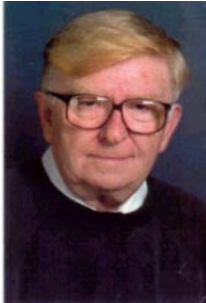


# The Costs of Federalised Sustainability



*Professor Alan Fogg  
Professor Emeritus, University of Queensland*

*The law seems like a sort of maze, through which a client must be led to safety, a collection of reefs, rocks and underwater hazards through which he or she must be piloted.*

John Mortimer, *Clinging to the Wreckage* (1982), Ch 7

John Mortimer is right where the sustainability jigsaw is concerned. Ecologically sustainable development (ESD) is an idea at a remarkably abstract level. Its translation into Australian statutes has provided an ideological envelope within which competing interests contend for mastery. There are two polarised world views. Green interests are highly educated, well organised and devoted to their cause. Their name is legion, and they monitor and network; they also have easy media access and have captured leading journals.<sup>1</sup> By contrast, the business case and pragmatic issues of genuine co-operative federalism are often overlooked.<sup>2</sup>

The balance should be redressed. Focus here is not on the giant burrowing frog or semi-evergreen vine thickets. There are three main areas. First, environment assessment and approval processes (EA) under the federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), and their effect on the development of land and those who advise developers. Secondly, the consequences of federal laws for independent State systems, notably the *Queensland Integrated Planning Act 1997* (IPA). Finally, and separately, the effect of ecological sustainability (ES) in IPA on local government schemes and development control.

We are already into an alphabet soup of acronyms for the polysyllabic ideas and titles. Reductive jargon will continue for reasons of space and coherence.

## 1. Statutory objects – do they matter?

Professor Douglas Fisher has carefully analysed objects clauses in the different Australian versions of ES and ESD.<sup>3</sup> For present purposes, objects clauses characteristically contextualise operational provisions, and will here only be glancingly dealt with. It is the scope and detail of operational provisions that are the heart of ESD.

The federal EPBC Act has seven objects, including protection of the environment and promotion of ESD through the conservation and ecologically sustainable use of natural resources.<sup>4</sup> The ESD objective is buttressed by five principles of ESD. They are all the offspring of ESD itself: integration of the decision-making processes, the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms.<sup>5</sup> Of the five, the precautionary principle has caused the most spilling of ink.<sup>6</sup>

There are two points about the EPBC objects. First, and subject to specific mention of the role and knowledge of indigenous people, the objects do not directly concern the well-being of humans. The definition of environment is essentially ecocentric not anthropocentric,<sup>7</sup> and the ESD object is aimed at natural resources. Human stakeholders are mentioned only in relation to the fourth object, a machinery provision concerning a co-operative approach to environmental protection and management.<sup>8</sup> Secondly, there is no serious inclusion of the benefits of economic development. The only reference is in the first ESD supporting principle, identifying the effective integration of economic, environmental, social and equitable considerations.<sup>9</sup> This is so broadly drawn

as to be of little practical assistance.

The EPBC Act is a green statute with a small economic tinge in its objects, and where an environmental assessment decision is concerned.<sup>10</sup> By contrast, IPA has a purpose that requires decision-makers to seek to achieve ecological sustainability in three cumulative ways: by co-ordinating and integrating planning, by managing the development process, and by managing the effects of development on the environment.<sup>11</sup> Ecological sustainability is separately defined to include economic development and the well-being of people and communities, as well as the protection of ecological processes and natural systems.<sup>12</sup> IPA is a development statute with contextualised ESD.

These different statutory envelopes have consequences for the nature and extent of development control. For the private sector the litmus test of sustainability is its effect on the approval processes for development projects, and the EPBC Act creates a parallel assessment and approval system. The Property Council sees the EPBC Act as the Feds revenge for Hinchinbrook, and predicts that it will bind business in a sea of red tape, stifle investment because of uncertainty and lead to a major reduction in Australian economic performance.<sup>13</sup>

By contrast, environmentalists look to the Commonwealth to provide national environmental leadership. Many would have preferred the Commonwealth to use its constitutional powers to produce legislation to override State laws.<sup>14</sup> Faced with a statute based on co-operative federalism stemming from the COAG agreement, their concern is to improve and expand upon the EPBC Act. The Act certainly provides considerable transparency through public notices and opportunities to make submissions and nominate additional biodiversity components. A World Bank expert has identified Australia as one of two countries that have the most specific biodiversity conservation laws in the world. The other is Costa Rica.<sup>15</sup>

However, the most important shift is political. The change of responsibility from numerous action ministers to the federal environment minister gives green interests the opportunity for regulatory capture of Environment Australia.

