

CHAPTER 7

LESSONS FROM AUSTRALIA

INTRODUCTION

The need for a clearer understanding in integration and consolidation of multiple laws pertaining to biodiversity conservation particular from similar government structures and system, led to several comparative study options within the Commonwealth system. Australia was an ideal choice. Not only did it have a federated system of governance¹, it is recognised by UNEP World Conservation Monitoring Centre as one of the 17 mega-diverse countries in the world². Primary too, was the fact that it had enacted a law that seeks to consolidate biodiversity conservation³. Grounded on legal positivism⁴, a brief comparative study of the Australian Environment Protection and Biodiversity Conservation Act 1999 (EPBCA 1999) was conducted, with the review being based on the law as it is posited, focusing specifically on aspects related to biodiversity and biodiversity conservation.

The goal of the exercise was to “assess and understand the differences that exist ... and to discover the attendant benefits of these differences⁵”. Lessons drawn from the study of the EPBCA 1999 provided inputs to understanding the prerequisites to developing an

¹ Like Malaysia, The Australian Constitution is a nod to the Westminster Parliamentary System see also Lane, P.H., *The Australian Federal System with United States Analogues*, 1972, The Law Book Company, Australia; Hanks, P., Keyzer, P., and Clarke, J., *Australian Constitutional Law: Materials and Commentary*, 2004, Butterworths; Blackshiled, T. and Williams, G., *Australian Constitutional Law and Theory* (4th Ed.), 2007, The Federation Press.

² Williams, J., Read, C., Norton, A., Dovers, S., Burgman, M., Proctor, W. and Anderson, H., *Biodiversity*, Australia State of the Environment Report 2001 (Theme Report), CSIRO, Publishing on behalf of the Department of the Environment and Heritage, Canberra. See page 13.

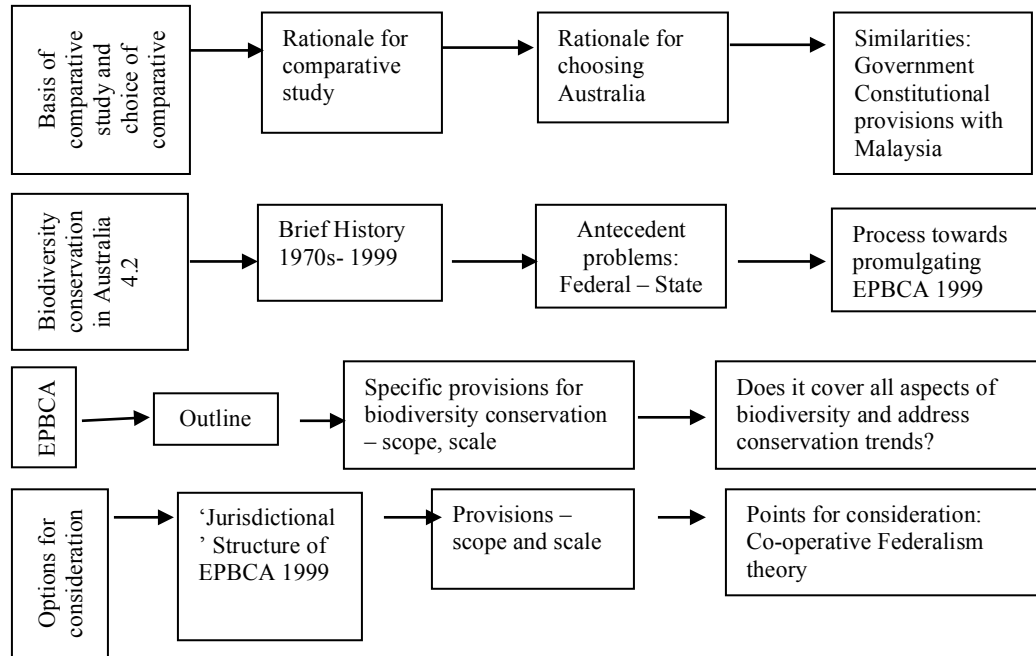
³ *Ibid*, at fn 2.

⁴ As discussed in Chapter 1, pages 14-15.

⁵ Sacco, R 2001. Centennial World Congress on Comparative Law: One Hundred Years Of Comparative Law. 75 *Tul. L. Rev.* 1159. References were also made to Koyzris, P 1994. Comparative Law for the 21st Century: New Horizons and New Technologies. 69 *Tul. L. Rev.* 165 and Osakwe, C 1988. Recent Development: An Introduction To Comparative Law: by K. Zweigert & H. Kotz. 62 *Tul. L. Rev.* 1507

integrative framework for regulating biodiversity and biodiversity conservation in Malaysia.

Diagram 7.1. Outline for Chapter 7



7.1. The Scope and Methodology of Study

As discussed in Chapter Two, this Chapter focuses on the options for a legal transplant⁶, albeit of possible “borrowing” of options in the construction of a ‘similar’ statutory structure in Malaysia. The scope of the study is the EPBCA 1999, and the purpose of this is to aid the both construction and deconstruction of existing statutory frameworks for biodiversity conservation in Malaysia, and establish options in the construction of an integrative framework. It is also used to determine how best Australia translates its international commitments into national laws⁷. The approach adopted here, as stated is

⁶ Ibid, taking on his discussion on Watson, A. Legal Transplants. Ed. (Athens, Georgia: University of Georgia Press, 1993).

⁷ Delmas-Marty, M, 2003. The contribution of comparative law to pluralist conception of International Criminal Law, ICJ 1.1 (13). He proposes that the subsidiary role of comparative law in process of descending integration (from international law to domestic law). In this case, the EPBCA 1999 is studied to understand the scale of descending integration afforded in adapting international commitments

based on the law as it is posited, the emphasis being on functionality, the relationship of law and biodiversity, its structure and jurisdiction in respect of biodiversity conservation⁸.

The structure of analysis is divided into three parts i.e.

- A brief historical review in the development of the EPBCA 1999, to help gather the rationale that led to ‘unification’ of provisions and to an extent the basis for construction of the EPBCA 1999;
- An exercise in ‘close reading’, whereby emphasis is given on rigorous literary analysis, looking also at the composition of texts⁹. By doing this, an understanding can be made of the construction of the statute, the structure wherein to house legal provisions related to biodiversity and its conservation. A conceptual framework can also be gleaned, and ‘transplanted’ for consideration. Emphasis is given also to the linguistics, the choice of words and its consistency with science’s aspiration for biodiversity conservation, particularly that channelled by the CBD.
- A construction of a conceptual framework that flags complementarities, i.e. factors that can complement as well as addressing the lessons learnt from the differences.

It is also important to note that the process of the enactment of the EPBCA 1999 will not be discussed. It was fortunate that a recent amendment to the EPBCA 1999 was

into national jurisdictions, crucial since Malaysia also has a host of international commitments that can be used as the basis of hybridisation of existing laws.

