LET OFF THE HOOK: WESTERN AUSTRALIAN DRUM LINING OF GREAT WHITE SHARKS

A DISCUSSION OF AUSTRALIAN ENVIRONMENTAL LAW

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So basically if you cut off the head - if you wish - the top species, the top carnivores that control a lot of the processes lower down the food web, you're removing a really important controlling agent and that could cause upheaval in the lower trophic levels – like the plants and the zooplankton. The ocean is basically the life support system of the planet. To change that support system in any major way is a risky thing, we know from the past that when oceans have changed that life on earth has changed.

Dr Boris Worm, Marine Biologist, Dalhousie University

But I did not make them because I had premonitions of impending eco-disaster. I did so because I know of no pleasure deeper than that which comes from contemplating the natural world and trying to understand it.

- David Attenborough, Life on Air, 1997

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Abstract

Carcharodon carcharias, the great white shark, is a threatened, migratory species. Its legal protection under Australian state and Commonwealth laws and, international law has done little to arrest the decline of its populations. Shark attacks remain rare. However in response to seven shark fatalities in the period 2010 - 2013 in Western Australian waters the state government controversially introduced a lethal trial drum line program the purpose of which was to target capture and dispose of the great white and other marine life. Before the drum line program could legally proceed domestic laws were by-passed with relative ease by way of exemptions to state and Commonwealth laws under which the great white is protected. This dissertation considers the failure of those laws in both the domestic and international setting. It also examines and opposes imminent and significant reform to Commonwealth law concluding that the environment, with reference to the Western Australian drum line program, requires more and not less rigorous legal protection.

Acknowledgments

To my supervisor, Nicola Wheen, for your invaluable guidance and experience.

To my family and friends, especially my mum, Joy.

Abbreviations

AAT	Administrative Appeals Tribunal
ACF	Australian Conservation Foundation
ADJR	Administrative Decisions (Judicial Review) Act 1977 (Cth)
ANEDO	Australian Network of Environmental Defender's Offices
BCA	Business Council of Australia
CBD	Convention on Biological Diversity 1992
CMS	Convention on the Conservation of Migratory Species of Wild Animals 1983 (Bonn Convention)
COAG	Council of Australian Governments
DoF	Department of Fisheries, Western Australia
EP Act	Environment Protection Act 1986 (WA)
EPA	The Environmental Protection Authority (WA)
EPBC Act	Environment Protection and Biodiversity Conservation Act 1999 (Cth)
ESD	Ecologically Sustainable Development
FRMA	Fish Resources Management Act 1994 (WA)
ICJ	International Court of Justice
IGAE	Intergovernmental Agreement on the Environment
IUCN	International Union for Conservation of Nature
MNES	Matters of National Environmental Significance.
PER	Public Environmental Review
UNTS	United Nations Treaty Collection

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Introduction

Carcharodon carcharias, the great white shark, is a threatened, migratory species. It is legally protected under Australian state and Commonwealth laws as well as international law.[1] Those legal protections have done little to arrest the decline of its populations. Shark attacks remain rare. However in response to seven shark fatalities in the period 2010 - 2013 in Western Australian waters the state government controversially introduced a lethal trial drum line program the purpose of which was to target, capture and dispose of the great white and other marine life. The drum line program was strongly opposed by the scientific community, conservation groups and the public. It could not legally proceed without first circumventing the protection afforded to the great white under state and Commonwealth laws. The Government of Western Australia exempted the program from state laws and then applied to the Commonwealth Minister for the Environment for an exemption from Commonwealth law which was granted on the basis that the state drum line program was in the national interest.

The drum line program ran from January 25 to April 30 2014. Three weeks before the drum line program was due to conclude the Government of Western Australia applied for Commonwealth approval to continue the drum line program for a further three years.[2]

This dissertation examines Australian environmental laws within the context of the Western Australian drum line program. Chapter I considers the ecological importance of the great white shark and the political response to the sudden spike in the incidence of shark attacks in Western Australian waters. Chapter II sets out the framework of Australian environmental laws within which the drum line program occurred with a particular focus on the Environment Protection and Biodiversity Conservation Act 1999 (Cth). Chapter III examines more closely the state and Commonwealth laws under which the great white is protected and the exemptions from those laws which permitted the drum line program to proceed. The unsuccessful legal challenge to the drum line program in the Western Australian Supreme Court is also discussed.

The Commonwealth exemption was not challenged during the drum line program. Chapter IV however analyses the Minister's decision to exempt the program from Commonwealth law and considers whether the exemption might have been open to judicial review. Australian environmental laws also operate within an international setting. Chapter V considers whether Australia's tolerance for drum lining is meeting its international obligations. Chapter VI suggests that Commonwealth law is failing to meets its objects because of broad statutory discretion leading to inconsistent outcomes. A case is made to address that failure by the introduction of statutory merits reviews of ministerial decisions.

[1] See Appendix 1 for table of legal and conservation status of the great white shark.
[2] See Appendix 2 for chronology of WA drum line program and proposed extension.

Imminent and significant reform, which will likely weaken rather than strengthen Commonwealth law, is then reviewed and opposed.

This dissertation concludes that the Western Australian drum line program represents a conservation failure and demonstrates that Australian environmental laws are failing. Environmental indicators show that effective environmental regulation leading to positive outcomes is needed now more than ever before. Despite this, the Commonwealth is proposing its withdrawal from environmental regulation at a time when national leadership is critical.

Chapter I: Government of Western Australia Misunderstands a Fish

Carcharodon carcharias, the great white shark, is the largest predatory fish on the planet. As an apex predator it roams across borders free of natural predators. Despite this, the International Union for the Conservation of Nature has listed the great white shark's conservation status as 'vulnerable' since 1996.[3] Factors contributing to this vulnerable status include overfishing, shark finning, habitat deterioration,[4] and arguably underpinning all of these factors is the widespread misunderstanding many people hold towards sharks in general.

Sharks play a vital role in maintaining marine ecosystems. They are efficient predators often pursuing weak or sick prey, which in turn encourages strong genetic traits to prevail in species they target. As apex predators ecologists often refer to sharks as keystone species.[5] In order to maintain ecological integrity it is important to identify and appropriately protect keystone species.[6]

Shark attacks are rare. Since 1580 there have been 2,667 confirmed unprovoked shark attacks on humans of which only 495 were fatal.[7] There have been 10 shark fatalities in Western Australia (WA) in the last 10 years compared to 10 in the previous 100 years.[8] Of the 20 shark attacks in WA over the past 100 years the great white has been responsible for 11.[9] Significantly more lives are lost annually to rips,[10] boating, surfing, diving accidents and rock fishing.[11]

The relative novelty of this ocean threat is a phenomenon of the last century reflecting increased recreational use of the ocean by humans. Since 1900 encounters between sharks and humans have increased proportionately to increased recreational use of the ocean. This perspective is frequently absent from debate regarding shark attacks. As populations increase

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[3] The IUCN Red List of Threatened Species *Carcharodon carcharias* Version 2014.2 available online at: www.iucnredlist.org.

[4] Wildlife Conservation Society *White Shark Carcharodon carcharias: status and management challenges, Conclusions of the Workshop on Great White Shark Conservation Research* (Central Park Zoo, New York, NY, USA, 20-22 January 2004) at 2.

[5] Keystone species affect ecological communities disproportionately to their number strongly influencing the abundance and distribution of other species. See Power and others "Challenges in the quest for keystones" (1996) 46 Bioscience (8) 609 as cited in Simone Libralato Villy Christensen and Daniel Pauly "A method for identifying keystone species in food web models" (2006) 195 Ecological Modelling (3-4) 153 at 154.

[6] At 154.

[7] Florida Museum of Natural History *International Shark Attack File Ichtyoloty.*

[8] Government of Western Australia *Western Australian Shark Hazard Mitigation Drum Line Program 2014-17 Public Environmental Review EPA Assessment No. 2005 EPBC Act Assessment No. 2014/7174* (June 2014) [PER] at 1.

[9] Government of Western Australia *Review Western Australia Shark Hazard Mitigation Drum Line Program Review* (June 2014) [Drum Line Program Review] at 9.

[10] 21 lives are lost per year to rips. See Brander and others "A new perspective on the Australian rip Current Hazard" (2013) 13 Nat Hazards 1687 at 1687.

[11] See Surf Living Australia *2013 National Coastal Safety Report.* In 2013 there were 121 coastal drowning deaths in Australia, at 5. In WA in 2013 there were 24 drowning deaths, at 18.

and more people use the sea for recreational purposes, there will be more shark attacks. It does not follow that sharks are attacking humans at an increased rate. An appropriate analogy is that as the number of people using cars increases, so too does the incidence of car accidents. The resulting perception is that shark bites are increasing. The reality is that shark numbers are decreasing at an alarming rate.[12]

Shark attacks in WA waters increased from one person per year in the 1990s to over two per year in the period 2010-2013.[13] The death of a male surfer 270 kilometres south of Perth on 23 November 2013 was the seventh recorded shark fatality in Western Australia in that 3 year period.[14] Following that fatality the WA government, led by State Premier Colin Barnett, resolved that existing shark hazard mitigation policies were inadequate. In January 2014 the WA government launched a highly controversial drum line program aimed at reducing the number of shark attacks in state waters by eliminating target shark species including the great white. 72 static baited drum lines were each deployed one kilometre off shore to lure large and potentially hazardous sharks to the hooks in an attempt to prevent their progress closer inshore where they would be more likely to encounter ocean users.

Any captured great white, tiger, or bull shark greater than three metres in length was shot dead and disposed of at sea. Sharks smaller than three metres, if found alive, were released where possible. The program operated from 25 January to 30 April 2014. During this period 172 sharks were caught.[15] Of those sharks 40 were destroyed as they either exceeded 3 metres or were near death. A further 24 were found dead on the lines. Another 104 were either released alive or managed to free themselves. Many of these sharks are likely to have subsequently died.[16] Video evidence captured by members of the public graphically documents the deaths of several sharks following their release.[17] No great white sharks – the target species – were captured during the drum line program.

Tiger sharks accounted for 163 of the 172 captured sharks, 35 of which had reached sexual maturity. In terms of by-catch seven stingrays and one North West blowfish were also caught. Despite the use of large hooks in an attempt to minimise the capture of non-target species and undersized sharks 74% of animals captured were either the wrong species or undersized.

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[12] The global annual commercial shark catch is estimated to be 100 million per year. This is unsustainable and could have drastic impacts on ocean ecosystems. See Boris Worm and others "Global catches, exploitation rates, and rebuilding options for sharks" (2013) 40 Marine Policy 194 at 194, 199.

[13] Drum Line Review, above n 9, at 9.

[14] Drum Line Review, above n 9, at 6.

[15] Western Australia Department of Fisheries *Catch Data for Shark Drum Line Deployment Western Australia: 25 January – 30 April 2014.*

[16] This is due to significant injuries sustained whilst on the drum lines. See Jessica Meeuwig "WA's shark cull didn't answer the big safety questions" *The Conversation* (online ed, Melbourne, 23 May 2014).

[17] WA Green MP Lynn MacLaren's Submission to the EPA: Western Australian Shark Hazard Mitigation Drum Line Program 2014-2017, Figure 1 at 2.3.

The drum line program and its results represent a conservation failure. A tiger shark was last linked to a fatality in WA in 1925.[18] Tiger sharks do not pose a statistically significant threat to public safety so that the link between drum lines and public safety is at best tenuous.[19] The by-catch was typical of drum lines as they attract predators indiscriminately.[20]

Few creatures strike more fear in humans than the great white shark. Fear of sharks however is often an irrational response to a perceived rather than a real or imminent threat. When the incidence of shark attacks spiked in WA the scientific community called for calm, public education and further research into shark behaviour and evidence based non-lethal shark hazard mitigation policies.[21] The WA government dismissed that advice. Ill-considered public statements from its leaders inflamed an already difficult situation. Mr Kim Hames, the acting State Premier, was reported as saying:[22]

> …maybe sharks have gotten so many and so big that there will be sharks that go out and attack people when they see them.