## 2. Environmental assessment under the EPBC Act

“[T]he EPBC Act represents a fundamental change in the relationship between Commonwealth and the States and private citizens in the control of activities having an environmental impact.”<sup>16</sup> There are two

basic reforms affecting the private sector. First, the Act puts duties directly on “proponents.” A person becomes a proponent once the Minister has decided that an “action” is a “controlled action” requiring federal assessment and decision.<sup>17</sup> “Action” is widely defined to include development, and a designated “proponent” includes a developer.<sup>18</sup>

Secondly, the trigger for federal involvement is any action that “has, will have or is likely to have” a “significant impact” on listed items of national environmental significance (NES).<sup>19</sup> This contrasts with State control systems. For example, under IPA development activity is caught by the definition of development. Subject to difficulties of interpretation, it is known in advance whether assessment and approval is required. Under the EPBC Act, the threshold issue is a matter for the exercise of ministerial discretion.

There are other dangers for developers who seek certainty. First, some of the components of each of the six NES items are regularly being enlarged, notably the biodiversity elements. Secondly, the list of six can be unilaterally added to by regulations,<sup>20</sup> a greenhouse trigger is under official consideration,<sup>21</sup> and national heritage places are foreshadowed. Environmentalists are pressing for additional triggers for land clearing, sustainable water use including salinity and land degradation, genetically modified organisms, and persistent organic pollutants.<sup>22</sup>

### (1) Prospective punishments as negative incentives for compliance

Failure to comply with the EPBC Act can make developers vulnerable to quite startling civil and criminal penalties. The taking of an action that is likely to have a significant impact on a matter of NES, without first obtaining an approval, renders an individual liable to a maximum civil penalty of \$550,000, or \$5.5 million if a corporation. There is also a criminal penalty of 7 years imprisonment, and/or a fine of \$46,200. Executive officers of corporations can separately be liable for civil penalties and criminal offences (including a maximum of 2 years imprisonment) for a contravention committed by a corporation.<sup>23</sup> Additionally, the Commonwealth actively encourages whistleblowers, and grants them anonymity.<sup>24</sup>

As a backstop for laxity in official enforcement, broad standing is given to third parties to seek injunctive relief.<sup>25</sup> Federal Court decisions show that the requirement to be an interested person is easily satisfied by environmentalists.<sup>26</sup> Such third parties are expressly liberated from the previous requirement to give undertakings as to damages as conditions of granting interim injunctions.<sup>27</sup>

This panoply of threats makes it essential for all developers to check with Environment Australia before proceeding in all but the simplest of urban development projects. There are two sequential decisions for developers with respect to referral. First, whether the development impacts on one or more of the NES triggers. Secondly, is the impact significant?

## **(2) The six current triggers for referral for environmental assessment**

The EPBC Act is likely to have more notable effects in Queensland than many other States because of the large number of environmentally significant sites and species within its boundaries, and because of higher levels of development activity.

The statistics given below are as near contemporary as sources allow, but are subject to regular expansion.<sup>28</sup>

### **(a) *The World heritage values of a declared World Heritage property.***

There are 14 World properties. Since the properties can be geographically identified, it is comparatively easy for a developer to direct its mind to a NES impact. There are two points to bear in mind. First, a development activity can have a relevant impact even though located outside a World Heritage Area. For example, discharge of pollutants into a creek that ultimately flows through a World Heritage property can have impact on the relevant values. Secondly, the impact is on values. The Spectacled Flying Foxes in *Booth v Bosworth*<sup>29</sup> are a “common mammal,” but nevertheless constituted a component of the values of the Wet Tropics World Heritage Area.

### **(b) *The ecological character of a declared Ramsar wetland***

There are 56 Ramsar wetland sites in Australia. For a developer, the geography should be clear, but issues similar to those for World Heritage properties will arise.

### **(c) *Nationally listed threatened species and ecological communities***

There are over 1500 threatened species and 23 endangered communities listed under the Act. An impressive number of additional nominations are under consideration.

It is obviously less easy for a developer to check first the existence of a listed species or community on the site, and secondly to estimate significant impact.

### **(d) *Nationally listed migratory species***

There are 200 species, eight families and one genus of migratory species, ranging from marine species to migratory birds. A developer will face the same two

problems that arise in relation to threatened species. These are not decisions to be skimped. A referred proposal for a magnesium smelter in South Australia denied the existence of listed migratory species. A conservation organisation drew the Minister’s attention to the existence of at least six migratory species using the area which could be impacted by the smelter. The Minister made the proposal a controlled action.<sup>30</sup>

### **(e) *Nuclear actions***

This is a self-identifying category. It may be noted that the food irradiation plant approved in the *Sol Theo* decision is caught by this specification.<sup>31</sup>

### **(f) *Commonwealth marine areas***

The areas are vast, covering 18 million square kilometres within the Australian Exclusive Economic Zone.