⁸ *Supra fn 7*, at 434-440

⁹ Borrowing from Lasser, M., The Question of Understanding in Legrand, P. & Munday, R. (editors), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003), 197-239, at page 203, close reading is adopted, and the EPBCA 1999 and accompanying selected literature are treated as almost ‘sacrosanct’.

accompanied by an Explanatory Memorandum¹⁰ tabled to the Parliament briefly detailing out the need for amendments based on gaps and options identified. This invaluable summation of six years of implementation of the EPBCA 1999 and the results of the ‘road tests’¹¹ identified important areas where changes are to be made to optimise operations, will provide much needed inputs to help avoid ‘pitfalls’ in the construction of an integrative statutory framework for Malaysia.

7.2 THE ROAD TO EPBCA 1999

In order to briefly understand the factors that led to the enactment of the EPBCA 1999, an introduction of the system of government and the status of nature resource/biodiversity conservation prior to 1999 must be looked at, albeit cursorily.

7.2.1. Government in Australia

The Commonwealth of Australia Constitution Act 1901 provides the basis of legislative powers between the Commonwealth and States. There is no specific reference to the environment in the Constitution¹², the constitutional power to falls to the State, and various legislations have been introduced at State level for amongst others the control of pollution, conservation of flora and fauna, and the protection of cultural and natural heritage¹³. The Commonwealth government has legislated on matters with respect to environmental impact assessment, nature conservation and heritage, based on provisions within the Constitution Act 1901 to legislate on matters such as external affairs and

¹⁰ Environment and Heritage Legislation Amendment Bill (No.1) 2006 Explanatory Memorandum circulated by the Senator the Hon Ian Campbell, Minister for the Environment and Heritage. Document downloaded from www.environment.gov.au. (Last accessed 10th June 2007).

¹¹ See above.

¹² Here are among the many similarities that exist between both Malaysian and Australian Constitution.

¹³ Guide to Environmental Legislation and Administrative Arrangements in Australia. Second Edition. AEC Report No.18. Australian Government Publishing Service. Canberra 1986.

territories of the Commonwealth¹⁴. Section 51 of the Constitution provides that Parliament shall have the power to make laws for the peace, order, and good government of the Commonwealth with respect to (a selection of relevant aspects to biodiversity has been listed): -

- i. Trade and commerce with other countries, and among the States;
- ii. Taxation; but so as not to discriminate between States or parts of States;
- iii. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- iv. Lighthouses, lightships, beacons and buoys;
- v. Quarantine;
- vi. Fisheries in Australian waters beyond territorial limits;
- vii. Census and statistics;
- viii. Copyrights, patents of inventions and designs, and trade marks;

- xxiv. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- xxv. The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- xxvi. The people of any race, for whom it is deemed necessary to make special laws;
- xxvii. External Affairs;
- xxviii. The relations of the Commonwealth with the islands of the Pacific;
- xxix. The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

¹⁴ There is a great similarity between the Commonwealth of Australia Constitution Act 1901 and Malaysia's Federal Constitution of 1957.

- xxx. The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
- xxxi. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- xxxii. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- xxxiii. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- xxxiv. Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Similar to the Malaysian Constitution, no specific provision is given for the terms ‘biodiversity’ nor even ‘environment’, though aspects related can be read in Section 51 (i), (iii), (vii), (viii), (ix), (x), (xxix), (xxxi) and (xxxiv). Crawford, (1992) suggests that this is due to fact that framers of the Constitution regarded them to be not of Federal concern, as

most resources were static within States, apart from rivers that cross boundaries, which were deemed as a utilisation problem rather than resource¹⁵.

The Commonwealth may legislate for States on matters referred for legislation, but the legislation shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law¹⁶.

Australia is divided into eight States and Territories, i.e. New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, Australian Capital Territory and Northern Territory. The national system of government draws from both the United Kingdom and United States of America models¹⁷. The federal system benefits from continuous interactions between three tiers of government (Commonwealth, State and Local Government) formalised in the form of the Council of Australian Government (COAG) established in 1992 focusing on initiating, developing and monitoring the implementation of policy reforms of national significance that require cooperative action¹⁸.

7.2.2 Biodiversity Conservation Laws prior to 1999

There were at least five Commonwealth statutes linked to biodiversity conservation prior to the enactment of the EPBCA 1999, i.e. the Endangered Species Protection Act 1992, Environment Protection (Impact of Proposals) Act 1974, National Parks and Wildlife Conservation Act 1975, Whale Protection Act 1980 and World Heritage Properties

¹⁵ Crawford, J., The Constitution, in Bonyhady, T. (ed), Environmental Protection and Legal Change (Sydney Federation Press 1992), 1-23, as reproduced in Ramsay, R., & Rowe, G. C., Environmental Law and Policy in Australia: Text and Materials (Reed International Books Australia, 1995).

¹⁶ Section 51 (xxxvi), Commonwealth of Australia Constitution Act 1901. This provision is similar to that in the Malaysia Constitution Article 76.

¹⁷ See pages 21-32, Occasional Paper Two: The Australian Experience of Public Sector, 2003. Australia Public Commission. Commonwealth of Australia 2003.

¹⁸ As above, the COAG replaced the Premier's Conference system.

Conservation Act 1983¹⁹, and a host of State laws. Conservation was initially pegged to the regulation of use and trade of wildlife as well as declaration and management of a reserve, and over the years expanded towards conservation of threatened species and ecosystems²⁰.

Biodiversity (2001) lists a host of legislations prior to the enactment of the EPBCA 1999 related to biodiversity and conservation, which is reproduced here, in an amended format, focusing on statutes that were repealed or replaced by the EPBCA 1999 (Table 7.1).

Table 7.1. Key Biodiversity Laws as listed in Biodiversity (2001) listed in chronological order focusing on statutes that were ‘addressed’ by the EPBCA 1999²¹

| List of Laws |
|--|
| <p>Commonwealth</p> <p>Environment Protection (Impact of Proposals) Act 1974 (Replaced by EPBCA 1999)</p> <p>Australian Heritage Commission Act 1975</p> <p>Great Barrier Reef Marine Park Act 1975</p> <p>National Parks and Wildlife Conservation Act 1975 (Replaced by EPBCA 1999)</p> <p>Antarctic Treaty (Environment Protection) Act 1980</p> <p>Whale Protection Act 1980 (Replaced by EPBCA 1999)</p> <p>Antarctic Living Marine Resources Conservation Act 1981</p> <p>Environment Protection (Impact of Sea Dumping) Act 1981</p> |
| <p>Wildlife Protection (Regulation of Exports and Imports) Act 1982</p> <p>Protection of the Sea (Prevention of Pollution from Ships) Act 1983</p> <p>World Heritage Properties Conservation Act 1983</p> <p>Biological Control Act 1984</p> <p>Endangered Species Protection Act 1992 (Replaced by EPBCA 1999)</p> <p>National Environment Protection Council Act 1994</p> <p>Wet Tropics of Queensland World Heritage Area Conservation Act 1994</p> <p>Natural Heritage Trust of Australia Act 1997</p> <p>Environmental Reform (Consequential Provisions) Act 1999</p> |

¹⁹ Bates, G. 2002. Environmental Assessment: Australia’s New Outlook under the Environment Protection and Biodiversity Conservation Act 1999. 2002 *Enviro LR 4.4*.