Despite Mr Barnett's claim of a "silent majority"[23] in favour of the drum line program the policy enjoyed limited public support. A public survey commissioned by the Department of Fisheries (WA) in 2013 revealed that less than 20 per cent of respondents agreed with culling sharks and the majority had not altered their beach-going behaviour as a result of recent shark attacks.[24] The results of this survey were not publicly released or disclosed to the Commonwealth Minister for the Environment the Hon Greg Hunt MP (the Minister) when the WA government applied for an exemption to Commonwealth laws.[25]

The program was also denounced by conservation groups and the Australian and international scientific communities. In an open letter to Mr Barnett, the WA Opposition Leader, the WA Minister for Fisheries and the WA Minister for Environment 102 scientists and experts expressed their concerns about the significant environmental impacts the drum line program would have on a threatened species.[26]

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[18] Above, n 7.
[19] Tiger sharks are responsible for just 13 per cent of all unprovoked attacks and of that 13 percent only 38 per cent were fatal. See *International Shark Attack File Statistics on Attacking Species of Sharks, Species of shark implicated in confirmed unprovoked attacks around the world 1580-2013*.
[20] Daryl McPhee *Likely effectiveness of netting or other capture programs as a shark hazard mitigation strategy in Western Australia* (Western Australian Fisheries Occasional Publication No. 108, 2012) at 11-15.
[21] 102 scientists signed an open letter of concern to the WA Premier, WA Opposition Leader, WA Minister for Fisheries and WA Minister Environment [Scientists' Open Letter] available online at: www.supportoursharks.com/Open_Letter_on_WA_Shark_Policy.pdf.
[22] See Liam Ducey "Sharks may target human beings in WA: Kim Hames" *WA Today* (online ed, Perth, 4 January 2014).
[23] See Katie Robertson "Premier Barnett says silent majority support WA Shark Cull" *Perthnow Sunday Times* (online ed, Perth, 13 February 2014).
[24] See Metrix *Community Perceptions Research* (Department of Fisheries, May 2013).
[25] See Aleisha Orr "Sharks: report reveals what Western Australians really think" *WAtoday* (online ed, Perth, 29 August 2014). See also discussion in ch III regarding state and Commonwealth exemptions.
[26] Scientists' Open Letter, above n 21.

Three and a half weeks before the trial drum line program ended the WA government sought approval from the Minister for a three year extension to the program. Opposition to the extension was as equally vociferous.[27] Professor Corey Bradshaw, an ecologist from the University of Adelaide, was reported as saying that "killing sharks indiscriminately will never reduce shark attacks on humans until we kill every last one of them".[28] It is now unlikely that the proposed extension will proceed. In September 2014 the Environmental Protection Authority (WA) (EPA), having conducted a Public Environmental Review of the extension, recommended against it.[29]

[27] Letter of Concern signed by 301 Australian and International Scientists regarding the State Government Proposal for a 3-Year Lethal Drum Line Program to the WA Environmental Protection Authority (7 July 2014) (Letter of 301 Concerned Australian and International Scientists) available online at: http://coreybradshaw.files.wordpress.com/2014/07/wa-drum-lines-expert-submission-20140707.pdf.

[28] See Oliver Milman "WA shark cull condemned by global group of marine scientists" *The Guardian* (online ed, UK, 4 July 2014).

[29] See Government of Western Australia Department of the Premier and Cabinet *Western Australia Shark Hazard Mitigation Drum Line Program 2014/17;Report and recommendations of the Environmental Protection Authority No 1527* (11 September 2014) [EPA recommendation].

Chapter II: Australian Environmental Laws

The drum line program occurred within the framework of Australian environmental laws. The relevant WA state and Commonwealth laws which operated together to allow the drum line program are discussed in Chapter III. However those laws did not operate in isolation. This chapter provides context by way of an overview of the Australian environmental legal framework. The first part of this chapter discusses the importance of the Australian Constitution, the model of co-operative federalism and the role of Australia's international obligations in shaping domestic law. The second part of this chapter focuses on Australia's overarching environmental legislation, the Environment Protection and Biodiversity Conservation Act 1999 (Cth).

A. The Legal Framework

The Commonwealth of Australia Constitution Act 1900 (Constitution) is important for two reasons. Although the Constitution does not expressly provide for protection of the environment it enumerates heads of power for Commonwealth law making[30] which in respect of the environment the High Court of Australia has interpreted expansively. A series of cases considered the "external affairs" head of power[31] and confirmed under that head the Commonwealth has jurisdiction to make laws to implement and give effect to Australia's international legal obligations.[32] These High Court decisions allowed the federal government to introduce into domestic law the terms of international instruments so that the Constitution's silence on the environment is not considered significant.[33] Given Australia's many obligations under international environmental instruments this jurisprudence broadened the scope of Commonwealth environmental law making which culminated in the enactment of the Environment Protection and Biodiversity Conservation Act (1999) (Cth) (EPBC Act).

The Constitution is also important because it established a federal system of government under which legislative powers are distributed between the federal government, six states and two territories. Those legislative powers are held concurrently however in the event that a Commonwealth law is inconsistent with a state law the Commonwealth law prevails to the extent of the inconsistency.[34] The states and territories retain plenary power meaning they can legislate with respect to any matter other than those matters over which the Commonwealth

[30] The Constitution, ss 51, 52.
[31] The Constitution, s 51(xxixx).
[32] See for example *Koowarta v Bjelke* (1982) 153 CLR 16;, *Queensland Conservation Council Inc v Minister for Environment and Heritage* [2003] FCA 1463 [The Tasmanian Dam case].
[33] Chris McGrath, "Australia's scrambled egg of government: who has the environmental power?" *The Conversation* (online ed, Melbourne, 5 December 2012).
[34] The Constitution, s 109.

has exclusive power.[35] They therefore retain extensive powers to make legislation regarding environmental matters in their own jurisdictions. Notably the majority of controls on land-use and resource management occur at state level with the Commonwealth adopting a more supervisory role at least until the enactment of the EPBC Act in 1999.[36]

This sharing of law making powers and approach to government is known as co-operative federalism and since the 1990s it has shaped the development of environmental law and regulation in Australia.[37] Providing each constituent part legislates within the confines of its powers the co-operative federalism model "may achieve an object that neither could achieve by its own legislation".[38] In theory both tiers of government work together to achieve good policy outcomes which would be unachievable if pursued in isolation.[39] The reality however speaks to a tension between the constituent parts.[40] Local governments, created under state and territory legislation, add a further and complicating tier of environmental regulation and law making.

The Council of Australian Governments (COAG) was established in 1992 to facilitate cooperation between all levels of government on policy areas of national significance. In the same year as COAG was established the Intergovernmental Agreement on the Environment (IGAE) was also reached. The IGAE is a seminal document because it defined, for the first time, the respective roles and responsibilities of the Commonwealth, states and local government. The concepts of IGAE were further developed in 1997 when COAG and representatives of local governments concluded a Heads of Agreement on Commonwealth and state roles and responsibilities for the Environment. The Heads of Agreement informed the EPBC Act. It was agreed the Act would give effect to Australia's obligations under international instruments at a Commonwealth level.[41] International treaties and conventions create obligations in broad terms for Australia to prevent or minimise harm to the environment. International environmental law is itself a complex regulatory field comprising hundreds of conventions, treaties and policy mandates.

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[35] Cheryl Saunders and Katy Le Roy "Australia - The allocation of powers in politically decentralised countries: A comparative study" (2002) 61 AJPA 69.
[36] Lee Godden and Jacqueline Peel "The *Environment Protection and Biodiversity Act 1999* (Cth): Dark Sides of Virtue (2007) 31 (MULR (1) 106 at 117 [Godden Dark Sides of Virtue].
[37] See Lee Godden and Jacqueline Peel "Commonwealth should keep final say on environment protection" *The Conversation* (online ed, Melbourne, 5 December 2012).
[38] *Re Wakim; Ex parte McNally* (1999) 19 CLR 511 at [566].
[39] Chris McGrath *Does environmental law work?: How to evaluate the Effectiveness of an Environmental Legal System?* (Lambert Academic Publishing, Saarbrucken, 2010) 60 at 70.
[40] John Williams and Clement Macintyre "Commonwealth of Australia" in A Majeed R Watts and D M Brown (eds) *Distribution of Powers and Responsibilities in Federal Countries* (McGill-Queen's University Press, Montreal, 2006) 9 at 11.
[41] EPBC Act, s 3(e). See also 1997 Heads of Agreement pt 1, D.

B. The Environment Protection and Biodiversity Conservation Act 1999 (Cth)

Following a lengthy consultation process the EPBC Act was introduced amidst an "atmosphere of controversy and optimism".[42] For the first time certain projects were required to pass through an independent Commonwealth assessment and approval process which was directed towards environmental protection and not merely resource development.[43]

The Act is a significant piece of legislation and the complexities of its operative provisions have drawn comment from the Federal Court.[44] In simple terms any proposal that has the potential to impact on a matter of national environmental significance listed under the Act must be referred to the Minister for approval.

The WA government did not refer the drum line program to the Minister for approval under the provisions of the Act. If it had referred the drum line program that referral would have followed the typical assessment and approval processes set out below. This process is also relevant because the proposed extension of the program was referred to the Minister and the operative provisions of the Act were applied to that referral, leading to an entirely different outcome.

The following discussion of the EPBC Act is limited to the areas of Commonwealth responsibility, the objects and guiding principles of the Act, and the assessment and approval process under the Act. This discussion also introduces the granting of exemptions from the provisions of the Act and legal challenges to ministerial decisions. Those topics are discussed further in Chapters IV and VI.

1. Commonwealth Responsibilities

Not all environmental matters fall within the scope of Commonwealth legal protection. The Commonwealth's responsibilities under the EPBC Act are, as agreed under the 1997 Heads of Agreement, limited to matters of national environmental significance (MNES). The nine MNES currently protected under the Act are:[45]

(a) world heritage properties;
(b) national heritage places;
(c) wetlands of international importance (listed under the Ramsar Convention);
(d) listed threatened species and ecological communities;
(e) migratory species protected under international agreements;

[42] Stephen Keim "The EPBC Act Ten Years on: The Gunns Method of Assessment Case as a Key Indicator" (paper presented to Queensland Environmental Law Seminar, 29 June 2009).
[43] Chris McGrath "Key concepts of the EPBC Act" (2005) 22 EPLJ 20 at 20.
[44] See *Buzzacott v Minister for Sustainability Environment Water Population and Communities and Others* [2013] FCAFC 111 at [39]. For a detailed account of the referral process see *Humane Society International Inv v Minister for Environment and Heritage* [2003] FCA 64 per Kiefel J at [9]-[26].
[45] EPBC Act, pt 3, div 1.

(f) commonwealth marine areas;
(g) the Great Barrier Reef Marine Park;
(h) nuclear actions (including uranium mines); and
(i) a water resource, in relation to coal seam gas development and large coal mining development (the water trigger).

2. The Objects of the Act

Section 3(1) of the Act provides its objects. The Federal Court has held the objects to be to a reflection of the Act's purpose.[46] They are:

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

3. Guiding Principles of the Act

Central to the operation of the Act are the principles of ecologically sustainable development (ESD) and the precautionary principle. They underpin and inform decision-making under the Act and are considered the paradigm through which the Act is viewed.[47] Section 3A lists the principles of ESD, incorporating the precautionary principle at s 3A(b):

> Section 3A
>
> The following principles are principles of ecologically sustainable development:
>
> (a) Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.
> (b) If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[46] *Blue Wedges Inc v Minister for Environment, Heritage and the Arts and Others* [2008] FCA 399 at [11].
[47] Australian Government Department of the Environment *The Australian Environment Act: Interim Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Interim [Hawke Review] at [2.50]. See also Chris McGrath *Synopsis of the Queensland Environmental Legal System* (5th ed, Environmental Law Publishing, Brisbane, 2011) at 6; Lee Godden "Dark Sides of Virtue", above n 36, at 118; Donald K Anton "The 2012 United Nations Conference on Sustainable Development and the Future of International Environmental Protection" (2012) 7 Consilience: Journal of Sustainable Development 64 at 64.

(c) The principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.
(d) The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.
(e) Improved valuation, pricing and incentive mechanisms should be promoted.

When the Minister is required to consider the objects of the Act he or she must consider the principles of ESD. The Act requires the Minister to consider the objects of the Act when deciding whether or not to approve the taking of an action and what conditions to attach,[48] when declaring that actions do not need approval under Part 9 of the Act,[49] and when approving an action taken in accordance with an endorsed policy, plan or program.[50]

The EPBC Act confers wide discretionary powers on the Minister when making those decisions. The Minister "must have regard to" or "take into account" the principles of ESD however, once considered, the Minister is not required to prefer the principles of ESD over any other consideration. The principles of ESD therefore have no legislative force as criteria against which decisions must be made.[51] At a minimum however the principles of ESD are an important interpretative tool when the Minister is making decisions under the Act. Section 15AA of the Acts Interpretation Act 1901 (Cth) provides that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act…shall be preferred to a construction that would not promote that purpose or object.

Section 391 provides that the Minister must also consider the precautionary principle when deciding whether actions are 'controlled actions' under the Act[52] and when deciding whether to grant approval.[53] However the Minister is required to consider the precautionary principle only to the extent to which he or she can do so consistently with the other provisions of the Act.[54] As with the principles of ESD, once considered, the Minister can exercise his or her discretion when determining what, if any, weight is given to the precautionary principle.[55]

4. Assessment and Approval of Proposals under the Act

Part 3 of the EPBC Act governs the process by which actions with the potential to impact on MNES are referred to the Minister for determination whether the proposed action triggers the

[48] EPBC Act, s 136.
[49] EPBC Act, s 37B.
[50] EPBC Act, s 146B.
[51] See further ch VI at 54.
[52] EPBC Act, s 67.
[53] EPBC Act, pt 9.
[54] EPBC Act, s 391(2).
[55] See *Lawyers for Forests Inc v Minister for the Environment* [2009] FCA 330 per Tracey J at [36].