## **(3) The duty to refer**

It is an intending developer’s duty to decide whether to refer. Figures for the 2000/2001 reporting year show comparatively few referrals, whether the developer thought there was likely to be significant impact or simply hoped for federal confirmation that there was not.<sup>32</sup> There are two conclusions from the figures. First, the vast majority of referrals resulting in the need for further assessment have concerned the difficult categories of threatened or migratory species.<sup>33</sup> Secondly, most controlled actions have been major developments. Below that level there seems little awareness of duties and penalties under the EPBC Act.

Beyond small urban developments, there should be a recognition of the need to engage specialised environmental and biodiversity consultants. Those consultants should themselves be aware of the duty of care to their client where breach may lead to extensive damages payments.<sup>34</sup> Failure by a consultant to identify those six migratory species in connection with the magnesium smelter could count as a serious breach of duty. Migratory birds may only visit a site once in a year; the Minister’s powers to request further information, especially just before approval, makes it important to get it right in the first place. There is, moreover, an additional spur to the supplying of accurate information by developers and their consultants. By s 489, any person who knowingly, recklessly or negligently provides false or misleading information is liable to a criminal penalty of two years in gaol and/or a fine of \$13,200.

When in doubt developers should refer for a ministerial decision. The current touchstone is found in federal *Administrative Guidelines*.<sup>35</sup> There is a power in the

Act to make regulations concerning significant impact.<sup>36</sup> No regulations have been made, but will identify actions, or classes of action, deemed to have a significant impact thereby satisfying the threshold test. Any regulations can only assist rather than replace the exercise of discretion. Further, the similar specification of designated developments in NSW planning legislation has been prolific in producing litigation on borderline categories.<sup>37</sup>

The *Administrative Guidelines* make a brave attempt to ameliorate the open-ended discretion by giving examples on either side of the significance divide. For example, establishing a new subdivision in an existing suburb on a tributary of the Brisbane River would not normally be expected to have a significant impact on the Moreton Bay Ramsar wetland. By contrast, establishing a new subdivision in the vicinity of a Ramsar wetland is likely to have a significant impact if it involves extensive vegetation clearing, clearing riparian vegetation, modifying the flow of water to or within the wetland, or if it will result in significant discharges of pollutants into the wetland.<sup>38</sup>

The question is clearly finely balanced, and developers will not wish to run the risk in the face of extensive enforcement powers. Failure to refer is not by itself an offence. However, commencing an action without referral may lead to proceedings for an injunction, or may count as an offence or engender liability for a civil penalty.

There are two choices for a compliant developer. Direct referrals where a developer believes there will be the relevant significant impact. Alternatively, referrals where the developer believes there is no such impact but wishes for the certainty of the Minister's decision. The Minister has 10 business days to decide a direct referral and 20 business days to decide where a developer merely seeks a negative certainty.<sup>39</sup>

Up to the end of June 2001, there were 294 referrals, of which 190 were decided not to be controlled actions. Assessment for a controlled action commences when the developer proponent provides preliminary information, on which the Minister decides the appropriate assessment approach. In the same period, preliminary information had been received for 44 controlled actions, of which 23 were assessed on preliminary documentation, three by public environment reports, six by EIS, and seven by an accredited State process.<sup>40</sup>

Once Queensland has agreed to an assessment bilateral, developer workload will be reduced. However, nothing in assessment bilaterals will remove the two bookends of Commonwealth involvement: a decision that an action is a controlled action, and the ul-

timate decision with respect to approval.

### 3. Bilaterals and State assessment systems

#### (1) Background

The EPBC Act goes over the top of State assessment and decisional processes, creates a parallel system, and is in several respects a departure from the principles of the COAG agreement upon which it was intended to be based. It is a piece of the legislative jigsaw which does not easily fit. Even if assessment bilaterals are achieved, there will be no real partnership basis for assessments. It will remain legislation by and for the Commonwealth.

The extent of contradictions are considerable. First, the Act cuts across the work of the Development Assessment Forum (DAF). DAF has been operating since 1998, and is a combined initiative of all levels of Australian government, the development industry and relevant professional bodies. It has the imprimatur of the Prime Minister, and aims to harmonise planning laws in order to save an annual \$1.8 billion of unnecessary red tape. It has done valuable work on practical issues such as operational and land use definitions, but the program appears stymied by the EPBC Act. States are instead preoccupied with putting in place assessment legislation that meets federal benchmarks.<sup>41</sup> If DAF harmonisation could save nearly \$2 billion a year, it would be interesting to see an analysis of additional costs attributable to EPBC Act laws concerning environmental assessment.