²⁰ See page 30-31 of Williams, J., Read, C., Norton, A., Dovers, S., Burgman, M., Proctor, W. and Anderson, H., 2001. *Biodiversity, Australia State of the Environment Report 2001 (Theme Report)*, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Canberra and *Australia State of the Environment 2001*, Independent Report to the Commonwealth Minister for the Environment and Heritage, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Canberra, in general.

²¹ *Supra fn 2*

List of Laws

Australian Capital Territory

Nature Conservation Act 1980
Land (Planning and Environment) Act 1991
Commissioner for the Environment Act 1993
Environment Protection Act 1997

New South Wales

Clean Waters Act 1970
National Parks and Wildlife Act 1974
Heritage Act 1977
Coastal Protection Act 1979
Environmental Planning and Assessment Act 1979 As amended
Biological Control Act 1985
Wilderness Act 1987
Catchment Management Act 1989
Rural Land Protection Act 1989
Protection of the Environment Administration Act 1991
Threatened Species Conservation Act 1995
Native Vegetation Conservation Act 1997
Marine Parks Act 1997
Protection of the Environment Operations Act 1997
Environmental Trusts Act 1998

Queensland

Beach Protection Act 1968
Marine Parks Act 1982
Rural Lands Protection Act 1985
Local Government (Planning and Environment) Act 1990
Nature Conservation Act 1992
Queensland Heritage Act 1992
Wet Tropics World Heritage Protection and Management Act 1993
Land Act 1994
Environmental Protection Act 1994
Fisheries Act 1994
Coastal Protection and Management Act 1995
Integrated Planning Act 1997
Vegetation Management Act 1999

South Australia

National Parks and Wildlife Act 1972
Coast Protection Act 1972
Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986
Soil Conservation and Landcare Act 1989
Environment Protection Act 1993
Native Vegetation Act 1991
Wilderness Protection Act 1992
Environment Resource and Development Court Act 1993

List of Laws

Water Resources Act 1997

Victoria

Victorian Conservation Trust Act 1972

Wildlife Act 1975

National Parks Act 1975

Planning and Environment Act 1987

Flora and Fauna Guarantee Act 1988

National Parks (Alpine National Park) Act 1989

National Parks (Wilderness) Act 1992

Heritage Rivers Act 1992

Catchment and Land Protection Act 1994

Coastal Management Act 1995

Fisheries Act 1995

Environment Conservation Council Act 1997

Western Australia

Town Planning and Development Act 1928

Soil and Land Conservation Act 1945

Wildlife Conservation Act 1950

Conservation and Land Management Act 1984

Environment Protection Act 1986–1993

Water and Rivers Commission Act 1995

Botanic Gardens and Parks Authority Act 1998

Northern Territory

Territory Parks and Wildlife Conservation Act 1976

Bushfires Act 1980

Cobourg Peninsula Aboriginal Land Sanctuary and Marine Park Act 1981

Environmental Assessment Act 1982

Biological Control Act 1986

Fisheries Act 1988

Nitmiluk (Katherine Gorge) National Park Act 1989

Pastoral Lands Act 1993

Parks and Wildlife Commission Act 1995

Tasmania

National Parks and Florentine Valley Act 1950

National Parks and Wildlife Act 1970

Whales Protection Act 1988

State Policies and Projects Act 1993

Environmental Management and Pollution Control Act 1994

Threatened Species Protection Act 1995

Living Marine Resources Management Act 1995

Inland Fisheries Act 1995

Resource Planning and Development Commission Act 1997

Weed Management Act 1999

Similar to Malaysia, the Commonwealth can and has exercised its legislative rights over the environment based on section 51 of the Constitution Act 1901, whereby legislations can be enacted to give effect to international obligations ratified by the Commonwealth or justify matters pertaining to trade and commerce or race²². Despite the enabling provisions, it was the State government that had established administrative structures to manage natural resources²³. There were a series of constitutional conflicts in that the Commonwealth had to address issues pertaining to national strategies for environmental protection²⁴ and natural resources management, mindful of the fact that the States were the one controlling land use²⁵.

In the 1990's a 'new age of co-operative federalism' emerged and Inter-Governmental Agreement on Environment (IGAE) 1992 was forged between the Commonwealth, States and Territories to integrate environmental considerations into decision making processes and pursue principles of 'ecologically sustainable development'²⁶. Schedule 6 of the IGAE stated the intention of the Commonwealth, States and Territories to adopt a cooperative approach regarding the implementation of the CBD²⁷.

This led to the formulation of strategies to encourage and coordinate national approaches to environmental issues, relying on States and Territories to produce strategies to not only

²² *Supra fn 31*.

²³ *Ibid*.

²⁴ In 1996 a National Strategy for the Conservation of Australia's Biodiversity was adopted, as an overarching policy accepted by Commonwealth, States and Territories. See also *Supra fn 2*, pg 39.

²⁵ *Supra fn 27*.

²⁶ See Bates, G. 2003. Legal Perspectives. In Dovers, S. and River, S.W. (eds) 2003. Managing Australia's Environment. Federation Press 2003. pgs.256-301, and the Australian National Strategy for Ecologically Sustainable Development.

²⁷ Ramsay, R., & Rowe, G. C., Environmental Law and Policy in Australia: Text and Materials (Reed International Books Australia, 1995) see pg 629.

instill a sense of greater ownership and attract funding from the National Heritage Trust²⁸. The National Strategy for the Conservation of Australia's Biodiversity 1996, for one was drafted to fulfill Australia's obligation under the CBD to develop a national strategy for biodiversity²⁹. Bates, 2002, noted that there were both advantages and disadvantages on relying on national strategies as an effective comprehensive response, highlighting that the constitutional conflict still prevailed despite the initiative, the bone of contention being Commonwealth immunity from state environmental and planning laws³⁰.

These challenges were also echoed in the Australia State of the Environment Report 2001³¹ (SOE 2001), outlining five specific difficulties confronting institutions involved in environmental management, i.e.:

- i. Varying regulatory arrangements that were applied to land uses in adjacent areas which made it difficult to achieve conservation at a landscape scale;
- ii. Fragmented responsibilities within and between levels of government;
- iii. Differing philosophies and approaches between non-indigenous and Indigenous environmental managers;
- iv. Compliance with governmental legislation, policy and regulation; and
- v. Limited cooperation between private and public sectors in long-term environmental management³².

²⁸ *Supra fn 31*. WA National Strategy for the Conservation of Australia's Biological Diversity was implemented by the Department of Environment, Sport and Territories, Canberra in 1997.

²⁹ *Supra fn 2*, page 39.

³⁰ *Supra fn 31*.

³¹ *Australia State of the Environment 2001*, Independent Report to the Commonwealth Minister for the Environment and Heritage, CSIRO Publishing on behalf of the Department of the Environment and Heritage, Canberra (SOE 2001).

³² See pages 22-23 of the SOE 2001.