Act's assessment and approval provisions. In simple terms the referral process consists of three stages.

(a) Referral of proposals and controlled action determination

Any proposed action that has, will have, or is likely to have a significant impact on a MNES must be referred to the Minister for approval.[56] The penalties for undertaking controlled actions without approval are severe and generally act as a deterrent.[57]

The Minister then advises the proponent of the action whether the referred proposal requires assessment and approval under the Act. This is determined by considering whether there is an identifiable "action"[58] which has, will have, or is likely to have a significant impact on a MNES. If the Minister makes that determination he or she will classify the proposed action as a controlled action which may require further assessment.[59]

An initial evaluation of any likely significant impacts on MNES takes place as part of the Minister's controlled action decision.[60] The Minister may only consider the adverse impacts of a proposal,[61] and must also take into account the guiding principles of ESD and the precautionary principle.[62]

The Act does not define "significant impact" leaving its interpretation to the Federal Court. In *Booth v Bosworth* Branson J held significant impact to mean an impact which is "important, notable or of consequence having regard to its context or intensity"[63] and indicated that impacts would extend to indirect impacts.[64] The Full Federal Court later affirmed that significant impacts would extend to indirect impacts and suggested they could even include cumulative impacts.[65] In 2006 a statutory definition of "impact" was introduced, likely curtailing the Act's expansive earlier jurisprudence.[66] If the Minister determines the referred action is a controlled action the next step is an assessment of the environmental impacts of the proposal.

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[56] EPBC Act, s 68(1).
[57] Godden "Dark Sides of Virtue", above n 36, at 118.
[58] EPBC Act, s 523 broadly defines 'action' to include projects developments undertakings activities or a series of activities.
[59] EPBC Act, s 67.
[60] EPBC Act, s 75.
[61] EPBC Act, s 75(2).
[62] EPBC Act, s 67.
[63] *Booth v Bosworth* (2001) 114 FCR 39 at [64].
[64] At [66].
[65] See *Minister for Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24 at [38],[39]; [2004] FCAFC 190 [Nathan Dam Case]; *Wielangta Forest* [2006] FCA 1729 (unreported, Marshall J, 19 December 2006) at [94,] [111], [146].
[66] Government of Australia Department of the Environment and Water Resources also releases administrative guidelines. See *EPBC Act Policy Statement 1.1: Significant Impact Guidelines: Matters of National Environmental Significance* (Versions 2006, 2013).

(b) Assessment of controlled actions

The Minister elects a method of assessment from the six provided under s 87 of the Act. The assessment may take place under a bilateral agreement where one has been concluded with the relevant state or territory government. There are two types of bilateral agreements:

1. Assessment agreements under which state or territory processes assess the environmental impacts of a proposed action and the final approval decision remains with the Commonwealth Minister.[67]
2. Approval agreements under which actions assessed pursuant to a bilaterally accredited management arrangement or authorised process under state or territory law require no further assessment or approval under the EPBC Act.[68]

Within the context of approval bilateral agreements concerning listed threatened or migratory species the Minister must be satisfied that Australia's international obligations will be met before accrediting a management arrangement or authorisation process.[69] There has been limited use of approval bilateral agreements to date however these provisions are significant for the great white shark in the context of imminent reform of the Act.[70]

(c) Approval of proposal

The final stage following environmental assessment is obtaining ministerial approval. When determining whether to grant approval the Minister must consider the principles of ESD, the precautionary principle, any relevant public environmental report, economic and social matters and the proponent's history in relation to environmental matters.[71] The Minister also has wide discretion to impose conditions on an approval in order to protect MNES or to mitigate, repair or offset any damage that might be caused by the action.[72] When granting an approval or imposing conditions on an approval relating to threatened or migratory species the Minister's decision must be consistent with Australia's obligations under any relevant international law,[73] and in respect of threatened species the Minister must not grant an approval which is inconsistent with a recovery plan.[74]

5. *Exemptions and Legal Challenges under the Act*

[67] EPBC Act, s 47.
[68] EPBC Act, ss 29, 46.
[69] EPBC Act, ss (53(2)(a), s54(1)(a).
[70] See discussion ch VI at 42.
[71] EPBC Act s 136.
[72] SEPBC Act s 134(1).
[73] EPBC Act ss 137, 138, 139, 140.
[74] EPBC Act s 139(1)(b).

Section 158 allows the Minister to exempt a proposal which might otherwise have a significant impact on a MNES from the provisions of the Act. Before granting an exemption the Minister must be satisfied that granting the exemption is in the national interest.[75]

There are limited avenues through which ministerial decisions may be legally challenged. Merits reviews of administrative decisions are circumscribed under the Act and those which may be referred to the Administrative Appeals Tribunal (AAT) are very limited.[76] The Act has never included provisions for merits reviews of decisions relating to controlled actions so those seeking to challenge the Minister's decision are limited to applications for judicial review.[77] In contrast to this situation the EPBC Act provides for appeals by proponents wishing to request a reconsideration of a ministerial decision that their proposed action(s) would have unacceptable impacts on a MNES.[78]

All administrative decisions made under the EPBC Act are potentially subject to judicial review by the Federal Court.[79] This common law right is codified in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). The legal standing requirements of the ADJR Act provide that an applicant must establish a "special interest"[80] however the EPBC Act expands the legal standing requirements for injunctive relief and judicial review to the broadly defined "interested persons".[81]

[75] EPBC Act s 158(4). See further discussion in Ch IV at 36.
[76]Chris McGrath "Flying foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324 at 332.
[77] At 332.
[78] See EPBC Act, s 74(3)(c).
[79] See further discussion in Ch IV 19.
[80] ADJR Act, s 3(4).
[81] ADJR Act, ss 475(6), 475(7), 487.

Chapter III: Drum Lines Lawful under Australian Environmental Laws

The great white shark is protected under WA state law and the EPBC Act. The purpose of the drum line program was to reduce its population numbers by lethal methods yet the drum line program operated lawfully. This chapter examines the state and Commonwealth laws which allowed the drum line program to proceed.

A. State Law: The Great White - Totally and Wholly Protected

The Fish Resources Management Act 1994 (WA) (FRMA) provides that tiger, bull and great white sharks are "totally protected".[82] They cannot be taken, held in possession, sold or purchased or consigned. The taking of any totally protected species is an offence.[83] However s 7 of the FRMA also provides that the Minister of Fisheries may exercise his or her discretion, and by instrument in writing, exempt a specified person or class of persons from all or any provisions of the Act.

The drum line program prima facie contravened the FRMA. Prior to the deployment of drum lines the Minister of Fisheries issued two "Exemption Instruments" under s 7 of the Act, exempting the program from the provisions of the FRMA.

Under the Wildlife Conservation Act 1950 (WA) (WC Act) the great white shark is "fauna" and "wholly protected" throughout WA.[84] The capturing and killing of a great white shark is also an offence under the Act. [85] Schedule 5 to the WC Act also lists the great white shark as "rare or likely to be extinct". The drum line program prima facie also contravened the WC Act. In January 2014 the Director General of the Department of Parks and Wildlife issued a licence, pursuant to Regulation 15 of the Wildlife Conservation Regulations 1970, to take fauna for public purposes.

The Department of Fisheries considered the risk of the drum line program to target species, non-target species and broader ecosystems "negligible".[86] The EPA did not consider an assessment of the drum line program until it received a third party referral which resulted in a record 23,000 communications to its office. In response to that referral the EPA then determined that the drum line program was unlikely to have a significant effect on the environment and did not warrant a formal environmental impact assessment under the Environment Protection Act 1986 (EP Act). The EPA concluded that its objectives for marine

[82] FRMA, s45 as listed in the Resources Management Regulations 1995.
[83] FRMA, s 46.
[84] WC Act, s 14(1).
[85] WC Act, subss 16(1), 17(2).
[86] PER, above n 8, at 2. Appendix 6 Department of Fisheries Research Division *Research advice on the Proposed Shark Mitigation Strategy using drum lines for January to April 2014* (January 2014).

fauna could be met "with a high level of confidence because of the limited extent of the proposal in terms of the duration and geographic footprint".[87]

Under the EPBC Act the great white shark is a MNES.[88] Any proposal that has, will have or is likely to have a significant impact on great white sharks must be referred to the Minister for approval. The drum line program was not referred to the Minister. Rather, in January 2014 Mr Barnett applied to the Minister for an exemption from the relevant provisions of the Act. Further, the WA government does not appear to have considered its commitment to the national Recovery Plan for the Great White Shark[89] or Australia's obligations under relevant international instruments.

The FRMA and WC Act do not provide for merits reviews of decisions made by state ministers. Merits reviews to the AAT provide for independent consideration of all evidence relevant to the merits of a particular decision. By way of remedy the tribunal may vary and/or make a substitute decision.[90]

B. Sea Shepherd Seeks Judicial Review

In March 2014 Sea Shepherd sought judicial review in the Supreme Court of Western Australia of the state government's decisions relating to the drum line program.[91] Sea Shepherd also sought interim injunctive relief to suspend the deployment of drum lines. Before ruling on whether the applicants had legal standing under the ADJR Act for a full judicial review hearing and whether the relief as sought could be granted Edelman J had first to resolve a preliminary issue of law which turned on statutory interpretation.

The legal argument was technical. Sea Shepherd argued that the Exemption Instruments issued under s 7 of the FRMA were "subsidiary legislation" under s 5 of the Interpretation Act 1984 (WA). They were therefore invalid due to the operation of s 41 of the Interpretation Act which requires all subsidiary legislation to be published in the WA Gazette. The question before the court was essentially whether the Exemption Instruments were legislative or administrative in nature. If legislative they should have been published in the Gazette and were invalid. If administrative they did not need to be published and were valid.

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[87] PER, above n 8, at 23. See also Attachment 25 *The Environmental Protection Authority Notice Under Section 39A(3)* in Government of Western Australia, Department of the Premier and Cabinet *Shark Hazard Mitigation Drum Line Program – Referral of Proposed action* (July 2014) [WA referral document].

[88] Government of Australia *Species Profile and Threats Database – Carcharodon carcharias – Great White Shark.*

[89] Australian Government Department of Sustainability Environment Water Populations and Communities *Recovery Plan for the White Shark (Carcharodon carcharias)* (2013).

[90] Compare judicial review in ch IV at 19.

[91] *Sea Shepherd Australia Ltd v The State of Western Australia* [2014] WASC 66.

After resolving the issues of statutory interpretation that arose Edelman J held that the Exemption Instruments were administrative rather than legislative in nature.[92] Edelman J held further that even if the instruments were legislative in effect, other provisions contained within the FRMA treat exemption instruments and subsidiary legislation differently.[93] Even if the Exemption Instruments had legislative effect, Gazettal publication was not required due to implied inconsistencies within the FRMA.[94] Having ruled against Sea Shepherd on the preliminary issue the court was not required to consider whether Sea Shepherd could proceed to a full hearing and obtain an injunction to suspend the program. Sea Shepherd did not appeal that decision.

C. Commonwealth Law: The Great White Shark - A Matter of National Environmental Significance

Under the EPBC Act the great white shark is protected as a MNES[95] due to its listing as both a "vulnerable" and "migratory" species. Section 18 of the Act forbids the taking of an action that has, will have or is likely to have a significant impact on a listed threatened species included in the vulnerable category.[96] Section 18A creates an offence for breaches of that provision. Section 20 contains similar provisions for listed migratory species.

Those provisions do not apply if the action has received ministerial approval.[97] They are also of no application where the Minister's approval is not required. Approval is not required under s 158 of the Act when the Minister exempts a proposal from the provisions of the Act. Before granting an exemption the Minister must be satisfied that an exemption is in the "national interest"[98] and when making that determination the Minister may consider Australia's defence or security or a national emergency.[99]

The drum line program was likely to have significant impacts on a MNES however the WA government did not refer the program to the Minister for approval as required under the Act.[100] The environmental assessment processes under the EPBC Act were therefore never triggered. Rather, having exempted the program from its own laws the WA government then applied to the Minister for an exemption from the provisions of the EPBC Act. On 15 January

[92] At [137].
[93] At [119] – [129].
[94] At [130].
[95] Contrast tiger and bull sharks captured during the drum line program. They are not listed as "vulnerable" or "migratory" therefore are not protected under the EPBC Act.
[96] EPBC Act, s 18(4).
[97] EPBC Act, ss 19(3)(b), 20(2).
[98] EPBC Act, s 158(4).
[99] EPBC Act s158(5).
[100] EPBC Act, s 68(1).

