

# The 2007 amendments to the EPBC Act 1999 and their relevance to bat conservation

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## ABSTRACT

The 2007 amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) commenced on 19 February 2007. These amendments provide, among other things, greater flexibility in the assessment and referral process, establish a new process for listing threatened species, ecological communities and key threatening processes, and enhance the EPBC Act's compliance and enforcement regime.

Of particular relevance to the Australasian Bat Society are the new procedures that relate to the listing and recovery of threatened species and ecological communities. New procedures include the formulation of a prioritisation list for nominations, the possible adoption by the Minister of a conservation theme for new nominations and the establishment of an annual assessment cycle. The new process is designed to improve the effectiveness of listing with a more strategic approach focussing on those species in greatest need of protection.

The amendments change the focus from recovery plans to recovery 'action', primarily through ensuring that there is approved conservation advice at all times for each listed threatened species and ecological community. The Minister can decide whether a recovery plan is required for a threatened species or ecological community or whether to discontinue use of an existing plan. The Minister can also decide the type of plan (eg. single species, multi species, regional).

The changes to the EPBC Act will ensure that matters protected by the Act continue to receive the highest possible level of protection. Implementation of these changes will cut unproductive 'red tape' and enable quicker and more strategic action to be taken on emerging environmental issues.

**Key words:** environmental legislation, bat conservation, recovery planning, EPBC Act, act amendment

## Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) commenced operation in July 2000 and is the key piece of environmental legislation administered by the Australian Government. The Act has now been operating for over ten years and its influence has been felt throughout Australia by major companies and individuals. To date, over 2500 actions have been referred to the Minister to determine whether they required assessment under the Act. Of this number, over 600 actions have been determined controlled actions (as per Table 1, 2007–2008 Annual Report), meaning that these actions required assessment under the Act. Various bat species have contributed to this number of controlled actions by virtue of their threatened status under the Act.

Bats have also been the subject of the enforcement provisions of the EPBC Act. Of particular relevance to bat conservation is the case of *Booth v Bosworth*<sup>1</sup>, a legal case brought before the Federal Court of Australia, involving a lychee grower in Queensland and the Spectacled Flying-fox *Pteropus conspicillatus*. Although this species of flying-fox was not listed as a threatened species under the EPBC Act at the time of the subject activity, the Court found that the bat contributed to maintenance of the heritage values of the adjacent Wet Tropics World Heritage Area, an area protected under the provisions of the EPBC Act.

<sup>1</sup> [2000] FCA 1878

The injunction that was granted by the Court in this decision meant that the case became a landmark decision. Offences in relation to threatened species, such as flying-foxes, continue to attract the compliance and enforcement provisions of the EPBC Act.

The Aims of this paper are:

- To identify the species of Australian bats which are listed under the EPBC Act.
- To provide advice concerning the status of recovery planning in relation to Australian bat species.
- To indicate how often a likely significant impact on species of Australian bats has been identified under the EPBC Act.
- To describe the changes to procedures resulting from the recent amendments to the EPBC Act that may be relevant to the conservation of Australian bat species.

## Species of Australian bats listed under the EPBC Act

The listings in Table 1 were current as at 18 July 2010. One species, the Ghost Bat *Macroderma gigas*, has been de-listed since the commencement of the Act. Another species, the Christmas Island Flying-fox *Pteropus melanotus natalis* was recently assessed for inclusion in the vulnerable category. It is also noteworthy that the Southern

Bentwing Bat *Miniopterus schreibersii bassanii* was recently upgraded from the conservation dependent category to the critically endangered category. There are currently no bat species listed in the conservation dependent category, a category that does not attract the same legislative responses as in the higher categories.

### Provisions of the EPBC Act relevant to bat conservation

In addition to the protection afforded by the EPBC Act to listed bat species under sections 18 and 18A of the EPBC Act (which relate to actions with significant impacts on listed threatened species), other parts of the EPBC Act also become relevant for the protection of listed and non-listed bat species.

Previous reference has been made to the landmark legal action involving the Spectacled Flying-fox which, although not listed as threatened under the EPBC Act at that time, was found to contribute to the world heritage values of a World Heritage property. Similar provisions under Part 3 of the Act apply in the case of bat species which contribute to the natural heritage values of a National Heritage place. In all such cases, the protective provisions apply in the case of significant impacts on the natural or world heritage values of the place or property. There is a range of defences to prosecution under these provisions, but these generally do not apply to actions that have not been approved.

Bat species also receive protection by virtue of their inclusion as part of the environment on Commonwealth land (Part 3) or their presence on Commonwealth reserves (Part 15). In relation to actions on Commonwealth land (including those Commonwealth reserves that are Commonwealth land), it must be shown that the action has, will have, or is likely to have, a significant impact on the environment, of which the bat species comprise an important component. In the case of a Commonwealth reserve, actions that are taken within the reserve that results in the death, injury,

taking, trade, keeping or moving of a member of a native species, and are not taken subject to a management plan, are potentially the subject of prosecution under the Act.