In 1997 a draft COAG Draft Agreement defined and outlined the extent of Commonwealth responsibilities and interests with regard to the environment, and efforts will have to be put into place to institute a legal framework that addresses both Commonwealth and State concerns, and drafting of the EPBCA 1999 was instituted³³. The COAG Draft Agreement flagged nine key matters affecting national environmental significance which include:

- World Heritage properties;
- RAMSAR wetlands of international importance;
- Listed nationally threatened species and communities;
- Listed migratory species protected under international agreements;
- Nuclear actions;
- Commonwealth marine environment; and
- Any other action specified by regulation, after consultation with the states³⁴.

7.3 UNDERSTANDING THE EPBCA 1999

The EPBCA 1999 is a manifestation of Australia's co-operative federalism, as it formalises informal arrangements between Commonwealth and states and/or territory³⁵. It enables the Australian to join with states and territories in providing a truly national scheme of environment and heritage protection and biodiversity conservation³⁶. Emphasis is twofold, with the Australian Government interests lying with the protection of matters

³³ *Supra* fn 31.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Australia, Environment Protection and Biodiversity Conservation act 1999: Guide to the EPBC Act (Australian Government Department of Environment and Water Resources, Commonwealth of Australia, 2007).

of national environmental significance, whilst States and Territories are entrusted with the responsibility on matters of state and local interests³⁷.

7.3.1. Structure of the EPBCA 1999

The EPBCA 1999 is structured to contain eight chapters with multiple divisions as mapped out in Diagram 7.2³⁸. It is voluminous, running into two with more than 600 pages and 500 provisions. The pitch of the EPBCA 1999 rests on the conservation of the resources and all acts that benefit the resources rather than aspects just relating to the right use of the resource per se. It carves out the different roles, giving a nod to the constitutional privileges of both Commonwealth and State, acknowledging inherent rights but nudging parties to shift towards a conservation stance with its emphasis on ecologically sustainable development (ESD).

³⁷ Australia, Environment and Heritage Legislation Amendment Bill Explanatory Memorandum to the House of Representative, the Parliament of the Commonwealth of Australia (No.1 2006) 117pgs.

³⁸ Diagram 7.2 is based on the recently amended EPBCA 1999 which came into effect in 2007, through the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*, see Act No. 165, 2006.

7.3.1.1. EPBCA 1999 Chapter 1: Preliminary

This Chapter of the EPBCA 1999 serves as the introduction to the EPBCA 1999 as a whole. It sets out the objective, principles that underlines the spirit of the EPBCA 1999, acts that bind the Crown, the extent of its application, the application of the Criminal Code, the provision of native rights that are not affected, the relationship it shares with other Acts and State Law (see Diagram 7.2).

The primary objective of the EPBCA 1999 is outlined in Section 3, which is:

Section 3(1):

- (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
- (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
- (c) to promote the conservation of biodiversity; and
- (ca) to provide for the protection and conservation of heritage³⁹; and
- (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and

³⁹ Recent amendments, 2006

(g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

The objective is divided into two parts, Section 3(1) (a)-(ca) lays out the primary interest of the EPBCA 1999, which is matters of national interest, this addresses matters raised at the COAG 1997, with rising obligations in the international arena for example. In addition, it promotes a concept of ecologically sustainable development (ESD) which will be realised through acts that gear towards the conservation and ecologically sustainable use of natural resources; and biodiversity conservation. The word promote is used, to perhaps provide an encouraging tone, given the dynamicity of both the concept of ESD and methods in biodiversity conservation. The new amendment now makes provision for the protection and conservation of national heritage, which sends a clear message that national heritage is a matter of national interest.

The second part of the objective sets out the means and manner of operationalisation, in that the EPBCA 1999 will facilitate the cooperative implementation of Australia's international responsibility, again drumming in the matters of national interest, gives recognition to the role of indigenous people's role and knowledge.

In order to achieve this, Section 3(2) further outlines the general means and manner for the implementation of the EPBCA 1999, as detailed below:

Section 3(2):

- (a) recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and
- (b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
- (c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
- (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and
- (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
 - (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species; and
 - (ii) establish an Australian Whale Sanctuary to ensure the conservation of whales and other cetaceans; and
 - (iii) protect ecosystems by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and
 - (iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes; and

- (f) includes provisions to enhance the protection, conservation and presentation of world heritage properties and the conservation and wise use of Ramsar wetlands of international importance; and
- (fa) includes provisions to identify places for inclusion in the National Heritage List and Commonwealth Heritage List and to enhance the protection, conservation and presentation of those places; and
- (g) promotes a partnership approach to environmental protection and biodiversity conservation through:
 - (i) bilateral agreements with States and Territories; and
 - (ii) conservation agreements with land-holders; and
 - (iii) recognising and promoting indigenous peoples' role in, and knowledge of, the conservation and ecologically sustainable use of biodiversity; and
 - (iv) the involvement of the community in management planning.

Section 3(2) clearly defines the role of the Commonwealth (focused on involvement on matters of national environmental significance)⁴⁰, and providing a clear direction for inter-governmental cooperation through bilateral agreements, intergovernmental accreditation of environmental assessment and approval processes⁴¹ (a nod towards cooperative federalism), introduces a Commonwealth environmental assessment and approval processes pertaining to activities that are likely to have significant impacts on the environment and puts into place mechanisms to protect species and ecosystems, identifies and addresses threats, heritage listing, partnerships through bilateral arrangements,

⁴⁰ This addresses the constitutional issue.

⁴¹ This addresses the issue of neighbouring jurisdictions and inconsistent standards.

conservation agreements and instituting mechanisms for stakeholder involvement and participation. What this signals also is that The Commonwealth can delegate the management responsibilities of matters within its jurisdiction to the states or territories⁴².

The ESD principles are also laid out in the EPBCA 1999, in Section 3A, providing a clearer context as to what is meant by ESD and the target of ESD to avoid conflicts providing a niche for Australian National Strategy for Ecologically Sustainable Development within the EPBCA 1999. The principles are five-pronged in that they need to:

- Encompass the integration of economic, environmental, social and equitable considerations in decision making;
- Ensure that cause for postponement of action to prevent environmental degradation should not be based on lack of full scientific certainty;
- Adhere to the principle of inter-generational equity;
- Ensure that biodiversity conservation and ecological integrity shall be made a fundamental consideration in decision making; and
- Improve valuation, pricing and incentives mechanisms.

Section 5 provides for the application of the EPBCA 1999. Application extends to each external territory, but in certain circumstances unless a contrary intention appears, does not apply to acts, omissions, matters or things beyond national jurisdiction. For it to apply beyond the outer limits of the exclusive economic zone (EEZ) and not on or in the continental shelf applies only in relation to:

⁴² *Supra fn* 31. Bilateral agreements have been fleshed out in Guide see fn 47, whereby it provides the option to delegate through a system of accreditation, which states or territories have to meet based on a 'best practice' criteria (pg 9)

- (a) Australian citizens; and
- (b) persons who:
 - (i) are not Australian citizens; and
 - (ii) hold permanent visas under the *Migration Act 1958*; and
 - (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels
(including persons in charge of aircraft or vessels).