2014 the Minister, having satisfied himself that the drum line program was in the national interest, granted the exemption.[101]

When taken together state and Commonwealth laws did not provide adequate safeguards for a statutorily protected species. The WA government bypassed both its own laws and the EPBC Act with relative ease. In the case of the WA drum line program these environmental laws were ineffective.

[101] See further discussion of 'national interest' in ch IV.

Chapter IV: The Minister's Exemption – A Closer Examination

This chapter considers in detail the Minister's decision to exempt the WA drum line program from the provisions of the EPBC Act. The Act does not allow for merits reviews of ministerial decisions so that those wishing to legally challenge them must seek judicial review. An application for judicial review of the Minister's exemption in the Federal Court was available but not sought, perhaps for the reason that by the time a legal challenge could have progressed to a hearing the drum line program may have already concluded.[102]

This chapter nevertheless explores a potential application for judicial review of the Minister's exemption by considering the grounds of improper purpose and considerations in the context of the Minister's statement of reasons which might have established that the Minister's discretion was exercised ultra vires.[103] The following analysis is of value because judicial review remains the only way to challenge ministerial decisions made under the Act.

A Preliminary Observation

Section 158 is a rarely used provision.[104] Since commencement of the Act only 14 exemptions have been granted. Its ambit has not been fully considered by the Federal Court however in *Humane Society International v Minister for Environment and Heritage* Kiefer J considered it to be narrow:[105]

> The procedure by which exemption from that obligation [the obligation to refer controlled actions] is provided by s 158 and is very limited. It requires an opinion, on the part of the Minister, that it is in the national interest that the exemption be provided.

Guidelines issued by the Australia Government Solicitor also state the exemption is "likely to be used very sparingly".[106]

A. Judicial Review

In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* Mason J held that the role of the Court in undertaking a judicial review is to "…examine the legality of the decision, and not to delve deeper and examine the merits of a particular decision".[107]

More recently the Full Federal Court stated:[108]

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[102] Available to 'interested persons'. See ch II at 14.
[103] See Appendix 3: The Commonwealth of Australia *Statement of reasons for granting an exemption under section 158 of the EPBC Act 1999* (Cth) (15 January 2014).
[104] See Commonwealth of Australia database for full list granted exemptions, available at: www.environment.gov.au/epbc/notices/exemptions.html [List of exemptions].
[105] *Humane Society International v Minister for Environment and Heritage* [2003] FCA 64 at [55].
[106] Government of Australia *Solicitor Legal Briefing Number 82 (*4 June 200) at 7.
[107] *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24, [39]-[42] at [41].

> It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter…was the legality of the decisions made by the Minister that were the subject of the proceeding.

The relative merits of the reasons provided by the Minister for granting the exemption cannot therefore be considered under judicial review. [109] If however the Minister's reasons suggest that discretion was exercised for an unauthorised purpose or failed to take into account relevant considerations or took into account irrelevant considerations the Minister's decision is open to challenge.

Discretion – some general principles

All discretions must be exercised within their bounds. It is trite and fundamental to administrative law that no discretion is unfettered.[110] The Common Law has rejected the notion that statutory discretions can be completely unfettered[111] however the broader the discretionary power is framed the more difficult it becomes to limit the range of relevant considerations.[112]

B. First Ground of Review: Improper Purpose

The ADJR Act provides that improper purpose is the exercise of a power for a purpose other than that for which it is conferred.[113] If the discretionary power conferred under s 158 of the Act, on its proper construction, does not allow for an exemption to be granted in the circumstances of the drum line program then the decision is reviewable. The following discussion considers the scope of the discretion with reference to the national interest, the correct interpretation of the discretionary power and exemptions previously granted under s 158.

The s 158 discretion is framed in broad terms however the EPBC Act provides a reference point for its construction. Section 158(4) provides that the Minister may grant an exemption only if he or she is satisfied that it is in the national interest. National interest is not defined in the Act and it is a broad term. However s 158(5) further provides that:

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[108] *The Wilderness Society Inc v Turnbull* [2007] FCAFC 175 at 175. [the Gunns Pulp Mill case].
[109] An exception to this is *Wednesbury* unreasonableness, when in order to determine if a reasonable decision was made the court necessarily considers the merits of a decision: *Associated Provincial Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[110] Michael Head *Administrative Law, Context and Critique* (3rd ed, Federation Press, NSW, Australia, 2012) at 144.
[111] *Padfield v Minister of Agriculture, Fisheries and Ford* [1968] AC 997 per Lord Upjohn at 1060.
[112] *Murphyvores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 45.
[113] ADJR Act, s 5(1)(e).

> In determining the national interest the Minister may consider Australia's defence or security or a national emergency. This does not limit the matters the Minister may consider.

Though wide the discretion is not open ended. Without limiting the matters the Minister may consider, the reference to "Australia's defence or security or a national emergency" suggests the discretion is limited to times of genuine national emergency when human life or property is in immediate danger. Section 158(5) therefore sets a high threshold. The legislature must have intended that the Minister would exercise this discretion only in limited and exceptional circumstances.

The objects of the Act and the words of the statute must also be considered when determining the scope of the discretion. Section 15AA of the Acts Interpretation Act 1901 (Cth) provides that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

An interpretation consistent with the objects of the EPBC Act must therefore be preferred. The idea that Parliament would enact legislation which provides for the contravention of its very purpose has not found favour with the Australian judiciary. In *Paull v Munday* Murphy J commented: [114]

> It would be remarkable if an Act of Parliament directed toward the comprehensive regulation of air pollution…did not authorise the making of a regulation which prohibited the lighting or burning of open fires.

In the same way it would be remarkable if an Act directed at protecting the environment, conservation and meeting international obligations authorised a discretion which allowed the contravention of those purposes.[115] That is not to say that s 158 cannot be interpreted consistently with those purposes, but that on a proper construction it does not allow for an exemption to be granted in circumstances such as the WA drum line program.

A review of exemptions already granted under s 158 of the Act is also instructive. Previous exemptions have, with one striking anomaly,[116] mostly been granted to allow for urgent catch-and-recover programs for threatened species on the precipice of extinction[117] and in

[114] *Paull v Munday* (1976) 50 ALJR 551 at 599.
[115] EPBC Act, ss 3(1)(a) 3(1)(c) 3(1)(e).
[116] See List of Exemptions, above n 103. An exemption notice was issued for the construction of an asylum seeker detention facility on Christmas Island (3 April 2002).
[117] See List of Exemptions, above n 103. For example see exemption for captive breeding programs for the Christmas Island Blue-Tailed Skink (7 July 2009) and exemption for Christmas Island Forest Skink (7 July 2009).

non-contentious national emergencies.[118] Declaring the drum line program as in the national interest does not sit comfortably within either of these categories. The exemption which permitted reducing the numbers by lethal methods of a protected threatened species represents a marked departure from the history of s 158 exemptions already granted under the Act. The exemption also sets an unacceptably low standard as a precedent for what might be considered to be in the national interest in the future. According to this analysis the Minister appears to have exercised his discretion ultra vires.

C. Second Ground of Review: Considerations

The ADJR Act provides that if the Minister did not take into account relevant considerations or took into account irrelevant considerations his decision is amenable to judicial review.[119] *Sean Investments v MacKellar* provides an authoritative statement[120] of the considerations rule:[121]

> [W]here relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide.

1. Irrelevant Considerations

Section 158(5) does not limit the considerations the Minister may take into account,[122] so that it could not be argued the Minister took into account irrelevant considerations.

Given that the Act does not define national interest the Minister can take into account any matters which he or she deems relevant. What matters are relevant must be determined from construction of the statute.[123] Section 5(2) of the ADJR Act requires that decisions are made with "regard to the merits of the particular case".[124] The High Court of Australia has held:[125]

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[118] See List of Exemptions, above n 103. See for example the exemption for Montara Oil Spill (6 March 2014), exemption for locust plagues in South Australia (21 October 2000) and the Black Saturday bushfires in Victoria (11 October 2009).
[119] ADJR Act, ss 5(2) and 6(2).
[120] Michael Head *Administrative Law*, above n 110, at 164.
[121] *Sean Investments v MacKellar* (1981) 38 ALR 363 per Deane J at [75].
[122] EPBC Act, s 158(5).
[123] *Peko-Wallsend*, above n 107, at [39].
[124] Note this is not to be confused with the merits of the decision, rather means each decision must be made having regard to the characteristics of the individual case.
[125] *Peko-Wallsend*, above n 107, at [40].

> …that where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined.

In this particular case the exemption was sought in response to a spike in fatal shark attacks in WA's waters in the three years prior. From the Minister's statement of seasons it is evident he took into account the WA tourism industry, public safety and the confidence of beachgoers when making his decision. Given the broad nature of the discretion these are relevant considerations.

2. Relevant Considerations

A stronger argument is that the Minister failed to take into account relevant considerations. The principles of ESD are contained in s 3A of the Act. That section refers to "decision-making processes"[126] and states further that "the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making".[127] The Act further requires the Minister to consider the ESD principles when declaring approval of certain actions,[128] or that certain actions do not need approval.[129] This creates an inconsistency in the Act as s 158 does not require that consideration yet operates to deliver the same outcome.[130] It is unlikely the legislature intended this inconsistency. A requirement to consider the principles of ESD remedies this inconsistency. This interpretation is supported by the wording of s 3A and consideration of the objects of the Act. The same interpretation applies for the inclusion of the precautionary principle as a relevant consideration for decision-making under s 158. It is listed in s 3A as one of principles of ESD.

The Minister also failed to consider Australia's relevant international obligations. In *Minister for Immigration and Ethnic Affairs v Teoh* the High Court held there is a legitimate expectation that Australia's obligations under international treaties, whether or not they are ratified, will be considered by decision-makers.[131] Despite parliamentary attempts to legislate against this ruling *Teoh* remains good law today.[132]

The provisions relating to threatened and migratory species require the Minister to act consistently with Australia's international obligations when approving actions[133] or declaring

[126] EPBC Act, s 3(A)(a).
[127] EPBC Act, s 3(A)(d).
[128] EPBC Act, s 136(2)(a).
[129] EPBC Act, s 37B.
[130] Namely that a controlled action may proceed.
[131] *Minister for Ethnic Affairs v Teoh* (1995) 183 CLR at 273.
[132] Following *Teoh* it is clear from the decision in *Ex parte Lam* (2003) 195 ALR 502 not all members of the High Court agree with the *Teoh* decision however *Teoh* remains good law. See also Hilary Charlesworth and others *No Country is an Island: Australia and International Law* (UNSW Press Ltd, Sydney, 2006) at 30. See further discussion of *Teoh* in Mathew Groves, H. P. Lee *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, Port Melbourne, 2007) at ch 19.
[133] EPBC Act, ss139(1), 140.

that actions do not require approval under the Act.[134] Before entering into an approval bilateral agreement with a state or territory the Minister must also be satisfied that a state accredited management plan will allow Australia to meet its international obligations.[135] Australia's international obligations must therefore also be a relevant consideration when granting an exemption.

The statement of reasons does not indicate that the Minister considered the objects of the Act, the principles of ESD and the precautionary principle or Australia's international obligations. The Minister arguably failed to take into account relevant considerations so that his decision may have been amenable to judicial review. If this analysis is incorrect and these considerations are not relevant for the purpose of judicial review it must be the case that exemptions are only to be granted in emergency situations where these considerations might cause a delayed ministerial response leading to further harm to life, property or the environment.

Finally, if judicial review of the Minister's decision to grant the exemption had been sought the court could not have substituted its decision for that of the Minister. Rather the decision would have been remitted to the Minister to be made again in accordance with the law.

D. Subsequent Events

On 7 April 2014 and before the conclusion of the drum line program the WA government referred a proposed three-year extension to the Minister for approval. In its referral document the WA government submitted that drum lining was not a controlled action under the Act. [136] The Minister disagreed. In May 2014 and a mere four months after granting the exemption the Minister determined the very same program a controlled action requiring assessment and approval. That assessment, released in September 2014, recommended against an extension to the drum line program.[137] These subsequent events reinforce the view that the exemption should never have been granted.

[134] EPBC Act, ss 34D(1)(a), 34E(1)(a).
[135] EPBC Act, ss 53(1)(a), 53(2)(a), 54(1)(a), 54(2)(a).
[136] WA Referral Document, above n 87, at 30.
[137] EPA Recommendation, above n 29, at 21.

Chapter V: The Drum Line Program under International Law

Australia's environmental laws occur within an international setting. The EPBC Act was introduced, in part, to implement Australia's international obligations. This chapter discusses whether the drum line program contravenes Australia's obligations under the Convention on Biological Diversity 1992 (CBD)[138] and the Convention on Migratory Species of Wild Animals 1983 (The Bonn Convention) (CMS).[139] [140]

A. The Convention on Biological Diversity (CBD)

The CBD recognises the vital importance of the Earth's biological resources to mankind's economic and social development.[141] The aims of the CBD are the conservation of biological diversity, the sustainable use of the components of biological diversity and the fair and equitable sharing of benefits arising from the utilisation of genetic resources.[142] When the CBD was first opened for signing it was world leading. For the first time in international law leaders from around the world committed to the understanding that the Earth's natural resources are not infinite, and must be utilised sustainably.