### Listed bats and the EPBC Act Assessment Process

Bat species which have been listed under the EPBC Act are classified as matters of national environmental significance (NES) for the purposes of the Act.

Any person proposing to take an action which he or she thinks is likely to have a significant impact on a matter of NES will need approval from the Australian Government Environment Minister before doing so. The action may be deemed a “controlled action” and the matter of NES is referred to as a “controlling provision”. The person proposing the action must refer the action to the Minister who must then make a binding decision within 20 business days as to whether or not the proposed action is a controlled action under the Act. If the action is deemed a controlled action by the Minister it must be formally assessed under the Act and must not proceed unless approved.

The Assessment process commences with the referrals stage which involves initial screening of proposals to determine if assessment and approval are required. Potential outcomes at the referral stage are:

- Approval is not required
- Approval is not required if the action is taken in a particular manner
- Approval is required

A new outcome of the 2007 amendments is that the Minister may determine that the referral proposal is clearly unacceptable. As at January 2009, this determination has been made on four occasions. There are, however, reconsideration options should the proponent wish to have the Minister’s proposal re-examined.

**Table 1.** Bat Species Listed Under the EPBC Act

Category	Species Name	Common Name	Effective Date of Listing
Ex	<i>Nyctophilus howensis</i>	Lord Howe Long-eared Bat	4/4/2001
CE	<i>Pipistrellus murrayi</i>	Christmas Island Pipistrelle	12/9/2006
CE	<i>Saccolaimus saccolaimus nudicluniatu</i> s	Bare-rumped Sheath-tail Bat	4/4/2001
CE	<i>Miniopterus schreibersii bassanii</i>	Southern Bent-wing Bat	18/12/2007
En	<i>Hipposideros semoni</i>	Semon’s Leaf-nosed Bat, Greater Wart-nosed Horseshoe-bat	4/4/2001
En	<i>Rhinolophus philippinensis</i> (Large form)	Greater Large-eared Horseshoe Bat	4/4/2001
V	<i>Chalinolobus dwyeri</i>	Large-eared Pied Bat, Large Pied Bat	4/4/ 2001
V	<i>Nyctophilus timoriensis</i> (South-eastern form) = <i>Nyctophilus corbeni</i>	Eastern Long-eared Bat	4/4/2001
V	<i>Pteropus conspicillatus</i>	Spectacled Flying-fox	14/5/2002
V	<i>Pteropus poliocephalus</i>	Grey-headed Flying-fox	6/12/2001
V	<i>Rhinonictis aurantius</i> (Pilbara form)	Pilbara Leaf-nosed Bat	4/4/2001

(Categories: Ex—extinct; CE—critically endangered; En—endangered; V—vulnerable)

## Decisions made concerning matters referred for assessment under the EPBC Act (From commencement of the Act until 17 September 2008)

Based on information maintained on the DEWHA Referrals Administration Database, approximately 124 referrals were received from the commencement of the EPBC Act on 16 July 2000 until 17 September 2008 which related to matters for which listed bat species were identified as potential 'controlling provisions'. Approximately 38 of these referrals were deemed controlled actions which required approval.

Of the 38 controlled actions, 14 were approved provided that they were carried out in a particular manner. Approvals of this type are granted to ensure that the action is taken in such a way that the protected matter is not adversely affected. Civil penalties apply to persons or corporations who take actions that are inconsistent with the terms of the particular manner notice.

Of these, one action was refused, five actions were withdrawn and the remainder of the controlled actions received approval. In approving actions, the Minister has the option of attaching conditions which specify *inter alia* activities that must be carried out to protect the matter protected (which may be the listed species or habitat critical to its survival), or measures to repair or mitigate damage to the protected matter, which more often than not is the habitat that is critical for the survival of the threatened species. Conditions may also include a requirement to provide a financial contribution associated with the protection of the species or a requirement for a security in the form of a bond, guarantee or cash deposit.

## The Effect of Recent Amendments to the EPBC Act

The 2007 amendments to the EPBC Act commenced on 19 February 2007. Of particular relevance to bat conservation are the amendments that relate to the following:

- The process for listing threatened species, ecological communities and threatening processes
- Recovery planning and the development and formulation of conservation advice
- The referral and assessment process
- Compliance and enforcement

## Listing

Prior to the commencement of the EPBC Act, only one species of Australian bat, the Ghost Bat *Macroderma gigas*, was listed as threatened under Commonwealth legislation (the *Endangered Species Protection Act 1992* which was superseded by the EPBC Act). In 1999, changes were flagged in an important publication, the *Action Plan for Australian Bats*, which provided a national overview of the conservation status of Australian bats and included recommendations for conservation priorities. The

recommendations included in this action plan, which were based on assessment of taxa using International Union for the Conservation of Nature (IUCN) categories, formed the basis for new listings under the EPBC Act.