For areas within the limits of the EEZ or that is on or in the continental shelf than it applies to all persons (irrespective of citizenship), vessels and aircraft. Clarity is provided in the EPBCA 1999 itself, in that definitions are given to what is meant by Australian jurisdiction, which includes the land, water, seabed and airspace, in, under or above Australia, an external territory, EEZ or continental shelf.

The EPBCA 1999 also makes room for the application of the Criminal Code, specifically Chapter 2. Native title rights are protected in as much as they are contained in section 211 of the Native Title Act 1993 and it does not affect the operation of the Native Title Acts 1993 and Aboriginal Land Rights (Northern Territory) act 1976.

Section 9 makes provisions as to the relationship of the EPBCA 1999 with existing laws on amongst others Aboriginal Land Rights (Northern Territory) Act 1976, Airports Act 1996 and Antarctic Treaty (Environment Protection) Act 1980. It also provides that the operation of any concurrent State or Territory law will not be excluded or limited except when contrary intention appears, indicating that in as far as environment and biodiversity conservation, the EPBCA 1999 remains as the ‘umbrella’ act, since at the end of the day all matters related to the environment and biodiversity is of national interest.

7.3.1.2. Chapter 2: Protecting the Environment

Chapter 2 begins with a simplified outline nestled within section 11 that states that the Chapter provides a basis for the Minister to decide whether an action that has, will have or is likely to have a significant impact on certain aspects of the environment should proceed through a system of approvals, unless it is a bilateral agreement between the Commonwealth and the State or Territory in which the action is taken or a declaration by the Minister, as well as if the action taken is in accordance with Regional Forest Agreements or a plan for managing the Great Barrier Reef. Actions are defined as to include projects, developments, undertakings, activities or series of activities or alterations⁴³.

The Chapter is divided into three parts, i.e.:

- Part 2 – Simplified Outline of Chapter;
- Part 3 – Requirements for Environmental approvals;

⁴³ *Supra fn 47*, pg. 4

- Part 4 – Cases in which environmental approvals are not needed.

Part 3 is divided into two divisions; Division 1 looks at the requirement relating to matters of national environmental significance and Division 2, the protection of environment from actions involving Commonwealth land (see Diagram 3.1). Both Parts have bearing on biodiversity, in that Part 3, Division 1 sets out provisions for approval on:

- Sub-division A: World Heritage – Section 12-15A. The Minister is empowered to declare world heritage and this takes into account obligations under the World Heritage Convention 1972 (WHC). Definitions provided therein are those adopted by the WHC. Offences arise when persons take action that result in significant impact to the world heritage property or take action that result in significant impact and the person is reckless to that fact. Penalties will not be imposed if action falls within the ambit of Part 4.
- National Heritage – provisions to determine national heritage and related penalties for offences committed.
- Wetlands of International Importance – This set of provision facilitates the implementation of RAMSAR⁴⁴ obligations in Australia.
- Listed threatened species and communities – here species are divided into four categories, i.e. species that are extinct in the wild, critically endangered species, endangered species, vulnerable species, critically endangered communities, endangered communities. What is interesting here is that, the species and or communities may fall within state or territorial jurisdiction, but then with these

⁴⁴ Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971

provisions the Commonwealth government can determine the actions that may result in significant impact(s), and penalize accordingly.

- Listed migratory species – As above if the species are listed, the control of action that may result in significant impacts then would fall within the jurisdiction of the Commonwealth. Both these provisions tie in very closely with provisions under Chapter 5 of the EPBCA 1999.
- Protection of the environment from nuclear actions – this provision covers both actions and installations as well as products use or generated, as the EPBCA 1999 spells out the use of terms in the Act itself.
- Marine Environment – this set of provisions covers actions in Commonwealth marine areas affecting the environment, outside Commonwealth marine areas affecting those areas and fishing in State or Territory waters managed by Commonwealth (exceptions given for fishing in State areas and areas outside of Commonwealth managed areas). Commonwealth marine areas are defined as:
 - any waters of the sea inside the seaward boundary of the exclusive economic zone, except:
 - waters, rights in respect of which have been vested in a State by section 4 of the *Coastal Waters (State Title) Act 1980* or in the Northern Territory by section 4 of the *Coastal Waters (Northern Territory Title) Act 1980*; and
 - waters within the limits of a State or the Northern Territory;
 - the seabed under waters covered by paragraph (a)⁴⁵;
 - airspace over waters covered by paragraph (a);

⁴⁵ Paragraph here denotes any waters of the sea inside the seaward boundary of the exclusive economic zone, in the first sub bullet above.

- any waters over the continental shelf, except:
 - waters, rights in respect of which have been vested in a State by section 4 of the *Coastal Waters (State Title) Act 1980* or in the Northern Territory by section 4 of the *Coastal Waters (Northern Territory Title) Act 1980*; and
 - waters within the limits of a State or the Northern Territory; and
 - waters covered by paragraph (a);
 - any seabed under waters covered by paragraph (d);
 - any airspace over waters covered by paragraph (d); and
 - any other area of sea or seabed that is included in a Commonwealth reserve.
- Additional matters of national environmental significance – this set of provisions provides that the Governor-General of Australia may inform Ministers of each state or self governing Territory of proposals to regulation actions, and they have 28 days to comment. Provisions are made for consultations but the Commonwealth may proceed to make regulations despite no agreement being reached. In line with the Australian Constitution the sections are only applicable to:
 - those taken in a Territory or a place acquired by the Commonwealth for public purposes (within the meaning of section 52 of the Constitution); or
 - taken in a Commonwealth marine area; or
 - taken for the purpose of trade or commerce:
 - between Australia and another country; or
 - between 2 States; or

- between a State and a Territory; or
 - between 2 Territories; or
 - taken by a constitutional corporation; or
 - whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries.
- Actions taken – in determining actions taken the Commonwealth is restricted to
 - those taken in a Territory or
 - taken in a Commonwealth marine area; or
 - taken for the purpose of trade or commerce:
 - between Australia and another country; or
 - between 2 States; or
 - between a State and a Territory; or
 - between 2 Territories; or
 - taken by a constitutional corporation; or
 - whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries.
- Evidentiary certificates for the following – this describes the mode of notification of offence or penalties.

Part 3, Division Two focuses on the protection of environment from actions involving Commonwealth land that includes:

- Protection of environment from actions involving Commonwealth land – here Commonwealth land is taken to mean land under the Commonwealth excluding Commonwealth marine areas.
- Protection of Commonwealth Heritage Places outside Australian jurisdiction – extension of jurisdiction is to territories governed by the Commonwealth beyond Commonwealth lands or marine areas but under Australian jurisdiction.
- Protection of environment from Commonwealth actions – self-explanatory, in that Commonwealth agencies are not absolved from actions that impact on the environment. This addresses the problem earlier of Commonwealth governments being exempted from actions that affect the environment, prior to the EPBCA 1999⁴⁶.
- Action taken – provisions are made empowering the Commonwealth to determine what qualifies as an action that attracts both civil and criminal penalties.