No species are specifically protected under the CBD, rather the Convention "establish[es] general obligations for the preservation of biological diversity".[143] The CBD defines "biological diversity" broadly as:[144]

> …the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.

This essentially encompasses all living things and signatories are therefore required to adopt wide-ranging policies to conserve biodiversity. However the obligations created by the CBD are weakened by its wording.[145] For example art 6(b) requires states to "integrate, as far as

[138] Convention on Biological Diversity 1760 UNTS 142 (opened for signature 5 June 1992, entered into force 29 December 1993) [CBD].
[139] Convention on the Conservation Migratory Species of Wild Animals 1651 UNTS 333 (opened for signature June 23 1979, entered into force 1 November 1983) [CMS].
[140] Australia is a signatory to the CBD and the CMS.
[141] "History of the Convention" CBD available online at: www.cbd.int/history.
[142] History of the Conention, above n 141, art 1.
[143] Cyrille de Klemm and Clare Shine *Biological Diversity Conservation and the Law* (IUCN, Gland, Switzerland, 1993) at 17.
[144] History of the Convention, above n 141, art 2.
[145] This reflects the difficulties inherent in trying to reach an agreeable position of compromise when putting forward an instrument that is to be signed by so many countries, each with varying interests. See Timo Koivurova *Introduction to International Environmental Law* (Taylor & Francis Ltd, London, December 2013) at 19.

possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies."

The autonomy afforded to states by the qualifying words "as far as possible and as appropriate" considerably dilutes the force of the provision and effectively renders it soft law.[146] Identical wording precedes almost every obligation imposed by the CBD, arguably rendering it "an exercise in political symbolism".[147] Article 6 is of most relevance to the WA drum line program however as shown below it does not give rise to any readily enforceable obligation.

Article 6 requires states to take general measures for the "conservation and sustainable use of biodiversity."[148] A program intending to reduce the population of a species listed as vulnerable, and protected under state and Commonwealth law cannot be considered "conservation and sustainable use of biodiversity".[149] However art 6 is also qualified and weakened by the words "as far as possible and as appropriate". Therefore it is open to Australia to contend that there was no obligation in this instance to comply with art 6 because it was not considered possible or appropriate. Given the autonomy conceded to Australia it is difficult to establish the WA drum line program contravenes art 6.

This analysis is not encouraging. The nature of the provisions of the CBD have been said to be "largely 'expressed as overall goals and policies' rather than obligations". [150] The CBD provides a framework within which signatories agree to make environmental policy although how they achieve this is at their discretion given its "soft law nature".[151] The effectiveness of the CBD is very much dependent on the political will of its signatories.[152]

B. Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention) (CMS)

The CMS is an intergovernmental instrument directed towards protecting migratory species.[153] It applies to the Commonwealth of Australia, its territories and territorial

[146] See Stuart R Harrop "'Living in Harmony with Nature?' Outcomes of the 201 Nagoya Conference of the Convention on Biological Diversity" (2011) 23 JEL 117 at 119; Cyrille de Klemm and *Biological Diversity Conservation and the Law*, above n 154 at 17.
[147] Alan E Boyle "The Rio Convention on Biological Diversity" in M Bowman and C Redgwell *International Law and the Conservation of Biological Diversity* (Kluwer Law International, 1996) at 34.
[148] CBD, above n 152, art 6(b).
[149] See Appendix 2: Legal/Conservation Status of the Great White Shark.
[150] See LF Glowks F Burhenne-Guilmin and H Synge, *A guide to the Convention on Biological Diversity* (IUCN, Gland, Switzerland 1994) cited in Stuart R Harrop, above n 146, at 119.
[151] E Fisher, B Lange and E Scotford *Environmental Law: Text, Cases & Materials* (Oxford University Press, Australia and New Zealand, 2013) at 924, 925.
[152] Boyle, above n 147, at 34.
[153] Australia became a signatory to the CMS in 1991. A full list of range and party states is available online at: www.cms.int/en/parties-range-states.

waters.[154] The operation of the CMS presents difficulties as migratory species can cross borders without regard for jurisdictions.

Migratory species are listed in Appendices I and II. Appendix I lists "migratory species which are endangered"[155] and Appendix II lists those which have "an unfavourable conservation status and which require international agreements for their conservation and management… [and/or] would significantly benefit from the international cooperation".[156] A species can be listed under both Appendices if "the circumstances so warrant".[157] The great white shark is listed in both. Ironically, it was Australia in 2002 that proposed those listings.[158]

1. Article III(5) CMS – Prohibition on "taking"

Article III is considered for its relevance to the WA drum line program. Article III prohibits the "taking" of migratory species listed in Appendix I. Article III(5) provides that:

> Parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species. Exceptions may be made to this prohibition only if:
>
> (a) the taking is for scientific purposes;
> (b) the taking is for the purpose of enhancing the propagation or survival of the affected species;
> (c) the taking is to accommodate the needs of traditional subsistence users of such species; or
> (d) extraordinary circumstances so require; provided that such exceptions are precise as to content and limited in space and time**.** Such taking should not operate to the disadvantage of the species.

Article I broadly defines "taking" as "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in such conduct". This "imposes an unequivocal obligation" on parties not to take Appendix I species.[159] The WA drum line program clearly falls within that definition. That no great white sharks were captured is of no significance as the WA government was "attempting" to kill great white sharks.

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[154] Application of CMS to Overseas Territories/Autonomous Regions of Parties and Reservations regarding species in the CMS Appendices" available online at: www.cms.int/sites/default/files/document/territories_reservations.pdf
[155] CMS, art 3(1).
[156] CMS, art 4(1).
[157] CMS, art 4(2).
[158] Secretariat of the Convention *Proceedings of the Seventh Meeting of the Conference of the Parties* (18 to 24 September 2012, Bonn, Germany) 33 at [226].
[159] S Lyster "The Convention on the Conservation of Migratory Species of Wild Animals (The "Bonn Convention") (1989) 29 Natural Resources Journal 979 at 987.

The drum-lining program clearly contravenes art III(5). It is also clear that the exceptions under art III(5)(b) and (c) do not apply however the exceptions at (a) and (d) might be argued to justify the drum line program.

(a) First exception: "scientific purposes"

A number of the sharks caught during the program were fitted with conventional 'fin tags',[160] and three were fitted with acoustic tags.[161] These science based actions might therefore support the argument that the drum line program falls within art III(5)(a).

The CMS does not define "scientific purposes" however limited guidance can be found in the recent decision of the International Court of Justice (ICJ) in the *Whaling in the Antarctic* case.[162] Notwithstanding that case considered another convention,[163] and the Court declined to provide a definition for "scientific research",[164] it is apparent from the judgment that the threshold for what might be considered "scientific research" is significantly higher than that of WA's drum line program. Of particular relevance the court dealt specifically with lethal methods and stated that when determining their reasonableness the court will consider, among other things, the programs stated scientific objective, the programme's scientific output and a comparison of the target sample sizes and the actual take.[165] Most importantly, it was held that lethal methods must be a necessary part of the research. Given that sharks which were killed were disposed of at sea, there can be no connection between any claimed scientific research and the lethal methods employed. The sharks captured and killed during the program were not taken for "scientific purposes".

(b) Second exception: "extraordinary circumstances"

It is unclear what conditions might constitute "extraordinary circumstances". Arguably a broad discretion is available to Australia when making that determination. A sudden spike in the incidence of shark attacks might be extraordinary circumstances. The Minister's exemption of the program from the provisions of the EPBC Act suggests the Australian government considered that to be the case.

[160] Drum Line Program Review, above n 9, at 14.
[161] At 15.
[162] *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (31 March 2014).
[163] The International Convention for the Regulation of Whaling 161 UNTS 72 (signed 2 December 1946 at Washington, USA, entered into force on 10 November 1948).
[164] Above, n 162, at [58].
[165] At [87].

However, as Arie Trouwborst recently argued, a narrow interpretation of the exception is more appropriate.[166] This view is supported by textual and purposive analysis and, Australia's conduct subsequent to signing the CMS.

The reference to "require" arguably "indicate[s] a complete absence of reasonable alternatives" to the taking of an Appendix I species when responding to extraordinary circumstances. It follows that the exception can only be relied on when no other course of action is reasonably available.[167] Conservationists and scientists have argued there were more effective and non-lethal alternatives available to the WA government.[168]

The object and purpose of the CMS must also be considered in determining the scope of the exception. Article 31(1) of The Vienna Convention on the Law of Treaties provides that:

> A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to given be to the terms of the treaty in their context and in the light of its object and purpose.

The United Nations International Law Commission clarified this rule as follows:[169]

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.

These directives and consideration of the overall text support the view that the object and purpose of the CMS require an interpretation which prefers the protection of listed species over affording discretion to party states.

The subsequent conduct of Australia also favours a narrow interpretation. Australia is a signatory to the Memorandum of Understanding on the Conservation of Sharks, an ancillary CMS instrument which highlights the importance of the precautionary principle.[170] The WA drum line program directly contravenes that principle.[171]

Arie Trouwborst concludes that "treaty interpretation principles seem to render difficult any reconciliation between the shark-culling program and Australia's obligations regarding the great white shark under art III of the CMS."[172] This paper supports that conclusion.

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[166] A Trouwborst "Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species" (2014) 2 Cornell International Law Journal Online 41.
[167] At 44.
[168] See Open Letter from 102 Scientists, above n 21; Letter of Concern signed by 301 scientists, above n 27.
[169] Yearbook of the International Law Commission, 1966, 4 (U.N. Pub. Sales No. 67.W.2, Vol II) cited in Trouwborst "Aussie Jaws and International Laws, above n 166, at 43.
[170] Memorandum of Understanding on the Conservation of Migratory Sharks (12 February 2010) at [9].
[171] As evidenced by the WA EPA's recommendation that the cull should not be extended until 2017 due to scientific uncertainty about its impacts on great white shark populations, above n 29.
[172] Trouwborst "Aussie Jaws and International Laws", above n 175, at 46.

It appears that WA's drum line program breached Australia's obligations under art III(5) of the CMS. There is "an unequivocal obligation" that party states prohibit the taking of species listed in Appendix I. Although art III provides for some exceptions, Australia could not rely on any of them.[173]

2. Consequences for Contravention of CMS

The WA drum line program was prima facie in contravention to Australia's obligations under art III(5) of the CMS. That contravention is without significance if no consequences flow.

Article XIII of the CMS provides for resolution of disputes in the following terms:

> 1. Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of this Convention shall be subject to negotiation between the Parties involved in the dispute.
>
> 2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.

Even if a dispute were to arise the issue of jurisdiction is complicated by the drum line program occurring within Australia's Exclusive Economic Zone.[174] In the *Southern Bluefin Tuna Case*the ICJ held that when an instrument contains provisions for mutual dispute resolution, the International Tribunal for the Law of the Sea (ITLOS) does not have jurisdiction.[175] This means that the only available binding legal consequences for Australia's drum line program are under the dispute resolution provisions contained in art XIII of the CMS.

For these dispute resolution provisions to be triggered however another party state must first challenge WA's drum line program in a formal capacity. A challenge is highly unlikely given the WA drum line program and its proposed extension does not affect the interests of another nation. Queensland and New South Wales have deployed drum lines to capture and dispose of great whites for some time and those states continue to do so. The drum lining activities in those Australian states arguably represents an ongoing breach of Australia's obligations

[173] Notethe continued deployment of drum lines in New South Wales and Queensland would establish breaches under art III(5) of the CMS.
[174] Pt V of UNCLOS grants nations special rights over marine resources inside their Exclusive Economic Zones.
[175] *Southern Bluefin Tuna (Australia v Japan) (Jurisdiction and Admissibility)* (2003) 39 ILM 1539.

under the CMS. Until such time however as a dispute arises no legal consequences flow for Australia's contravention of the CMS.

This chapter shows that the WA drum line program and more importantly the EPBC Act do not give effect to Australia's international obligations. The most obvious consequence for Australia is a loss of credibility when its drum lining activities are contrasted to the position it took against Japan in *the Whaling in the Antarctic* case.

Chapter VI: Reform of the EPBC Act

A. The EPBC Act Fails

State and Commonwealth environmental laws which prima facie protect the great white shark nevertheless contain provisions which erode this protection. The drum line program exposes a failure of the EPBC Act to protect a MNES for which the Commonwealth has an overarching responsibility. The drum line program is an example of the EPBC Act not fulfilling its purpose.[176] The first part of this chapter considers that failure in the context of the discretionary nature of ministerial decision-making under the Act and concludes that environmental protections contained within the EPBC Act only extend as far as discretionary decisions permit.