Secondly, the COAG agreement has been altered in several respects, partly due to negotiations with the Australian Democrats to secure passage of GST legislation. There are three differences that stand out, and which cause concern in the States. First, the statutory benchmarks that must be met before the Commonwealth can sign a bilateral agreement were not in the COAG Heads of Agreement. Secondly, there was no indication that the Commonwealth would be involved in the assessment of matters not of NES significance. Thirdly, the States remain opposed to the Commonwealth's power to expand NES matters unilaterally and by regulation.<sup>42</sup>

The Commonwealth took an arbitrary line on consultation with the States on the EPBC Bill. States were regarded at the same level as other stakeholders, and given four days to comment.<sup>43</sup> This verges on disdain, since the Commonwealth clearly requires access to State infrastructure and experience either through ad hoc accreditations or bilateral agreements.

None of this reflects priority of the spirit of co-operative federalism implicit in the COAG Heads of Agreement.

## (2) Bilateral agreements

There are two types of bilateral agreement authorised by the EPBC Act: approval and assessment bilaterals.<sup>44</sup> There is no serious political possibility of approval bilaterals whereby the totality of federal assessment and approval powers are given to the States. It is necessary to have a bilaterally accredited management plan which is in force under the law of a State, and such plan may be disallowed by either House of Federal Parliament. This effectively places control in the hands of the Senate.

Assessment bilaterals cover the meat between the sandwich of federal identification of a controlled action and the decision at the end of the assessment process. Only Tasmania has so far finalised an assessment bilateral with the Commonwealth. Similar bilaterals are posted on the Environment Australia website marked as “not endorsed” by the relevant State; those drafts appear to represent the Commonwealth’s initial negotiating position.<sup>45</sup>

Both the Commonwealth and the States have good reasons for achieving an assessment bilateral. Without such an agreement the Commonwealth has powers of ad hoc accreditation of State assessment for particular projects.<sup>46</sup> Not only is this unsystematic, but discretions may be exercised against completed assessments. The federal minister has refused to accredit a NSW EIS for expansion of a cotton irrigation project near Macquarie Marshes, and required a federal public environment report (PER).<sup>47</sup> There is an obvious manpower advantage to the Commonwealth in avoiding the case-by-case accreditation process. Moreover, the Commonwealth promised that the EPBC Act would not cost more than repealed legislation; total long-term costs were predicted to be reduced.<sup>48</sup> This undertaking cannot come close to being met without State co-operation in avoidance of duplicating assessments.

The States are in competition with each other to attract major developments that give a tax and rate base and provide employment. Failure to have an assessment bilateral will mean disadvantage compared with States that have such agreements. There will be a confusing duplication of processes which may discourage international investment or persuade developers of major projects to move interstate.

An assessment bilateral will be judge-proof. Based on *Friends of Hinchinbrook Society Inc v Minister for the Environment*,<sup>49</sup> such an agreement is likely to be counted

a valid exercise of federal legislative power.<sup>50</sup> Nor is an agreement likely to be externally enforceable, because of the principle that agreements made between the executive arms of government are not usually enforceable in the courts.<sup>51</sup> Assessment bilaterals are political compacts; a blend of contract and statutory instrument.

Queensland is currently revising its planning and environment legislation to accommodate federal benchmarks. Rather than specify outcomes, these prescriptive federal standards reflect the Commonwealth processes in the EPBC Act. Despite these and other constraints, Queensland is creating the necessary legislative package:<sup>52</sup>

- Significant projects<sup>53</sup> under the *State Development and Public Works Organisation Act* 1971;
- EIS for mining projects within the jurisdiction of the Environmental Protection Agency under the *Environmental Protection Act* 1994;
- Insertion in IPA of a new Ch5 Pt7A to cover non-mining projects that are not declared to be significant projects.

It has been suggested that sustainability principles will not work for mining and extractive industries.<sup>54</sup> IPA changes are also of concern. IPA eschewed EIS, and previous EIS procedures were only partly and reluctantly transitioned. An important plank of the IPA reform is the incorporation of environmental evaluations and desired environmental outcomes in planning schemes, supported by codes and State Planning Policies. Site-specific environmental issues are to be dealt with at the information stage of an IDAS application. That platform remains, but has been compromised where a development is also a controlled action. The proposed Part 7A imports EIS as a necessary “bolt-on” to meet federal benchmarks, and is a contradiction of best practice in development control.

The content of an assessment bilateral for Queensland is undetermined, but the framework can be guessed at from the federal draft. Clause 10 is notable. Queensland is to ensure that impact on certain matters that are not of NES are assessed. The draft contains a blizzard of provisions requiring unilateral or mutually exchangeable notices, and is pregnant with the phrases “to the greatest extent practicable,” “use their best endeavours” and similar encouragements. An agreement lasts for 5 years only, and it is only the Commonwealth Minister who can cancel or suspend the agreement.<sup>55</sup> In terms of genuine co-operative federalism, the federal legislation imposes a rigid framework, leaving only a narrow space for negotia-

tions. When the bilateral piece of the sustainability jigsaw is put in place, then some incongruities and duplication will be avoided. However, administration of the agreement will incur additional bureaucratic costs.