Matters protected under Part 3 are as listed in Table 7.2 excerpted from the EPBCA 1999⁴⁷ below:

⁴⁶ *Supra fn* 31.

⁴⁷ EPBCA 1999 at pages 60-62.

Table 7.2: Section 34. Matters protected by a provision in Part 3.

| Matters protected by provisions of Part 3 | | |
|--|--------------------------|---|
| Item | Provision | Matter protected |
| 1 | section 12 | the world heritage values of a declared World Heritage property |
| 1A | section 15A | the world heritage values of a declared World Heritage property |
| 1B | section 15B | the National Heritage values of a National Heritage place |
| 1C | section 15C | the National Heritage values of a National Heritage place |
| 2 | section 16 | the ecological character of a declared Ramsar wetland |
| 2A | section 17B | the ecological character of a declared Ramsar wetland |
| 3 | subsection 18(1) | listed threatened species in the extinct in the wild category |
| 4 | subsection 18(2) | listed threatened species in the critically endangered category |
| 5 | subsection 18(3) | listed threatened species in the endangered category |
| 6 | subsection 18(4) | listed threatened species in the vulnerable category |
| 7 | subsection 18(5) | listed threatened ecological community in the critically endangered category |
| 8 | subsection 18(6) | listed threatened ecological community in the endangered category |
| 8A | subsection 18A(1) or (2) | a listed threatened species (except a species included in the extinct category of the list referred to in section 178 or a conservation dependent species) and a listed threatened ecological community (except an ecological community included in the vulnerable category of the list referred to in section 181) |
| 9 | section 20 | listed migratory species |
| 9A | section 20A | listed migratory species |
| 10 | section 21 | the environment |
| 10A | section 22A | the environment |
| 11 | subsection 23(1) | the environment |
| 12 | subsection 23(2) | the environment in a Commonwealth marine area |
| 13 | subsection 23(3) | the environment in the coastal waters (as defined in the <i>Fisheries Management Act 1991</i>) in which the action is taken of the State or Territory |

Table 7.2.Continued.

| Matters protected by provisions of Part 3 | | |
|--|----------------------------|--|
| 13A | subsection 24A(1) or (2) | the environment |
| 13B | subsection 24A(3) or (4) | the environment in a Commonwealth marine area |
| 13C | subsection 24A(5) or (6) | the environment in the coastal waters (as defined in the <i>Fisheries Management Act 1991</i>) in which the action is taken of the State or Territory |
| 14 | section 25 | a thing prescribed by the regulations for the purposes of this item in relation to an action to which section 25 applies |
| 15 | subsection 26(1) | the environment |
| 16 | subsection 26(2) | the environment on Commonwealth land |
| 16A | subsection 27A(1) or (2) | the environment |
| 16B | subsection 27A(3) or (4) | the environment on Commonwealth land |
| 16C | section 27B | the environment in a Commonwealth Heritage place outside the Australian jurisdiction |
| 16D | subsections 27C(1) and (2) | the environment in a Commonwealth Heritage place outside the Australian jurisdiction |
| 17 | section 28 | the environment |

Part 4 of Chapter 2, provide for cases in which environmental approvals are not needed. There five (Division 3 has no provisions) dedicated divisions that address issues related to exemptions that take into account amongst other matters within state/territorial purview and matters already sufficiently governed (by law) particularly forests and the Great Barrier Reef. The five areas are:

- Actions covered by bilateral agreements (Division 1)
- Actions covered by Ministerial Action (Division 2)
- Forestry operations in certain regions (Division 4)
- Actions in the Great Barrier Reef (Division 5)
- Actions with prior authorisation (Division 6)

7.3.1.3. Chapter 3: Bilateral Agreements

This Chapter sets out the mode in which co-operative federalism works, whereby agreements can be entered between the Commonwealth and States and/or Territories that are self-governed. Agreements can be reached in respect of:

- The protection of the environment; and
- The promotion of conservation and ecologically sustainable use of natural resources; and
- Ensuring an efficient, timely and effective process for environmental assessment and approval of actions; and
- Minimisation of duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (and vice versa)⁴⁸.

This allows for shared governance of matters privy to either Commonwealth or State or territories. Parties who can enter into agreements are spelt out in the EPBCA 1999, and these arrangements can be used to obtain exemptions from Chapter 2 provisions on protecting the environment as covered by Chapter 2, Part 4, and Division 1 to 6. These agreements are bound by a set of prerequisites as set out in Section 49A, that is:

- There must be consultation on draft agreements, whereby timeframes are set and key matters to be considered are provided. In this case the role and interests of indigenous peoples in promoting the conservation and ecologically sustainable use of natural resources in the context of the proposed agreement, taking into account

⁴⁸ Chapter 3, Part 5, Division 1, Section 44.

Australia's relevant obligations under the Biodiversity Convention has been singled out;

- Agreements can only be entered into if prescribed criteria are met, which includes meeting the objects of the EPBCA 1999 and requirements if applicable prescribed regulations of the EPBCA 1999.
- With regard to agreements relating to declared World Heritage Properties, agreements can only be entered into if the Minister is satisfied that the provision is not inconsistent with Australia's obligations under the World Heritage Convention and that such agreement will promote the management of the property in accordance with the Australian World Heritage management principles as well as ensuring that provisions in the agreement meet requirement prescribed by any regulation of the EPBCA 1999;
- For National Heritage Properties, the agreement can only be entered into if it promotes the management of the place in accordance with the National Heritage management principles and meets the requirements (if any) prescribed by regulations. In addition, management arrangement or authorisation processes may be accredited through bilateral agreements provided it promotes the management of the place concerned in accordance with the National Heritage management principles;
- As for RAMSAR wetlands, provided that the agreement is not inconsistent with Australia's obligations under the RAMSAR Convention, promotes the management of the wetland in accordance with the Australian RAMSAR management principles and meet the requirement of proscribed regulations, agreements can be made. Similar as above, management arrangement or an

authorisation process may be accredited as long as it is not inconsistent with Australia's obligations under the RAMSAR Convention and it promotes the management of the wetland in accordance with the Australian RAMSAR management principles;

- Agreements in relation to listed threatened species and ecological communities can be entered into provided the provision therein is not inconsistent with Australia's obligations under the CBD, the Apia Convention⁴⁹, CITES⁵⁰, it will promote the survival and/or enhance the conservation status of each species or community to which the provision relates, it is not inconsistent with any recovery plan for the species or community or a threat abatement plan, with due regard to any approved conservation advice for the species or community and meets the requirement (if any) prescribed by regulations. Again management arrangement or an authorisation process may be accredited as long as it is not inconsistent with Australia's obligations under the aforementioned conventions, it promotes the survival and/or enhances the conservation status of each species or community therein the provisions, it is not inconsistent with any recovery plan for the species or community or a threat abatement plan and with due regard to any approved conservation advice for the species or community.
- With agreements relating to migratory species, agreements can be entered into as long as it is not inconsistent with the Commonwealth's obligations under whichever of the following conventions or agreements because of which the species is listed that is the Bonn Convention⁵¹; CAMBA⁵²; JAMBA⁵³ or any

⁴⁹ Convention on Conservation of Nature in the South Pacific 1976.