This episode of environmental mismanagement also exposes the risk of any reform that might lead to further failures under the EPBC Act. The second part of this chapter considers imminent reform and opposes it. The Australian Government is set to implement a "one-stop shop" for environmental assessments and approvals.[177] The reform is controversial. Objections to the reform are considered and then applied to the drum line program. The one-stop shop reform in the international setting is also briefly considered.

B. A Context for Reform

Considerations of environmental law reform require context. The most reliable indicators of the efficacy of environmental laws are environmental indicators – not economic, social or any

[176] EPBC Act, s 3(1)(a). The overall impression from a literal reading of s 3 is that the objects of the Act are directed towards conservation and environmental protection. See also Government of Australia Department of the Environment *The Australian Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (October 2009) [Final Hawke Review] at [1.49].
[177] EPBC Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth).

other kind. If the purpose of environmental law is to protect the environment or at the very least to achieve ecologically sustainable development, its success must be measured against those goals.[178] As Stephen Keim SC observed, "it is on the ground…that environmental legislation is ultimately tested."[179]

Environmental indicators demonstrate that environmental laws in Australia and around the world are not achieving those goals. Global warming is projected to increase at a rate that can rightly be called disturbing,[180] biodiversity is plummeting at such a rate that scientists now generally accept that human activity is largely responsible for the 'sixth' or 'holocene' extinction,[181] and environmental law is not responding to satisfactorily prevent, mitigate or offset these negative outcomes. It is clear now, more than ever before, that environmental law needs to be delivering positive environmental outcomes.

The State of the Environment Report (2011) recognised that many of Australia's environmental indicators pointed towards widespread overall environmental degradation, although also noted that many had remained steady or had improved.[182] It considered Australia "particularly vulnerable to climate change" and noted that "our unique biodiversity is in decline". That report also commented that:

> The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes it leadership role.

The next 20 years is critical.[183] These observations underpin the following discussion.

C. A Reason for Failure: Discretionary Outcomes under the Act

Discretionary decision-making powers exercised by the Minister are a fundamental plank of the operation of the Act. The Minister's decision to exempt the drum line program from the provisions of the EPBC Act meant the drum lining could legally proceed. That decision was discretionary. In practical terms the Minister's exemption permitted a program which was wholly ineffective and contrary to evidence based science. The Minister's exemption also led to a poor environmental outcome.

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[178] For a critique of setting 'ecologically sustainable development' as an environmental benchmark see Donald K Anton "The 2012 United Nations Conference on Sustainable Development and the Future of International Environmental Protection", above n 47.

[179] Stephen Keim, "The EPBC Act Ten Years On", above n 42.

[180] OECD *OECD Environment Outlook* to 2050 – *The Consequences of Inaction* (OECD Publishing, 2013) (Climate Change, ch 3).

[181] For a study concluding that current losses of biodiversity are comparable to those seen historically during mass extinctions see A D Barnosky and others "Has the Earth's sixth mass extinction already arrived?" (2011) 471(7336) Nature 51; Rodolfo Dirzo and others "Defaunation in the Anthropocene" (2014) 345 Science 401.

[182] Australian State of the Environment Committee *State of the Environment 2011: Independent Report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities* (2011).

[183] See C Jacobson and others (2014) "Twenty years of pacifying responses to environmental management" (2014) 21(2) Australian Journal of Environmental Management 143 at 167.

The following comments are directed at the provisions of most general importance. They are when the Minister is deciding whether or not to determine an action a controlled action,[184] whether to approve a referred proposal[185] and whether to grant an exemption.[186]

1. The Role of Politics in the Exercise of Discretion

Chapter IV argued the Minister's exemption was possibly unlawful. However it was not challenged so what matters is that in a practical sense the drum line program was lawful. As required under the Act the Minister released a statement of reasons for granting the exemption.[187] However that statement is silent on the political forces at play and the influence they may have had. When the WA government initially approached the Minister it made three requests:

- To delist the great white shark as a protected species; or
- To allow WA to hunt for great whites in open water; or
- To allow drum lines to be set.[188]

These requests cast a shadow over the decision, one cast by the duty as Commonwealth Minister for the Environment to administer Commonwealth laws while also allowing the states the greatest possible degree of sovereignty. Subsequent comments of the Minister hint at an underlying pressure:[189]

> The third [the request to set drum lines] was about safety measures at a limited number of high-volume, high-risk beaches and that is part of the right of a state government to take reasonable and limited measures for public safety.

The following comments made by Mr Barnett also reflect the existence of tension between not only the Commonwealth and the states but between the states themselves:[190] [191]

> Conversations going backwards and forwards to Canberra have proven to be totally ineffective.

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[184] EPBC Act, s 75.
[185] EPBC Act, 136.
[186] EPBC Act, s 158.
[187] EPBC Act, s 158(7).
[188] Australia Associated Press (AAP) "Greg Hunt knocked back WA push for open sea shark cull" *The Sydney Morning Herald* (online ed, Sydney, 22 January 2014).
[189] "Greg Hunt knocked back" above, n 188.
[190] Aleisha Orr "Esperance shark attack: did Fisheries catch the right sharks?" *WA Today* (online ed, Perth, 3 October 2014).
[191] Stephanie Dalzell "WA shark cull: Drum lines dumped after EPA recommendations" *Australian Broadcasting Corporateion* (online ed, Sydney, 12 September 2014).

> I find it extraordinary…that the catching of sharks could be prohibited in Western Australia, but allowed in New South Wales.

These comments reflect the tension inherent under the co-operative federalism model where legislation and jurisdictions overlap and individual states are in competition.[192] The Minister might be under pressure from state governments to allow them to pursue their own agendas but it is not his role to facilitate them. The public have the right to expect that the Commonwealth Minister will act to protect and prioritise MNES even if at the expense of state and territory pet projects.

An examination of the Victorian government's referral under the EPBC Act to trial alpine grazing highlights a further problem with discretionary powers.[193] They are subject to the political preferences of the administration of the day.[194] A referral which was refused in 2012 under s 74B of the EPBC Act as "clearly unacceptable" was approved by the incoming Minister following the 2013 federal election.[195] As noted by Chris McGrath:[196]

> No doubt both Ministers would say they were upholding the high standards for decision-making under the EPBC Act even though very different conclusions were reached by each. This illustrates the discretionary nature of decisions under the EPBC Act.

This inconsistency suggests there is a need for more robust decision-making standards. The broad discretionary powers under the Act hinder environmentally positive and balanced outcomes. They introduce uncertainty into environmental decisions where certainty is desirable particularly if the operation of the Act is to meet its stated objects. The role of politics in the exercise of discretion is clear.[197]

2. Discretion and the Guiding Principles of the Act

Compounding the problem of discretion allowing for political leeway is that the Minister is required under the Act only to consider the principles of ESD and the precautionary principle and once considered he or she is not required to balance those principles against economic and/or social factors. The Minister is not required to give those principles any weight at all.[198] They are the guiding principles of the Act. The EPBC Act purportedly protects the environment and conserves biodiversity. That the Minister can simply dismiss those guiding principles permits decision-making which undermines the purpose of the Act.

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[192] In this context the reason for the WA government to withhold the results of a survey it commissioned which did not assist its application for a Commonwealth exemption is clear.
[193] EPBC Assessment No 2011/6219.
[194] Chris McGrath "One stop shop for environmental approvals a messy backward step for Australia" (2014) 31 EPLJ 164 at 181.
[195] Note this rejection is one of only two referrals which have been refused on this ground.
[196] McGrath "Messy step backward", above n 194, at 181.
[197] See for example Andrew Macintosh "Environment Protection and Biodiversity Conservation Act, An Ongoing Failure" (paper prepared for The Australia Institute, July 2006).
[198] See discussion in Chapter II p XX

3. Discretion and the Hawke Review

In 2009 Dr Allan Hawke led the first independent review of the operation of the EPBC Act (the Hawke Review).[199] The Hawke Review made 71 recommendations.[200] In the interests of transparency the Hawke Review recommended the Minister should retain the role of primary decision-maker under the Act.[201] However the review also noted that a widespread concern was a lack of trust in the quality of decision-making.[202] This is a difficult issue to confront in the absence of merits review particularly given the political undercurrent. Although concerns about the quality of decision-making were raised in the Hawke Report, "no evidence of inappropriate decision-making was produced."[203] This indicates a legislative tolerance for what many consider to be poor quality decision-making.

4. The Limitations of Judicial Review

The absence of merits reviews limits legal challenges of ministerial decisions to judicial review. The Sea Shepherd challenge of the state exemption[204] and the discussion of potential challenges to the Commonwealth exemption[205] demonstrate that arguments in judicial review are likely to be complex and technical in nature. Litigants are forced to find some procedural error whereas most wish to challenge the merits of a decision because of its environmental impacts. Such challenges have also been overwhelmingly unsuccessful.[206] The likelihood of failure is compounded by the costs associated with legal challenges in the Federal Court. This situation was exacerbated by the 2006 repeal of the provision forbidding the court from imposing an undertaking as to damages.[207] The words of Toohey J "that there is little point in opening the door if litigants cannot afford to come in" are apposite.[208]

Judicial review of the Minister's exemption was not sought. However the Minister's statement of reasons was not compelling. It failed to provide coherent evidence based reasoning in support of his decision. If that decision had been subject to a merits review an independent court might not have accepted the Minister's statement of reasons.

5. A Case for Merits Reviews under the Act

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[199] Section 522A EPBC Act stipulates an independent review must be undertaken within 10 years of commencement of the Act.

[200] The final Hawke Review, above n 176, focussed more on process than outcome and didn't not asses the Act's effective in meeting its purpose. See Professor Stephen Garnett, "Making Australian threatened species legislation more effective and efficient" (Professorial Lecture series, Charles Darwin University 17, September 2013).

[201] Final Hawke Review, above n 176, at 16 [105].

[202] At 15 [99].

[203] At 15 [99].

[204] See discussion ch III at XX

[205] See discussion ch IVat XX

[206] Stephen Keim "The EPBC Act Ten Years on", above n 40, at 9.

[207] Note also the risk of incurring substantial costs awards.

[208] Toohey J, "Address to the NELA conference" (1989), cited in Stein P, "The Role of NSW Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) 13 EPLJ 179 at 180.

If the Act is to achieve its objects the Minister's decisions must be robust, able to withstand scrutiny and as far as possible minimise political influences on MNES. The Hawke Review's recommendation that the Minister retain decision-making power is accepted and the recommendation requiring the Minister to release the advice he or she has received at the time of the decision should be considered a minimum requirement.[209] This recommendation was made to increase public participation and scrutiny. The Minister's exemption of the drum line program suggests that more is required.

The statutory discretion conferred on the Minister has been shown as a major deficiency of the Act. This problem could be addressed with the introduction of built in review mechanisms at least under those provisions of most general importance. The availability of statutory merits reviews would incentivise robust decision-making and alienate political influences. The mere existence of merits reviews might also have the effect of encouraging integrity in decision-making standards without necessarily opening the floodgates to litigation.

Any discussion around the inclusion of merits reviews under the Act would be incomplete without revisiting the Minister's freedom to ignore the guiding principles of the Act – the principles of ESD and the precautionary principle. The drum line example suggests those principles should have greater standing under the Act for the simple reason that the EPBC Act is environmental law and not a platform for economic and social policy. This proposed reform would strengthen the operation of the Act so that it could meet its objects. The following discussion however indicates that imminent reform is heading in the opposite direction.

D. The One-Stop Shop Reform

The one-stop shop reform refers to the federal government's intention to implement a streamlined assessment and approvals process of development projects by devolving Commonwealth approval powers to individual states and territories. Full implementation of the reform will mean that state and territory governments will be able to make a single approval decision for both state matters and MNES. Where an action is or could be approved by a bilateral agreement it will be assessed and approved by the relevant state or territory. In this situation proponents will not be required to refer the proposal to the Commonwealth Minister for approval. The aim of the reform is "to simplify the approvals process for

[209] EPBC Act, s158 requires the Minister to release a statement of reasons.

businesses, lead to swifter decisions and improve Australia's investment climate, while maintaining high environmental standards."[210]

1. A Brief History of the One-Stop Shop

The political appetite for implementing the one-stop shop reform can be traced to a discussion paper prepared by the Business Council of Australia (BCA) which was presented to COAG in April 2012.[211] One of the paper's recommendations was to streamline environmental assessments and approvals. The federal government's pro-development bias[212] (which is bi-partisan) therefore continues under the Liberal-led government with the role of the BCA in promoting the current reform.

Following the April 2012 COAG Business Advisory Forum at which the paper was presented, the Gillard-led Labour Government launched a process through COAG to implement approval bilateral agreements. That process however stalled and nothing further was agreed before the Liberal Party won the September 2013 federal election.

In November 2012, in contemplation of apparently imminent approval bilateral agreements, Greens Senator Larissa Waters MP introduced a Bill the purpose of which was to prevent the Commonwealth from entering into approval bilateral agreements with the states and territories.[213] The Bill was defeated in the Senate by a majority of 5:1 made up of Labour and Coalition Senators.

