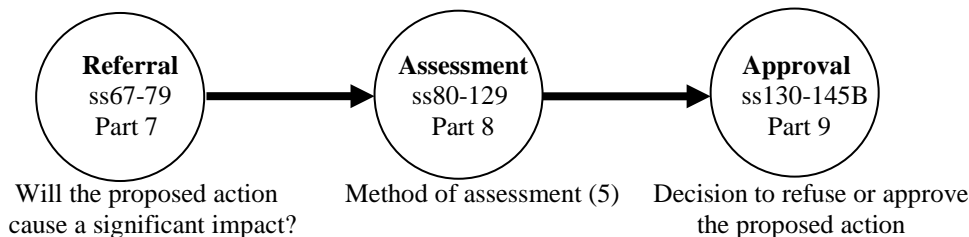
Actions that have, will have or are likely to have a significant impact on:

1. The world heritage values of a declared World Heritage property (ss12-15A)
2. The National Heritage values of a National Heritage Place (ss15B-15C)
3. The ecological character of a declared Ramsar wetland (ss16-17B)
4. Threatened species and ecological communities (ss18-19)
5. Migratory species (ss20-20A)
6. The environment if the action is a nuclear action (ss21-22A)
7. Commonwealth marine areas (ss23-24A)
8. Great Barrier Reef Marine Park (ss 24B-24C)
9. Coal seam gas & large coal mine development impacting on a water resource (ss 24D-24E)

##### Commonwealth land and actions

1. Actions taken on Commonwealth land that have, will have or are likely to have a significant impact on the environment (s26(1))
2. Actions taken outside Commonwealth land that have, will have or are likely to have a significant impact on the environment on Commonwealth land (s26(2))
3. Actions taken by the Commonwealth that have, will have or are likely to have a significant impact on the environment (s28)

#### Referral process for controlled actions Ch 4, Parts 6-9, ss67-145B



#### Bilateral Agreements – Ch 3, Part 5, ss44-65A

Agreements between the Commonwealth and State/Territory governments accrediting State or Territory development assessment processes for the assessment stage (“Assessment Bilaterals”) or alternatively the assessment and approval stages (“Approval Bilaterals”) of the referral process for controlled actions.

### BIODIVERSITY CONSERVATION – Ch 5, Parts 12-15, ss171-390J

1. Identification & monitoring (ss171-175)
2. Bioregional Plans (s176)
3. Listing of threatened species & ecological communities (ss178-194; 248-252)
4. Species offences & permits (ss195-264)
5. Register of critical habitat (ss207A-207C)
6. Australian Whale Sanctuary (s225)
7. Recovery & Threat Abatement Plans (s267)
8. Wildlife Conservation Plans (ss285-300A)
9. International trade in wildlife (Part 13A)
10. Conservation Agreements (ss304-312)
11. Biosphere and Cth Reserves (ss337-390A)

### ADMINISTRATION – Ch 6, Parts 16-21, ss391-516B

1. Precautionary principle to be considered when making decisions under Act (s391).
2. Wardens, rangers and inspectors; search powers etc (ss392-462); Conservation Orders (ss464-474); Ministerial orders to remedy environmental damage (s499).
3. Injunctions (ss475-480); Widened standing for public interest litigation (s475; ss487-488) and no undertaking as to damages required if applying for interim injunction (s478).
4. Executive officer liability (s493-5); due diligence (s496); false and misleading information (s489-91).
5. Committees (ss502-14); Annual Cth reports (s516A); 5 yearly State of Environment Reports (s516B).

(sometimes called “soft law”) such as *Agenda 21*<sup>56</sup> and *The Earth Charter*<sup>57</sup> forming the basis for government policy.

## Commonwealth law

Commonwealth law is the legislation enacted and administered by the Australian Government.<sup>58</sup> It also includes statutory instruments such as subordinate legislation (typically called “regulations”) and plans created under such laws. The centrepiece of Commonwealth environmental law is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). The Commonwealth also plays a particularly important role in customs and export controls for international trade in endangered species as well as for fisheries, ozone and greenhouse issues. The Great Barrier Reef Marine Park Authority is also a Commonwealth agency and is responsible for the protection and management of the Great Barrier Reef under the *Great Barrier Reef Marine Park Act 1975* (Cth). The limits of the Commonwealth Government’s law-making power are set out in the *Commonwealth Constitution*.

### Commonwealth Constitution

While there is little reference to “the environment” or “natural resources” in the *Commonwealth Constitution*, interpretation of it by the High Court has led to recognition that the Commonwealth has extensive legislative powers with respect to the environment. The primary rule of Australian constitutional law is that, to be valid, Commonwealth legislation must be based on a head of legislative power contained in the Constitution.<sup>59</sup> Section 51 of the Constitution is the principal statement of these heads of power. James Crawford has summarised other basic rules for determining Commonwealth legislative powers as follows:<sup>60</sup>

1. Subject to certain exceptions, the heads of power in section 51 of the Constitution are to be interpreted separately and disjunctively, without any particular attempt being made to avoid overlap between them.
2. The powers conferred by section 51 are to be construed liberally in accordance with their terms, and without any assumption that particular matters were intended to be excluded from federal authority or “reserved” to the States.
3. There is no requirement that Commonwealth legislation be exclusively about one of the granted heads of power. The purpose of the law and its practical effect are irrelevant provided its legal operation is with respect to a head of power.

The External Affairs power in s 51(xxix) of the Constitution provides an important link between international law and Australian domestic law. Under it the Commonwealth Government has power to enact legislation that is reasonably capable of being considered appropriate and adapted to fulfil Australia’s international legal obligations.<sup>61</sup> This is a very wide and important head of legislative power. Given the width of the obligations imposed by Article 8 of the *Biodiversity Convention* in particular, it is difficult to think of any real environmental issue (at least with respect to the natural environment) that the Commonwealth does not have legislative power over. Simply stated, the Commonwealth has virtually a plenary power to make laws with respect to the environment (or at least biodiversity).

Section 51(xxix) also allows the Commonwealth to regulate places physically external to Australia, such as the marine environment seaward of the low water mark.<sup>62</sup> However, in 1979 the Commonwealth gave proprietary rights and legislative jurisdiction to the States and Northern Territory for coastal waters (three nautical miles from the low water mark) under the Offshore Constitutional Settlement.<sup>63</sup> Subsequent cooperative arrangements also provide for State fisheries legislation to extend beyond coastal waters, as summarised in Appendix 3.

<sup>61</sup> *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168; *The Commonwealth v Tasmania* (1983) 158 CLR 1 (the Tasmanian Dam Case); *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (the Wet Tropics Case); *Victoria v Commonwealth* (1996) 187 CLR 416 (the Industrial Relations Act Case) at 487-488.

<sup>62</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case).

<sup>63</sup> *Coastal Waters (State Powers) Act 1980* (Cth); *Coastal Waters (State Title) Act 1980* (Cth). See generally s3 *Offshore Minerals Act 1998* (Qld); Fowler R, “Environmental Law and Its Administration in Australia” (1984) 1 EPLJ 10 at 13. This See also *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340.

<sup>56</sup> See <http://www.un.org/esa/sustdev/documents/agenda21/>

<sup>57</sup> See <http://www.earthcharter.org/>

<sup>58</sup> Commonwealth legislation and statutory instruments are available at <http://www.comlaw.gov.au/>

<sup>59</sup> *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129 (the Engineers’ Case).

<sup>60</sup> Crawford J, “The Constitution and the Environment” (1991) 13 *Sydney Law Review* 11 at pp 14-16.