⁵⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

⁵¹ Convention on the Conservation of Migratory Species of Wild Animals

⁵² China-Australia Migratory Bird Agreement

international agreement approved under subsection 209(4), it promotes the survival and/or enhances the conservation status of each species affected and that it meets the requirements (if any) prescribed by the regulations. Accreditation can also be given provided that it is not inconsistent with the Commonwealth's obligations

- In relation to nuclear actions, the Minister must not enter into agreement or accredit purposes of the agreement if it relates to nuclear action, has the effect of giving preference over one state over the other contrary to the Australian Constitution with regard to purposes related to trade or commerce between Australia and another country or between 2 States, or by a constitutional corporation.
- Prescribed actions cannot be put into bilateral agreements if it related to actions of prescribed purposes in relation to matters of national environmental significance⁵⁴ or has the effect of giving preference similar to that for nuclear actions.

These provisions for bilateral agreements and accreditation consolidates Australia's direction for co-operative Federalism, as it encourages shared governance of Commonwealth matters with states and territories, which in return streamlines the overall direction for the country, fulfils overall targets where international obligations are concerned and helps optimise local knowledge and expertise in the protection of environment and conservation of biodiversity. In this respect, the EPBCA1999 provides a facilitating mechanism that bridges Commonwealth and state priorities, interests and

⁵³ Japan-Australia Migratory Bird Agreement

⁵⁴ Sub-section 25 (1) of the EPBCA 1999

capacities. These agreements and accreditation are actually time bound and maybe cancelled or suspended.

7.3.1.4. Chapter 4: Environmental Assessments and Approvals

Apart from the Chapter 5 on Biodiversity Conservation, this Chapter forms the bulk of the Act. It is divided into 11 Parts (see Diagram 3.1) and in its simplest form serves to provide a framework for assessment and approval of actions prohibited in Chapter 2 Part 3 but does not cover matters that fall within bilateral agreements in relation to matters not requiring approvals. Persons that wish to take action submit proposals, and assessments are conducted in line with:

- Process – i.e. processes laid down by either the bilateral agreements, or by a Ministerial declaration, or a process accredited by Minister (from Commonwealth to state);
- Information that is included in the referral or preliminary documentation provided by the proponent or public environment report or environmental impact statements or through a public inquiry.

It begins with a proposal which will then be evaluated on the basis whether or a not an approval is needed, and if one is needed, then assessments are made on the impact of controlled actions this is where a bulk of reference will come from any or all of the aspects cited in the bullet on information above, and if approvals are give, provisions regarding the approval and its ensuing conditions are given. There are also provisions for strategic

assessments, which are divided into general strategic assessments and those, specific to Commonwealth Managed Fisheries. Provisions are also made for miscellaneous rules on assessments (modes and means) and approvals (type).

The state or territory governments on behalf of the Commonwealth can make assessments and decisions. In these cases assessments and decisions will be based on accreditations agreed, but the approval still lies with the Minister. Key to these assessment processes are the consideration of principles of ESD, outcomes of impacts of action, availability of referral documents, stakeholder and community comments, any relevant information related to impacts of action and commons from other government agencies, particularly those relating to socio-economic factors. What is interesting is this Chapter formalises stakeholder and major groups inclusion, and the fact that it is open to consideration of any type of information, allows for better participation and informed decision-making. In addition the history or background of the proponent is also important and approvals take this into account. The 2007 Amendments ⁵⁵ revised and updated matters relating to referrals, assessment and approvals, focusing on expediency and transparency. Emphasis on streamlining processes, shifting of burden for assessment through bilateral arrangements and accreditation also took centre stage.

7.3.1.5 Chapter 5: Conservation of Biodiversity and Heritage

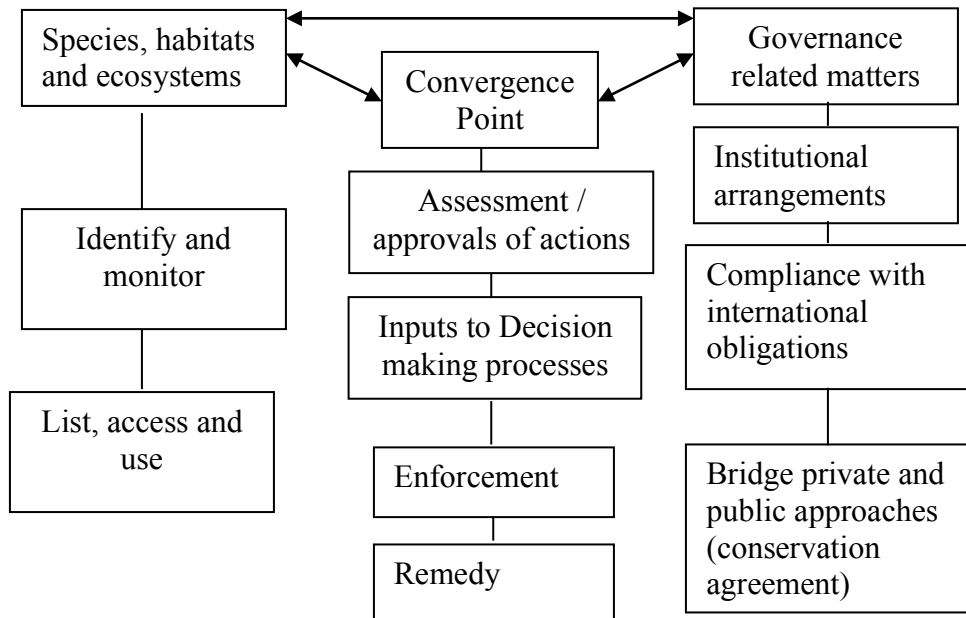
The biggest bulk of the EPBCA 1999 has been dedicated to biodiversity and heritage conservation, running into its own volume with 19 Parts and multiple divisions. It incorporate amendments tabled in 2007, fleshing out provisions related to protected species (introducing provisions to improve listing and permits), fisheries (realign existing regulatory requirements through accreditations, wildlife trade (revising import provisions and enforcement measures), heritage (revising listing processes) and protected areas (review of activities that be allowed in reserves)⁵⁶.

Biodiversity conservation under the EPBCA 1999 takes on a dual approach, provisions pertaining scientific aspects of biodiversity per se and related matters of conservation, and provisions pertaining to matters pertaining to biodiversity governance namely institutional aspects and processes. The two are connected by a common process that require complementary elements or inputs, i.e. decision making⁵⁷, enforcement and remedial measures (see Diagram 4.2). It works in tandem with supporting provisions, contained in Chapter 1 Part 1, Chapter 2 Parts 3 (Divisions 1 and 2), Part 4 (Division 1, 4 and 5), Chapter 3 Part 5, Chapters 4, 7 and 8 in entirety. A summary of the Chapter is conceptualized in Diagram 7.3 below.

⁵⁶ Ibid

⁵⁷ This includes all aspects of decision making both government and private sector, particular those pertaining to land and resource use, as well as impact mitigation.

Diagram 7.3 Framework of Chapter and its relationship with supporting Chapters.