The current Liberal-led Government considers the one-stop shop reform a "key election commitment",[214] and in October 2013 the Minister announced that the Government had put in place the framework to achieve approval bilateral agreements with all states and territories. He anticipated that approval bilateral agreements with all states and territories would be negotiated within 12 months.[215] At the time of writing none have been concluded.

2. Opposition to the One-Stop Shop

[210] See Government of Australia Department for the Environment website available online at: www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop.
[211] Business Council of Australia *Discussion Paper for the COAG Business Advisory Forum* (Melbourne, Australia, 10 April 2012).
[212] Note the vast majority of referred actions are not deemed 'controlled actions'. Of those that are very few are not approved. See discussion in Lee Godden "Dark Sides of Virtue", above n 36, at 136; Andrew McIntosh "An Ongoing Failure, above n 197.
[213] Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012.
[214] See Government of Australia Department for the Environment website at: www.environment.gov.au/minister/hunt/2014/mr20140514b.html.
[215] See the Department of the Environment "One-Stop shop for environmental approvals".

The reform has been widely opposed by Parliamentarians, the legal community, academics, scientists, public interest groups and, notably a group of concerned UNEP Global 500 Laureates.[216] The generally accepted areas of concern arising from the reform are considered.

(a) The influence of the Business Advisory Forum on reform

The BCA discussion paper recommended streamlining environmental assessments and approvals. The evidence presented to support that recommendation included:

- A study by Australia National University estimating that the direct cost to all industries was $820 million over the lifetime of the EPBC Act to date.
- The expense of the referrals program which was estimated at $30,000 to $100,000 per referral.
- The reduction in state royalties attributable to delays caused by the EPBC Act.
- The Traveston Dam Crossing as an example of the Commonwealth Minister withholding approval of a project which had already been approved at state level.

However the reliability of that evidence has been challenged by Economists at Large who were asked to review the BCA discussion paper by an alliance of Australian environmental groups. Their review concluded "that the BCA discussion paper falls short in three areas that should warrant caution by policy makers before adoption of the proposed reforms".[217] Those three areas were:

- failing to provide reliable figures due to cherry-picking, methodological errors resulting in overstated costs and providing figures in absolute rather than relative terms;
- ignoring the wider context of the debate due to an exclusive focus on business and a failure to consider the benefits of the EPBC Act or the costs arising from streamlining the assessment and approval process; and
- insufficiently linking the objectives of lowering costs to business, lifting productivity and enhancing competition with the proposed reform.

Further, the Traveston Dam Crossing example is disingenuous. The project was rejected because of its unacceptable impacts on MNES however if power of approval had rested with

[216] Laureates are elected to the Global 500 Roll of Honour of the United Nations Environment Program (UNEP) in recognition of their outstanding practical achievement in the protection and improvement of the environment. Letter available online at: http://placesyoulove.org/wp-content/uploads/2012/11/Strong-national-environmental-protection-laws-211112-pdf.pdf.

[217] Tristan Knowles *A Response to the Business Council of Australia's Discussion Paper for the COAG Business Advisory Forum: On environmental assessments and approvals* (Prepared for an alliance of Australian environmental groups by Economists at Large, Melbourne, Australia, 2012) at 9.

the state of Queensland it would have gone ahead. The example strengthens rather than weakens the argument for approval powers to remain exclusively with the Commonwealth.[218]

The influence of the BCA discussion paper on COAG's environmental reform agenda raises a number of issues. First, COAG relied on the paper's findings which have been shown to be unreliable. Secondly, such reliance indicates that COAG's reform agenda focusses exclusively on benefits to business rather than making any attempt to raise environmental standards.[219] Although there is a valid case to be made that business should not be subject to duplicitous regulations, that COAG's environmental reform agenda fails to address environmental concerns renders it an exercise in politics.

COAG's Business Advisory Forum, where the BCA paper was presented, is the only forum of its kind. No equivalent forums exist for other sectors of society.[220] That forum therefore provides the opportunity to present partisan views which exclude and diminish other and equally valid community concerns. The Business Advisory Forum has access to COAG unavailable to other interest groups, and by extension influences COAG's reform agenda to the exclusion of other interest groups.[221]

The reform seems more concerned with delivering on an election promise and easing disquiet from vocal industry groups than it does with meeting the Commonwealth's obligation to protect MNES and more generally protect the environment and conserve biodiversity. Parallels are readily drawn with the state and Commonwealth exemptions which permitted the drum line program. Those decision-makers were arguably more concerned with mitigating potential losses to the tourism industry than protecting a threatened species.

(b) Approval bilateral agreements will not improve efficiency

The Commonwealth claims that streamlining the approval process will lead to greater efficiency. The removal of duplication will, it is claimed, lead to a reduction in timeframes for approvals. This claim rests on the assumption that assessment and approval under the EPBC Act generally takes longer than it does under state and territory laws.

Ms Waters' Bill found little Senate support. However the chair of the Senate's Legislative Committee observed a lack of substantive evidence to support the proposition that the EPBC Act dual-approval system was causing inefficiency, slowing down approvals, having a

[218] Chris McGrath "A messy step backward", above n 194.
[219] For example see Walmsley and R, McKinnon, E, "In defence of environmental laws: ANEDO and COAG's environmental reform agenda" (2012) 3 Impact (National Journal of Environmental Law) 93 7.
[220] At 32.
[221] In Commonwealth of Australia *Report of the Senate Environment and Communications Legislation Committee*: *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation Bill 2014 [Provisions] Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014 [Provisions]* (June 2014) [the Senate Committee Report] the recommendation is made that "COAG deliberations on national environmental regulation must be, at all times, underpinned by Australia's national and international obligations and the objects of the *Environment Protection and Biodiversity Conservation Act 1999.*" at [2.66]. This is clearly not the case.

negative effect on investors or creating unreasonable costs.[222] The chair's observations reinforce the findings of Economists at Large.

Between 2008 and 2009 a staggering 251,837 development applications were received under state and territory laws.[223] Within that same time period a mere 438 referrals were made under the EPBC Act.[224] Those numbers speak for themselves. The overwhelming majority of assessments and approvals in relation to development take place under state and not Commonwealth law. Any serious attempt to increase efficiency would obviously be best undertaken at state and territory level.

The assessment process and not final determination is the most complicated and time-consuming stage of the overall process.[225] Approvals under the EPBC Act must be granted or withheld by the Minister within between 20 and 40 days of receiving the assessment report. Major development projects can take several years to reach the approval stage so that this statutory timeframe for final determination cannot be considered an unacceptable delay or justify the one-stop shop. Moreover, the proposed reform will not address perceived delays as state and territory decision-makers will still be required to consider assessment reports before approving projects.

Finally, the Government's claim that the reform will lead to savings to business of $426 million per year must be considered in a wider context. As stated in the BCA discussion paper "there are around $900 billion of committed and prospective investment opportunities in large-scale projects" however $426 million represents a negligible .0047 per cent of this figure.

(c) The reform ignores the potential for conflicts of interest

Conflicts of interest arise when the state is a proponent of the action or a major supporter, for example large infrastructure projects such as dams or highways. They also arise when the state stands to benefit directly from the project for example by receiving royalties from mineral extraction and, when the state government has demonstrated a political interest in the project.[226] Under the reform a state could potentially be the proponent, the benefactor, the assessor and the arbiter of an action. In such cases it is doubtful impartiality can be guaranteed or that rigorous environmental standards will be prioritised over or even balanced against economic imperatives.

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[222] C McGrath "Messy step backward", above n 194, at 172.
[223] Local Government and Planning Ministers' Council *First National Report on Development Assessment Performance 2008/09* (COAG, Canberra, 2010) available online at: www.coag.gov.au/node/82.
[224] Department of the Environment, Water, Heritage and the Arts, *Department of the Environment, Water, Heritage And The Arts Annual Report 2008-09 – Volume 2* (DEWHA, Canberra, 2009).
[225] See ANEDO *Submission on Draft ACT/Commonwealth Government Bilateral Approval Agreement,* (21 September 2014); see also generally Chris McGrath "A messy step backward", above n 194.
[226] ANEDO submission, above n 225, at 6.

The reform overlooks the obvious motivation for states to put their own short-term economic interests ahead of environmental protection particularly given the reality that the states compete fiercely against each other to attract billions of dollars of investment. In an effort to create the most attractive conditions to investors the risk is a "race to the bottom" where states competitively relax environmental standards in order to attract projects.[227] The Senate Committee expressed its concern that a loss of Commonwealth oversight might encourage competitive federalism.[228]

(d) State assessment standards are not Commonwealth assessment standards

Research suggests that the states and territories do not currently have assessment processes and legislation which meets federal standards.[229] In 2012 the ANEDO undertook an audit of state laws relating to threatened species and found that no state or territory biodiversity or planning laws currently meet federal standards to effectively and efficiently protect biodiversity.[230] A 2008 submission to the draft Victorian assessment bilateral agreement also noted:[231]

> Bilateral agreements should provide the opportunity to lift assessment standards and procedures to set a benchmark for best practice Environmental Impact Assessment. In practice it seems that many Bilateral Agreements simply 'rubber-stamp' existing state processes without requiring amendment of legislation, policy and practice to meet or ideally exceed Commonwealth standards.

If approval bilateral agreements rubber-stamp state and territory processes without requiring amendment to existing legislation then the environmental consequences stand to be much more significant than under an assessment bilateral agreement which at least still requires Commonwealth approval.

Under the Act the Minister must be satisfied that a bilateral agreement meets national standards before entering into one.[232] However given that no state or territory environmental laws currently meet national standards it is unclear how that situation will change prior to Commonwealth accreditation. In the context of the political intent around this reform the concern is that the Government will simply rubber-stamp existing and inadequate state and

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[227] See ANEDO submission, above n 225, at 8. See also the Senate Committee Report, above n 221 at [2.26] [2.27] and [2.76].

[228] The Senate Committee Report, above n 221, at [2.28] however the Senate Committee did not support Ms Waters' bill. See also the dissenting Greens submission that "politics appears to have trumped sound evidence based policy" cited in the Senate Committee Report, above n 221, at [1.13].

[229] See Senate Committee Report, above n 231, at [2.45] to [2.48]; ANEDO submission, above n 225, at 7.

[230] See ANEDO submission, above n 225, at 7 citing ANEDO *An assessment of the adequacy of threatened species and planning laws in all jurisdictions of Australia* (September 2014) a report commissioned by the *Places You Love Alliance* of environmental NGOs.

[231] Godden, L, Peel, J, Kallies, A, Submission on Draft Victorian Bilateral Agreement under the EPBC Act, 10 November 2008.

[232] EPBC Act, s 50.

territory accreditation processes which could only be challenged by rolling the judicial review dice.

Compounding this issue is the reality that state and territory environmental departments are already under resourced lacking the capacity to deliver appropriate assessment processes.[233] It is therefore unlikely they will be able to satisfactorily manage the additional burden of approval bilateral agreements requiring assessments based on national standards. The obvious risk is that compliance with environmental regulations and approval conditions will simply not be enforced, opening the door for environmental degradation.

(e) The Commonwealth must retain oversight of MNES

The Commonwealth has legal responsibility for the environmental protection of MNES. The EPBC Act was enacted to give effect to Australia's international obligations and provide greater protection to Australia's most important natural assets.[234] The devolution of approval powers from the Commonwealth to the states and territories for projects which affect MNES is on its face an abandonment of that responsibility. This view was endorsed in the Senate Committee's report:[235]

> The Committee's view is that it is not appropriate for the states and territories to exercise decision making powers for approvals in relation to matters of national environmental significance.

The ANEDO claims that the states and territories have proved incapable of acting beyond their own interests.[236] The Australian Conservation Foundation argues that the states have neither the mandate nor the capacity to act in the national interest.[237] Of equal concern is that local governments, created under state and territory legislation, could also be involved in the approval process without any guarantee that they have the necessary expertise. The devolution of Commonwealth approval powers to the states could lead to a further devolution of approval powers to local governments. The potential for an unacceptable dilution of national interest is clear.

Issues having an increasing impact on the Australian environment demand an extension of the Commonwealth's role as opposed to the withdrawal proposed by the reform. The Commonwealth's scope in national environmental law is already narrow, limited to the legal

[233] Senate Committee Report, above n 221, at [2.39], [2.42].
[234] See 1997 Heads of Agreement pt I, D.
[235] Senate Committee Report, above n 221, at [2.47]. That the Senate blocked a Bill which would have given effect to this statement illustrates the additional layers of political complexity which stand in the way of achieving positive environmental outcomes.
[236] See Walmsley " In defence of environmental laws", above n 219.
[237] Australian Conservation Foundation *Submission on draft assessment bilateral agreement between the Commonwealth and the State of Western Australia (WA)* (27 June 2014); Walmsley "In defence of environmental laws", above n 219.

protection of nine MNES. If the reform is enacted into law the question naturally arises what purpose does the EPBC Act serve?