## 4. Local government and sustainability

Since the EPBC Act places duties on developer proponents, a local government suffers no direct responsibility or threats. It is only required to refer its own developments. Environment Australia advises local governments to tell developers “that some actions may need Commonwealth approval under the EPBC Act.”<sup>56</sup>

This is sensible for two reasons. First, for their own reasons local governments should keep up to speed with the Environment Australia website.<sup>57</sup> Secondly, pre-lodgement advice about possible controlled actions will prevent the making of nugatory IDAS applications. Development applications lodged before identification of a controlled action will fail to trigger Part 7A assessment and produce problems for referral agencies. Premature applications should be withdrawn and refund of fees sought. Environmental assessment should always be completed before an IDAS application is made.<sup>58</sup>

Queensland local governments have positive duties to fulfil under the IPA sustainability purpose. They have been urged by David Nicholls to take the IPA purpose seriously by integrating a balance of economic, social and environmental considerations.<sup>59</sup> The IPA purpose is obviously relevant to the making of planning schemes, notably in the co-ordination and integration of core matters; these include “valuable features” which are defined in terms of the general purpose. The preferable argument is that the sustainability purpose is also relevant to development control. Schemes require fulfilment through IDAS decisions, and there is an express requirement for functions and powers to be processed in a way that advances the IPA purpose.<sup>60</sup> This means that impact assessable applications must be so dealt with. Moreover, applications for preliminary approval under s 3.1.6 overrule schemes, and their relationship to the purpose must be separately justified.<sup>61</sup>

The approach of the Planning and Environment Court in appeals is an important controlling factor. Judge Quirk has focussed on the limited function of an appeal court. “The unacceptability of a court’s being seen in any sense as ‘leading the charge’ in some

form of environmental crusade needs no elaboration.”<sup>62</sup> Of greater concern than abstract statutory concepts are a comparative assessment of a development proposal on a pragmatic basis. Riding instructions are worth setting out in full:<sup>63</sup>

- What weight should be given to that component of the environment that will be displaced;
- To what extent should existing flora, fauna or physical landforms be valued to determine whether the danger to its existence should stand in the way of the proposal;
- What weight should be given to countervailing public benefits that might flow from a proposal such as-
  - o benefits to the community in respect of the ease and convenience of everyday living;
  - o benefits in respect of the provision of employment;
  - o benefits to the economy in respect of the attraction of tourism, investment and the like.

This exercise in practicality is a necessary check on ideologies that infest the abstractions of a pure sustainability purpose, and flows from the integrated balance required by IPA. Compare the EPBC Act, where no integrated balance is unequivocally available. Nor is there any merit appeal against the federal minister’s decisions, so that case law jurisprudence will consist of third party injunctions plus judicial review in the Federal Court that, perhaps, will benchmark the test of significant impact.

Sustainability in IPA is perhaps no more than good planning under another label. At the planning scheme level, tangible benefits of ESD can be demonstrated by the Atherton Shire IPA scheme.<sup>64</sup> About 15% of the shire is within the Wet Tropics World Heritage area, and an environmental audit helped identify the shire’s “valuable features.” The audit was processed into Conservation Planning Areas over important volcanic landforms and remnant vegetation of significance on freehold land. The IPA purpose is likely to have assisted in persuading a conservative local government to accept conservation zones on freehold land for an area dominated by primary industries.

## 5. Conclusions

ESD is working well in IPA, substantially because the ES purpose is a sensible integrated balance. Sustainability of this kind is further guaranteed by

merit appeals to a specialised court. The unlimited opportunity for environmentalists to make submissions and to access the Planning and Environment Court ensures that greens can have their say, and are protected against a costs award save in exceptional circumstances.<sup>65</sup> The further appeal by leave to the Court of Appeal secures against mistaken legal interpretations.

It is the EPBC Act that provides the awkward piece of the jigsaw. A distinguished American sceptic has doubted whether adding the EIS to existing land development control approvals does more than impose additional procedural requirements without necessarily securing the added protection which the impact statement promises.<sup>66</sup> The EPBC Act adds referral, other assessment options, and a substantive decision on merits. Moreover, the substantive decision cannot be appealed. In contrast, the pattern of federal involvement under the repealed Environment Protection (Impact of Proposals) Act 1974 (EPIP Act) was comparatively innocuous. Decisions were left to action ministers with the federal environment minister in an advisory role, and most decisions were on an informal officer basis that worked well from an administrative perspective.<sup>67</sup> Further, the EPIP Act was basically unenforceable in the courts.<sup>68</sup>

The EPBC Act has radically changed the previous federal regime. It is a recipe for a permit explosion. When allied to the power unilaterally to extend the list of matters of NES, the combination of transparency through information and third party opportunities means that federal powers will be as inflationary as the Argentinian economy.