The 2007 amendments to the EPBC Act have provided a new process, which is designed to improve the effectiveness of listing with a more strategic approach focussing on those species and ecological communities in greatest need of protection.

The amendments enable the Minister to determine a conservation theme. The theme for the 2008 listing cycle is 'rivers, wetlands and groundwater dependent species and ecosystems of inland Australia'. This theme is relevant to bat conservation by virtue of the close association of many inland bat species with a range of water body types.

Although selection of an annual theme is optional, the change will facilitate the direction of nominations to areas in greatest need of legislative attention. Nomination of a theme does not negate the option for nominating species, ecological communities and threatening processes that are not directly related to the theme.

The latest amendments enable the Minister to establish an annual cycle for nominations and assessments. The defined cycle creates an enhanced capacity to focus priorities and work programmes on species and ecological communities in greatest need.

There is now a call for public nominations over a business period of 40 days within which nominations can be made to the Minister. The nominations are forwarded by the Minister to the Threatened Species Scientific Committee (the Committee) which prepares a proposed priority assessment list of nominations. The Committee will prepare the list, taking into account the conservation theme (if any), views on nominations which are a high conservation priority, and the Committee's capacity to undertake assessments.

The Minister will consider the proposed priority assessment list prepared by the Committee and may make changes to the list. The finalised priority assessment list will be made publicly available.

Nominations included on the final priority assessment list will be assessed within the 12 month assessment period (or over a longer time frame if suggested by the Committee and agreed by the Minister). Extensions to the assessment completion time must not exceed five years. The Committee will invite public and expert comment on the nominations during the assessment period.

At the end of the assessment period, the Committee gives its advice to the Minister, who will make a decision regarding whether the species or ecological community is eligible for listing under the Act. The Minister will make his decision within 90 business days, unless this period has been extended. If the Minister decides not to list a nominated species, ecological community or key threatening process he or she must, within 10 business days after making the decision, publish the decision on the Internet and notify the nominator of the decision and the reason for the decision.

## Recovery Planning

The 2007 amendments provide greater flexibility in responding to changing conservation needs for nationally listed threatened species and ecological communities (i.e. those listed under the EPBC Act 1999). There has been a change in focus from recovery 'plans' to recovery 'action', allowing for a more flexible type of recovery documentation. The revision of the recovery planning process has been driven by the long delays experienced in the formulation, development and approval of recovery plans. The key changes to the taking of recovery action are:

- The Minister is now required to ensure that there is approved conservation advice at all times for each listed threatened species and ecological community.
- The decision whether to have a recovery plan is to be made within 90 days of a species or ecological community being listed under the EPBC Act.
- The Minister can decide at a later date that a recovery plan is required or a recovery plan in place should no longer continue and
- There is now greater flexibility in the type of recovery plan being prepared.

## Plans

There are currently three recovery plans relevant to bats that have been endorsed by the Minister. They are:

- Recovery Plan for cave-dwelling bats, *Rhinolophus philippinensis*, *Hipposideros semoni* and *Tapochozous troungtoni* 2001–2005
- National recovery plan for the Christmas Island Pipistrelle (*Pipistrellus murrayi*)
- National recovery plan for the Bare-rumped Sheath-tail Bat (*Saccolaimus saccolaimus nudicluniatius*)

The following recovery plans are currently being prepared:

- Recovery Plan for the Large-eared Pied Bat (*Chalinolobus duyeyi*)
- National Recovery Plan for the Eastern Long-eared Bat (*Nyctophilus timoriensis*) (Note, the taxonomic study by Parnaby 2009 has split this species into a number of new species, and this will need to be reflected in future documents.)
- National Recovery Plan for the Grey-headed Flying-fox (*Pteropus poliocephalus*)
- National recovery plan for the Spectacled Flying-fox (*Pteropus conspicillatus*)

Of the plans in preparation, the recovery plan for the Grey-headed Flying-fox is nearing completion.

At the time of the 2007 amendments, a total of 766 listed species, including bat species, required either the preparation of recovery plans or conservation advices. In accordance with the Minister's instruction, all outstanding conservation advices were completed by December 2008. (The final total of completed conservation advices did not include advices for listed species which have been de-listed, or for which recovery plans had been completed before the due date).