7.4 IMPLEMENTING THE EPBCA 1999

Since its enactment the EPBCA 1999 has gone through several amendments,⁵⁸ which to an extent indicates its flexible framework that allows for adaptation. In a recent amendment in 2006, which took effect in 2007, several challenges were noted and options were presented in an Explanatory Memorandum tabled to Parliament⁵⁹ emphasising that amendments would:

- Reduce processing time and costs for development interests;
- Provide an enhanced ability to deal with large-scale projects and give priority attention to projects of national importance through the use of strategic assessment and approvals approaches and putting in place measures to enable developers to avoid impacts

⁵⁸ Based on the explanatory note to the EPBCA 1999 pg 387 – 392, 13 amendments were affecting this Act.

⁵⁹ Environment and Heritage Legislation Amendment Bill (No.1) 2006: Explanatory Memorandum.

on the matters of national environmental significance protected by the EPBCA 1999;

- Enable a better focus on protecting threatened species and ecological communities and heritage places that are of real national importance; and
- Clarify and strengthen the enforcement provisions of the EPBCA 1999.

It also includes a financial impact statement, which details the actions needed and the costs involved (both expenditure and potential savings). It also reports the outcome resulting in the implementation of the EPBCA 1999, which includes:

- Number of referrals made: Nearly 2000 referrals have been made, resulting in decisions that approval was required in relation to around 420 development proposals, nearly 200 assessments completed, and over 150 approval decisions made.
- Assessments made: Over 120 fisheries have been assessed and associated accreditations and declarations made.
- Species monitoring: Nearly 200 new species, communities and processes have been included on the lists of threatened species, ecological communities and key threatening processes.
- Species listing: Over 250 listed threatened species recovery plans and 50 RAMSAR management plans are in place (including draft plans).

- Permits issuance: Over 15,000 wildlife trade permits were issued.
- Heritage listing: Over 370 places have been added to the National and Commonwealth Heritage lists since the commencement of the new heritage scheme in January 2005⁶⁰.

Key issues identified, which require being addressed through the proposed amendments, include⁶¹:

- Inefficient, onerous or unnecessary processes with limited environmental outcomes
- Insufficient incentives and statutory constraints on strategic approaches
- Duplicative and inconsistent processes
- Insufficient transparency and risks to the environment
- Insufficient flexibility and scope
- Ambiguities, anomalies or lack of certainty
- Potential for delay or frustration of processes
- Technical and other issues

Benefits from the amendments include improve efficiency and timeliness, cross sector engagement of stakeholders and reduction of administration and compliance costs. Key stakeholders that have been impacted by the implementation of the EPBCA 1999 and benefactors of the amendment include the private sector, government (State and Territory

⁶⁰ See fn 28.

⁶¹ See fn 28.

governments and Local Governments), government agencies, and environment and heritage groups.

The proposed amendments were tabled and adopted and the amendments came into force on--. The biggest impact, amendment wise, was on both categories of biodiversity and governance (see Diagram 7.2). Focus was on the improvement on the ‘convergence points’ processes, and strengthening measures to facilitate better habitat and ecosystems conservation. The impact and influence from existing legislations both Commonwealth and State level, meant that complementary processes relating to land use, were harmonised in line with the EPBCA 1999’s object on ESD.

7.5. LESSONS LEARNT

Key to the construction of the EPBCA 1999 was co-operative federalism, whereby constitutional issues were addressed by firstly fleshing out the roles of the key government stakeholders, their jurisdictions and mandates; secondly focus was made on improving the process related to biodiversity conservation, from the information, knowledge, techniques and approaches towards creating uniformity in standards; thirdly, through clearer understanding of the application of existing statutes (all levels of government), convergence and complementary processes were streamlines, particularly those related to land use, resource use and impact. It is an impressive framework, but as cautioned by Bates (2002) and Godden *et al* (2007), it is not the panacea to cure that which ills

environmental protection and biodiversity and heritage conservation. In fact what was deemed as a weak framework has since, with judicial intervention, reflected strength⁶².

Where biodiversity is concerned, the key thrust of the EPBCA 1999 remained entrenched in protecting and safeguarding biodiversity. Biodiversity is the foci of the EPBCA 1999, and became the point, which provisions and regulations spawned. All other aspects that affect biodiversity particularly ecosystems via land and water were complemented with provisions that control; provide measures for access, utilisation and planning roped in through inbuilt assessment and approval processes. International obligations were adapted to suit national concerns, priorities and capacities; key principles and commitments inherent in ratified multilateral environmental agreements were carefully woven into the governance process, latched on national objectives. These commitments were suited to help strengthen national needs rather than stifle it.

Three important lessons that can be drawn from this comparative exercise, i.e.:

- Deconstruction of statutes and review of the same must be pegged to elements of and requirement to effect biodiversity conservation. It should serve as the platform of departure in the profiling exercise.
- Construction of an integrative statutory framework should be geared towards fulfilling aspects related to conservation with a target towards harmonising standards and approaches.
- Conservation of biodiversity, though not addressed in the Constitution, should be structured to ensure that all levels of government are engaged, and a

⁶² Godden, L & Peel, J, *The Environmental Protection and Biodiversity Conservation act 1999: the dark sides of virtue*, (2007) *Mel. Law Rev.* 31.1.

cooperative mechanism should be structured to facilitate clearer understanding of jurisdictional distribution.

The strength of the EPBCA 1999 also lies in the fact that it provided measures that respond to scientific growth and social concerns. Provisions were structured to allow authorities to determine and set the necessary scientific application, though not arbitrarily, suited to the local settings, conditions and priorities. It consolidated the relationship between science and law and to an extent provided enough space for ‘ethics’ or existing traditional norms to influence processes related to conservation. By formalizing the inclusion of stakeholders, major groups and information ensured that decisions and acts remain transparent. It provided a crucial set of clusters of that enabled measurement of progress, status and effectiveness, through provisions that facilitates the promulgation of performance and status indicators. Albeit the EPBCA 1999 remained entrenched at the national level, pegged to national concerns and priorities, but given the national importance of biodiversity, the ‘control’ and ‘setting of uniformed measures and standards’ stems from the seat of the Commonwealth. It has proven that where biodiversity is concerned, efforts to regulate must be through a collective.

It is also crucial to note here that the emphasis of the EPBCA 1999 is to provide measures to effect conservation, i.e. making provisions for processes rather than clear-cut control of biodiversity. This provides the means by which co-operative federalism operates, whereby the Commonwealth government recognizes the jurisdiction of the Territories to legislate and control biodiversity, and the Commonwealth govern, guided by the Australian Constitution, focuses on aspects related to administration, international matters, technical

support and to put it succinctly the ‘science’ of conservation (i.e. survey, census and research).

Given that Malaysia shares almost the same predicament, the lack of a specific mention of ‘biodiversity’ in its Constitution in addition to the existence of multiple relevant statutes, lessons drawn from the construction of the EPBCA 1999 can help materialize a statutory framework that weaves multiple objectives, closes gaps and streamlines actions and processes that gives effect to conservation.