The Commonwealth undoubtedly has a legitimate role in environmental protection. There are, however, three main conclusions about the EPBC Act. First, it gives a spin to co-operative federalism that makes the Commonwealth the dominant partner. Secondly, benchmarks for assessment bilaterals mean the leading practice of front-end loading of environmental issues central to IPA has been compromised. Thirdly, the Property Council prediction of truckloads of paper going to Canberra is being realised. Even if federal assessment is based on preliminary information, the documentation can be Everest-high.

There is no doubt that minorities in the Senate have seriously damaged the EPBC Act as a vehicle for co-operative federalism. It is difficult to see how the practical operation of the Act can appropriately meet the fourth general object of promoting a co-operative approach to protection and management of the environment, at least so far as the States are concerned.<sup>69</sup> Nor can the particular third and fourth

objects for bilateral agreements be satisfied so far as approval bilaterals are concerned. Neither current nor potential arrangements “ensure an efficient, timely and effective process” for environmental assessment and approvals, or appropriately “minimise duplication” through accreditation of State processes.<sup>70</sup>

Contrary to environmental opinion, an effective jigsaw necessitates the dovetailing of approval bilaterals. That solution requires legislative change and a differently constituted Senate.

## Endnotes

- <sup>1</sup> For example, the Environmental and Planning Law Journal concerns itself almost exclusively with environmental rather than planning law. Some of the contributions tend to extravagance. In one article, the author claims that national environmental significance is a flawed idea, since all degradation of the environment affects the delicate ecological balance of the planet as a whole: Hughes L, “Environmental Impact Assessment in the Environment Protection and Biodiversity Act, 1999 (Cth)” (1999) 16(5) EPLJ, 441 at 445. A second reading of that statement had to be conducted through splayed fingers while hiding behind the fridge door.
- <sup>2</sup> The Business Council of Australia is a tame cat. Its website contains numerous examples of internal corporate sensitivity to sustainability, but offers no comment about the content or operation of federal environment legislation. By contrast, the Property Council was affronted by many aspects of the EPBC Bill, but has been silent about its practical operation since it became law.
- <sup>3</sup> “Considerations, Principles and Objectives in Environmental Management in Australia” (2000) 17(6) EPLJ 487; “Sustainability – the Principle, its Implementation and its Enforcement” (2001) 18(4) EPLJ 361; “Sustainability: the role of an Appellate Court” (2001/2002) 7(34) QEPR 160.
- <sup>4</sup> EPBC Act, s 3(1)(a) (environment), s 3(1)(b) (ESD).
- <sup>5</sup> EPBC Act, s 3A.
- <sup>6</sup> This is surprising, since the precautionary principle can have no higher value than as an element in the applicant’s standard of proof on appeal. Nonetheless, distinguished legal voices have suggested a greater importance: for example Stein PL, “Are Decision-Makers too Cautious with the Precautionary Principle?” (2000) 17(1) EPLJ 3. As an antidote, read Talbot RN, address to the Third Australian Conference of Planning and Environment Courts and Tribunals (Queenstown, NZ, November, 2000), and Quirk TJ “Some Thoughts from ‘The Coalface’” (2001/2002) 7(34) QEPR 149. A sceptical judicial view in the law reports is found in *Nicholls v Director General of National Parks and Wildlife* (1994) 84 LGERA 397, Talbot J at 419.
- <sup>7</sup> EPBC Act, Ch 8 Pt 23 Div 2.
- <sup>8</sup> EPBC Act, s 3(1)(d).
- <sup>9</sup> EPBC Act, s 3A(a).
- <sup>10</sup> The Minister is prohibited from taking into account compensating benefits when considering whether a referral constitutes a controlled action: EPBC Act, s 75(2)(b). By contrast, criteria for the ultimate decision include the vague phrase “economic and social matters”: EPBC Act, s 136(1)(b).
- <sup>11</sup> IPA, s 1.2.1.