## The Referral and Assessment Process

The recent amendments to the EPBC Act provide greater flexibility in the referral and assessment processes. Changes to the process include the following:

- The Minister now has the option to determine that a project is clearly unacceptable at the referral stage (this option was used in the recent (2008) decision by the Minister in the Singleton Grey-headed Flying-fox colony relocation/eradication referral<sup>2</sup>).
- The assessment approach can now be determined at the same time as the controlled action decision.
- A new assessment approach has been introduced. This approach – assessment based on referral information – will be selected in cases where the impacts are well understood and information is already available to make an informed decision. No preliminary information is required.
- The introduction of a revised assessment based on preliminary information. This change provides the ability to seek additional information and enables publication of the proponent's revised information including a summary of public comments received.
- The Recommendation Report now combines assessment and approval recommendations. This report provides a summary of the assessor's findings and conclusions and also a logical argument about the likely impact of the proposed action and how the action can proceed (or not) in an acceptable manner.
- Approval decisions in relation to referred actions may now deal with alternative proposals for taking the action and can include a condition requiring financial undertakings.

## Compliance and Enforcement

The Explanatory Memorandum to the amending bill included the statement that the bill would introduce 'more effective and more flexible compliance and enforcement provisions'. Of particular importance are the following provisions arising from the amendments:

### 1. Strict Liability

The introduction of new strict liability elements: a strict liability offence is an offence which does not require an element of fault to be proven in order to obtain a conviction. In short, the amendments therefore provide that the prosecution is not required to demonstrate fault elements, for example knowledge or recklessness, which are often a required element for obtaining a conviction in relation to typical offences.

For example, strict liability now applies to an offence relating to threatened species under section 18A(1) of the EPBC Act, so the fact that a person lacked knowledge, or was reckless as to the fact that a species is a listed threatened species under the EPBC Act, will no longer

<sup>2</sup> [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=3916](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=3916)



necessarily mean that the accused lacked the requisite fault element for having committed the offence.

Strict liability now also applies to the offence for breach of approval conditions.

## 2. New Prohibition

The February 2007 amendments introduced a new provision to prohibit a person taking a controlled action prior to a controlled action decision being made or an assessment being completed. While this is not an offence provision, the EPBC Act provides that a person can be restrained from doing such by way of an injunction under section 475. It remains necessary in this case to prove that the action had, or would have had, a significant impact on the protected matter.

## 3. Enforceable Undertakings

The Minister can now set a penalty, through negotiation, for breaches of a Part 3 civil penalty provision (Part 3 of the EPBC Act chiefly relates to the requirements relating to matters of NES). This penalty, referred to as an enforceable undertaking, is an alternative to Court action, and the payment can be directed to the Commonwealth or to some other specified person, or conservation agency, for the protection or conservation of, for example, the species or ecological community which is affected by the action. The penalty could, for instance, be directed to financing actions specified in recovery plans or conservation advice which are to be carried out by a state conservation agency.

## 4. Remediation/Conservation Agreement

The Minister can also enter into a conservation agreement with a person the Minister considers has breached a provision of Part 3 of the EPBC Act relating to a protected matter. The conservation agreement can include a remediation provision consisting of measures to

repair or mitigate damage to the protected matter. A civil penalty applies to a contravention of a determination or a provision of a conservation agreement. The Federal Court can also make remediation orders requiring a person to take actions to repair or mitigate damage that has been, will be, or is likely to be caused to the environment by a breach of the EPBC Act or Regulations, on application by the Minister.

## 5. Landholders

Although landholders have always been subject to the provisions of the EPBC Act, they may now be civilly or criminally liable for the actions of others that contravene specific conditions under Part 3 if the conditions in section 496C of the EPBC Act are met.

## 6. Corporate Liability

The amendments have also expanded the concept that companies, directors and managers are liable for actions taken on their behalf by employees and others. There is now no requirement to prove that management had a direct involvement in a breach of the provisions.

## Conclusion

The 2007 amendments to the EPBC Act have enhanced the protective provisions of the legislation. They have also added a degree of flexibility to the referral and assessment processes and provided more effective compliance and enforcement provisions. Departmental decision-makers are now provided with legislative options which are more focussed on conservation outcomes rather than what are perceived to be draconian penalty provisions. Australian bat species, which have a relatively high profile on the EPBC Act threatened species list, will be beneficiaries of the enhanced provisions of the Act. It is also possible that these provisions will be further enhanced following the review of the EPBC Act in 2009.

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## Appendix I Photographs

### EXAMPLES OF OFFENCES AGAINST THE EPBC ACT



Destruction of flying-fox camp vegetation – Dallas Park, NSW  
(Photo: D Jackson)



Ringbarking of trees within flying-fox camp – Dallas Park, NSW (Photo: D Jackson)



**THE PRIMARY CAUSE FOR COMMUNITY REACTION TO FLYING-FOX PRESENCE**



Temporary Flying-fox camp – Bega, NSW (Photo: D Jackson)



Listed Grey-headed Flying-foxes within the Bega camp (Photo: D Jackson)