- <sup>12</sup> IPA, s 1.3.6.
- <sup>13</sup> “Environment Protection and Biodiversity Conservation Bill 1998,” (Property Council Lobby Alert, 21 August 1998).
- <sup>14</sup> For example, Garrett P, “Commonwealth environment powers: An environment movement perspective,” *A New Green Agenda* (National EDO Network Conference, 14 October 1999), 13.
- <sup>15</sup> Dr Tom Lovejoy, chief World Bank biodiversity adviser. See “The Australian,” 11 September 1999.
- <sup>16</sup> Scanlon J and Dyson M, “Will Practice Hinder Principle? – Implementing the EPBC Act” (2001) 18(1) EPLJ 14 at 19.
- <sup>17</sup> EPBC Act, s 75(3) It is worth noting that the Minister has power under s 77(3) to impose what are effectively conditions, despite deciding the action is not controlled action. 90% of a 2.159 ha site for a waste transfer station in Cardwell Shire was required not to be developed to preserve a wildlife corridor for listed threatened species, including the mahogany glider and the southern cassowary. Guarantee of continuing protection was through a covenant under the *Land Title Act* 1994 (Qld): EA Ref No 2001/284, 4 July 2001.
- <sup>18</sup> EPBC Act, s 523
- <sup>19</sup> EPBC Act, s 75(2). When deciding whether an action is a controlled action, the Minister is prohibited from considering any beneficial impacts the action “has, or will have, or is likely to have” on the protected matter. The preliminary decision based on the referral is limited to actual or potential adverse impacts.
- <sup>20</sup> EPBC Act, s 25. By s 28A, the Commonwealth is committed to quinquennial reviews to identify extra matters to be protected. Such reviews do not circumscribe the regulation-making power in s 25.
- <sup>21</sup> A draft regulation was issued on 16 November 2000, and States and Territories were invited to comment: *Proposed Amendments to the EPBC Act and Regulations*, Environment Australia website. Presumably the delay is due to complications connected with ratification of the Kyoto Protocol.
- <sup>22</sup> For example, Chapple S, “The Environment Protection and Biodiversity Conservation Act 1999 (Cth): One Year Later” (2001) 18(6) EPLJ 523 at 538. A longer green shopping list is given in Kennedy M, “The EPBC Act & Biodiversity Protection: A conservation organisation perspective,” *A New Green Agenda* (National EDO Network Conference, 14 October 1999), 45 at 49.
- <sup>23</sup> Major offences and penalties are in Ch 2 Pt 3 of the EPBC Act (requirements for environmental approvals).
- <sup>24</sup> *Compliance and Enforcement*, Environment Australia website, 1. Whistleblowers are encouraged to contact the Monitoring and Compliance Section, where queries will be promptly answered.
- <sup>25</sup> EPBC Act, s 475.
- <sup>26</sup> *Booth v Bosworth* [2000] FCA 1878.
- <sup>27</sup> EPBC Act, s 478.
- <sup>28</sup> The figures are taken from Chapple S, “The Environment Protection and Biodiversity Conservation Act 1999 (Cth): One Year Later” (2001) 18(6) EPLJ 523. Information that is more contemporary requires enthusiastic trawling of the Environment Australia website.
- <sup>29</sup> [2001] FCA 1453.
- <sup>30</sup> EA Reference No 2000/29. The surrounding circumstances are given in Chapple S, op cit, at 530.
- <sup>31</sup> *Sol Theo as Trustee for the Solon Theo Family Trust v Caboolture Shire Council* [2001] QPELR 101. There is a potential complication when proposals subject to the IDAS process are also a controlled action under the EPBC Act. Conditions imposed by the federal Minister can conflict with conditions on a development approval. A practical reconciliation by the local government, or the PEC on appeal, appears necessary. The EPBC Act not only partly federalises State assessment systems through bilaterals, but also effectuates a part de facto federalisation of State appeal processes and outcomes.
- <sup>32</sup> Up to 31 August 2001, there were only 295 referrals: Chapple S, op cit, at 526. Queensland is only slightly outstripped by NSW in terms of referral numbers.
- <sup>33</sup> 57 out of 83 controlled actions were triggered by the categories of threatened species and communities.
- <sup>34</sup> Fisher DE, “Legal Pitfalls for Environmental Consultants” (1997) 14(4) EPLJ 282.
- <sup>35</sup> *EPBC Act Administrative Guidelines on Significance*, July 2000. There is some doubt, however, whether the guidelines will be persuasive in the Federal Court. In *Booth v Bosworth* [2001] FCA 1453, Branson J identified World Heritage values from sources other than the official guidelines.
- <sup>36</sup> EPBC Act, s 25A.
- <sup>37</sup> For example, *Mitchell v Vella* (1998) 101 LGERA 333; *Levenstrot Community Association Inc v Tomies Timber* (2000) 108 LGERA 176; *Lyne v Moree Plains Shire Council* (1999) 110 LGERA 120.
- <sup>38</sup> *Administrative Guidelines*, 12.
- <sup>39</sup> EPBC Act, s 75(5). General rules about time limits are established by s 156.
- <sup>40</sup> *Environment Australia Annual Report 2000-01*, 3.
- <sup>41</sup> Details can be found in the DAF website at [www.daf.gov.au](http://www.daf.gov.au). The Prime Minister’s endorsement is in *More Time for Business* (1997). The forum is run by the National Office of Local Government within the federal Department of Transport and Regional Services.
- <sup>42</sup> See the list in Scanlon J and Dyson M, “An overview of the EPBC Act: From a State’s Perspective.” *A New Green Agenda* (National EDO Network Conference, 14 October 1999), 21 at 22. The involvement of the Commonwealth in assessment of non-NES matters was regarded as running counter to the basis of the COAG agreement.
- <sup>43</sup> Scanlon J and Dyson M, note 42, at 22.
- <sup>44</sup> EPBC Act, Ch 3 Div 2 Subd A.
- <sup>45</sup> This action was condemned as premature by the Victorian Minister for Planning: Media Release, 21 July 2000. The Victorian government had no intention of signing its draft bilateral in its then form, and the draft failed to represent the latest version agreed between Commonwealth and State officials. The Victorian Minister concluded that the federal environment minister “completely undermines the effective implementation of his own legislation that relies on cooperation with States and Territories.” The words are obviously politically heated, but the sense of grievance appears real.
- <sup>46</sup> EPBC Act, s 87(4).
- <sup>47</sup> Chapple S, op cit, at 530.
- <sup>48</sup> Financial Impact Statement in the *Explanatory Memorandum* for the EPBC Bill. Costs were suggested to be small compared with the ongoing benefits of more streamlined and efficient processes. It is difficult to find justification for this bland optimism at the time the EPBC Bill was introduced in Parliament; even more difficult when the Senate had ensured that approval bilaterals were political dead ducks.
- <sup>49</sup> (1997) 147 ALR 608; (1997) 95 LGERA 229. In *Hinchinbrook*, the Full Court of the Federal Court held that the federal environment minister had not made an error of law under the *World Heritage Properties Convention Act* 1997 (Cth) by consensual

- arrangements put into place under Queensland legislation.
- <sup>50</sup> Branson C, “Some key constitutional and administrative issues,” *A New Green Agenda* (National EDO Network Conference, 14 October 1999), 5 at 10. Since the Hon Justice Catherine Branson is a Federal Court judge, the opinion may be treated as carrying weight.
- <sup>51</sup> As Windeyer J said in *South Australia v Commonwealth* (1962) 108 CLR 130 at 154, an agreement deliberately entered into and by which both parties intend themselves to be bound may yet not be an agreement that the courts will enforce.
- <sup>52</sup> Roberts A, “Queenslands Perspective of the EPBC Act” in *The EPBC Act – 12 Months On* (QELA Seminar, 30 July 2001), 8; Bowie L, “The new EIS Provisions” in *IPOLEAA 2001* (QELA Seminar, 15 March 2002), 45.
- <sup>53</sup> As a rule of thumb, an experienced practitioner has suggested that most significant projects are worth more than \$50 million, and are most likely to be industrial or infrastructure projects rather than residential projects: Bowie L, *op cit*, note 2.
- <sup>54</sup> Bowie L, “Why the New Environmental Legislative Principles Don’t Work for Mining and Extractive Industries” (2001/2002) 7(32) QEPR 99.
- <sup>55</sup> Queensland draft, cl 5 (length of agreement) and cl 22 (cancelling or suspending the agreement). Minor though legislatively necessary irritations include the following requirements. Bilateral agreements must be submitted to a period of public consultation both before and after agreement is reached between the two governments: EPBC Act, s 49A. The federal minister may seek to change a concluded agreement after the public has been consulted. Agreements are subject to audit by the Commonwealth Auditor-General: EPBC Act, s 48A(4); Queensland draft, cl 20. Although not judicially enforceable, an assessment bilateral is open to third party claims of breach; those claims must be investigated and a public report made by the Commonwealth: EPBC Act, s 57.
- <sup>56</sup> *Information about the EPBC Act for local governments*, Environment Australia website.
- <sup>57</sup> The website is revised on a weekly basis.
- <sup>58</sup> See Bowie L, “The New EIS Provisions,” *IPOLEAA 2001* (QELA Seminar, 15 March 2002), 45 at 49.
- <sup>59</sup> By David Nicholls in “ESD and the Integrated Planning Act 1997 – A Question of Balance” (to be published).
- <sup>60</sup> IPA, s 1.2.2.
- <sup>61</sup> These are all arguments made by David Nicholls, n 59 above, and are cheerfully adopted.
- <sup>62</sup> Quirk TJ, “Some Thoughts from the ‘Coalface’” (2001/2002) 7(34) QEPR 149 at 152.
- <sup>63</sup> *Ibid*.
- <sup>64</sup> Ovenden G, “‘Atherton IPA Planning Scheme’” (2001/2002) 7(32) QEPR 95.
- <sup>65</sup> IPA, s 4.1.23.
- <sup>66</sup> Mandelkar D, *Environmental and Land Control Legislation* (Bobbs-Merrill Co, New York, 1976), 166.
- <sup>67</sup> Scanlon J and Dyson M, “Will Practice Hinder Principle? – Implementing the EPBC Act” (2001) 18(1) EPLJ 14 at 21.
- <sup>68</sup> Munchenberg S, “Judicial Review and the Commonwealth Environment Protection (Impact of Proposals) Act 1974” (1994) 11(4) EPLJ 461.
- <sup>69</sup> EPBC Act, s 3(1)(d).
- <sup>70</sup> EPBC Act, s 44(c) and (d).