3. One Stop Shop and Western Australian Drum Lines

The one-stop shop reform would hit migratory species the hardest because 75 per cent of all referrals to the Minister concern threatened and migratory species.[238] Migratory species also cross many state borders without regard to jurisdiction. If the one-stop shop reform had been law at the time of the fatal shark attack in November 2013 south of Perth the WA government would still be deploying drum lines in WA waters to capture and destroy great white sharks.[239] State law, the EP Act, failed to trigger an environmental impact assessment of the trial program before the state government had even applied for the Commonwealth exemption.

If an approval bilateral agreement had been in place earlier in 2014 the proposed extension would never have been environmentally assessed. The extension would never have been referred to the Commonwealth Minister for determination whether the continued deployment of drum lines was a controlled action under the EPBC Act. The WA government did not consider that the proposed extension to the drum line program was a controlled action under the Act as is evidenced in its referral document to the Minister in April 2014.[240]

The criticisms of the one-stop shop reform when applied to the WA example are particularly relevant. The objective of the WA government was to manage a perceived risk for political reasons and to mitigate a potential downturn in the tourism industry. It is apparent that environmental impacts were of no real concern. That the program and its extension would diminish populations of a threatened and migratory species which was protected under state, Commonwealth and international law did not deter the state government. The WA government's assessment processes were also lacking. They were not even triggered, and the state does not have a proud history of managing conflicts of interest either.

In 2013 the Supreme Court of WA held that the government had acted unlawfully in approving a proposed gas plant notwithstanding a declared conflict of interest. The Supreme Court overturned environmental approvals due to the conflicts of interest arising from

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[238] Peter Cosier, Wentworth Group of Concerned Scientists *Committee Hansard*, 10 June 2014 cited in the Australian Labour Party Senator's Dissenting Report of the Senate Committee Report, above n 241, at [1.35], 51.

[239] Even after the EPA's recommendation in September 2014 against the proposed extension due its uncertain scientific impacts the WA government is still deploying drum lines to kill great white sharks under its imminent threat policy which highlights that WA will find a law to deploy drum lines. As recently as 2 October 2014, a surfer was attacked at a remote and unpatrolled WA beach. He is reported as telling the attending paramedics he was attacked by 2 bronze whaler, see www.perthnow.com.au/news/western-australia/shark-attack-man-injured-at-esperance-beach/story-fnhocxo3-1227077781315. Within one hour of the attack state officials had deployed drum lines and killed 2 great whites. See Government of Western Australia Department of Fisheries "Second white shark caught after Esperance incident today" (2 October 2014) www.fish.wa/gov.au/About-Us/Media-Releases.

[240] WA Referral Document, above n 87, at 30.

members of the state EPA who had financial interests in the gas plant proceeding.[241] The state government's immediate response to this decision was to introduce retrospective legislation to validate other projects potentially affected by conflicting interests in order to provide certainty for those projects. The WA drum line program makes a persuasive case for the Commonwealth to retain oversight of MNES.

4. The One-Stop Shop under International Instruments

It is also far from clear how Australia will fulfil its international obligations, particularly those contained in the CMS,[242] under a one-stop-shop regime. Australia is required to prepare a national report to the CMS and it difficult to see how Australia will meet its commitments if responsibility for threatened and migratory species is delegated to the states and territories, or even local governments.[243]

This chapter deferred to the call made in the 2011 State on the Environment Report for leadership at a national level. An analysis of the WA drum line program and the imminent one-stop shop reform leads to the conclusion that the Government does not appear to have answered that call. An analysis of the drum line program and its proposed extension under the reform demonstrated the likely detrimental outcomes to the environment if the reform is enacted into law.

A picture emerges in which political influence is significant and the key driver for environmental law reform is economic growth rather than sustainable development, the internationally accepted paradigm through which environmental laws are viewed. The real concern is that Australia's unique and valuable environment may be irreversibly damaged as the Commonwealth pursues policies to reap short-term benefits from the extraction of Australia's massive mineral and fossil fuel reserves. The one-stop shop reform represents a significant step backwards for Australian environmental law at a time when there is real and urgent need for a shift towards more protective measures for the environment.

[241] *The Wilderness Society of WA Inc V Minister for Environment* [2013] WASC 307. Note the WA EPA strongly defended the integrity of the assessment process and claimed a technical error was at fault. However, 25 other projects were affected therefore it is arguable that an independent inquiry, rather than a blanket endorsement, might have been a more appropriate response from the WA state government.
[242] See discussion ch V.
[243] Alexia Wellbelove, Humane Society International *Committee Hansard*,(10 June 2014) cited in the Senate Committee Report, above n 231, at 36.

Conclusion

This dissertation has revealed a failing in Australia's environmental law. Chapter I outlined the Government of Western Australia's controversial drum lining program which was exempted from state and Commonwealth environmental laws. Chapter II considered the multi-layered and complex legal framework within which the program occurred. Within that framework the Commonwealth's power is held concurrently with the states under the model of co-operative federalism so that overlapping laws, jurisdictions and indeed tensions emerge. A tier of local governments adds yet another layer of decision making and policy.

Against that background Chapters III and IV examined how environmental laws which prima facie protect the great white shark, a threatened, migratory species enabled the erosion of those protections. As was shown, the WC Act, the FRMA and the EPBC Act confer statutory discretion on decision makers to exempt proposals and/or activities from the provisions of those statutes and they also preclude merits reviews of those exemptions. In this case of the drum line program, these laws afforded only superficial protection. Sea Shepherd's unsuccessful challenge for judicial review in the WASC highlighted the legal difficulties litigants face when limited to finding a procedural error in the decision when it is the decision itself they wish to overturn because of its negative environmental impacts. The analysis in Chapter IV reinforced that view. Legal arguments in judicial review are complex and technical. Also, under the EPBC Act they are overwhelmingly unsuccessful.

Chapter V considered the legal protection provided under international environmental law. The CBD and CMS were considered for their relevance to the drum line program. Chapter V highlighted that the obligations contained in conventions can be so broadly framed that they are soft law (the CBD). The analysis of the drum line program under the CMS showed that even though Australia is arguably not fulfilling its obligations under that Convention, the legal remedies are generally weak. Moreover no party nation has initiated any action against Australia for the drum line program or its continued drum lining in other states. The suggestion was made that international conventions can impact credibility which might ultimately force Australia to rethink its position on environmental matters.

Chapter VI confirmed that the Australian Government is not currently contemplating rethinking its position. The one-stop-shop reform signals its intention to withdraw its oversight of Australia's national assets by devolving approval powers for proposals to the states and territories. This dissertation suggested the failures of the EPBC Act were caused by statutory discretion and made a case that the Act would operate more effectively and meet its object with the introduction of built in review mechanisms. Imminent reform is however heading in the opposite direction. It was argued that the one-stop shop reform will lead to a bidding war for investment projects between the states, lower standards in environmental assessment and regulation which in turn may lead to further environmental degradation. The

environmental indicators are already far from positive so that this reform is considered a significant step backwards in Australian environmental law. It is also far from clear how the one-stop shop policy will fulfil Australia's international obligations.

The analysis of the one-stop shop reform in the context of the WA drum line program confirms the criticism of the reform. If the reform were law earlier in 2014 the Government of Western Australia would still be drum lining today. Under the one-stop shop the proposed extension would never have been environmentally assessed. The decisions made regarding the WA drum line program can be seen to have foreshadowed the thrust of the one-stop shop reform. This dissertation extends beyond the great white shark and has relevance to all matters of national environmental significance under the Act.

Australian environmental law has reached a fork in the road. It may be time for COAG to renegotiate the 1997 Heads of Agreement and reaffirm the importance of the Commonwealth retaining ultimate legal responsibility for matters of national environmental significance. This may require a non-partisan approach which makes Environmental Protection and Biodiversity Conservation the overriding consideration in environmental law. Present policies appear to pursue short-term economic benefits at the expense of maintaining ecological integrity, including that of our oceans. Drum lining can only increase the risk of extinction – the irrevocable loss of a species. It is difficult to see what drum lining protects or conserves.

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Appendix 1: Table of Legal/Conservation Status of Great White Shark

The great white shark (*Carcharodon carcharias*) is protected under the following laws:

Jurisdiction	**Instrument**	**Listing**	**Provision**	**Year Listed**
Commonwealth	EPBC Act 1999	Vulnerable Migratory Threatened species and communities Migratory species	Section 178 Section 209 Sections 18 & 18A Sections 20 & 20A	1999
Western Australia	FRMA 1994 Wildlife Conservation Act 1950	Totally Protected Rare or likely to become extinct Wholly Protected	Schedule 46 Schedule 5 Section 14(1)	1997 1999
International	CITES 1973	Endangered	Appendix II	2004
	CMS 1983 (Bonn Convention)	Threatened with extinction Benefit from international co-operation	Appendix I Appendix II	2002

Appendix 2: Chronology

23 November 2013:	7th fatal shark attack in WA during period 2010-2013.
10 December 2013:	The drum line program is announced by the WA government.
January 2014:	Exemptions from state laws (FRMA and WC Act) granted.
4 January 2014:	Approximately 4000 people protest the program at Cottesloe Beach.
15 January 2014:	Commonwealth Minister exempts program under s 158 EPBC Act until April 30 2014.
25 January 2014:	Drum lining begins.
1 February 2014:	Approximately 6000 people again protest the program at Cottesloe Beach.
5 March 2014:	Sea Shepherd Australia unsuccessfully seeks judicial review of exemptions under FRMA in Supreme Court of WA.
11 March 2014:	WA EPA declines to assess the program.
7 April 2014:	WA Government refers proposal for three year extension of the drum line program to the federal Minister under the EPBC Act.
30 April 2014:	Trial drum line program ends.
May 2014:	Minister Hunt determines the proposal a 'controlled action' under the EPBC Act and that it is to be assessed pursuant to bilateral assessment agreement.
11 September 2014:	WA EPA recommends against the three-year implementation of drum lines. The final word on approval now rests with Minister Hunt.
23 October 2014:	WA Premier Barnett withdraws referral at 11:59 pm. Minister Hunt was due to release his decision on 24 October.

Appendix 3: Relevant Extract from Statement of Reasons for s 158 EPBC Act Exemption

Findings

Increase in shark strikes and impact on public safety and water-based activities

7. A recent study by the Western Australian Department of Fisheries (*A correlation study of the potential risk factors associated with white shark attacks in Western Australian waters*, November 2012) identified a statistically significant increasing trend in the annual incidence of shark strikes since 1995. Shark strikes have increased from, on average, less than one per annum in the mid 1990s to three strikes in each of 2010, 2011 and 2012, and two strikes in 2013. The trend is consistent when considered by calendar year or fiscal year, and is also clear when the data are pooled into two year groups (figures 1a-c of the paper). This evidence indicates that the number of White Shark strikes in Western Australia is increasing over time at a faster rate than population growth though generally the frequency of White Shark sightings reduces during the January – April period.

8. There is substantial public concern about the safety of water based activities in Western Australia, and anecdotal evidence that the frequency of shark strikes is impacting on business in Western Australia. For example, the recreational diving industry has reported substantial declines in people wishing to participate in the sport, with one dive shop stating in the media that it has experienced a greater than 90% decline in people learning to dive.

9. According to Tourism Western Australia (*Experience Perth – Overnight Visitor Fact Sheet, Years ending December 2010/11/12*) there were 3.5 million overnight visitors to the Perth region in 2012; approximately 40% of these overnight stays were for holiday or leisure purposes; going to the beach (including swimming, diving and surfing) is one of the top five leisure activities of these visitors and is undertaken by 14% of intrastate visitors, 18% of interstate visitors and 64% of international visitors.

10. Similarly for the South West region (*Australia's South West – Overnight Visitor Fact Sheet, Years ending December 2010/11/12*), there were almost 2 million overnight visitors; over 60% of these overnight stays was for holiday or leisure purposes; going to the beach (including swimming, diving and surfing) is one of the top five leisure activities of these visitors; and is undertaken by 34% of intrastate visitors, 40% of interstate visitors and 84% of international visitors.

11. In total, the Western Australian tourism industry is valued at $8.52 billion per annum, directly employs 56,000 people and indirectly a further 33,000 people, directly accounts of 1.7% of the State economy, and indirectly a further 1.6% of the State economy (*Tourism Satellite Account, Western Australia 2011-2012, Fact Sheet*).

12. Australia is an island country with a strong beach culture where water-based activities are carried out along most of its coastlines. This beach culture is key drawcard for international visitors to Australia, as indicated by the high percentage of international visitors that participate in these activities. A loss of confidence in water-based activities impacts on tourism and other leisure-based businesses impacting on the Australian economy, making this impact a matter of national significance.

13. A reduction in public safety while undertaking water based activities is also a matter of national significance. The continued safety of Australians is a key

consideration of all Australian governments as demonstrated by the shared responsibility and national approach to many of the key factors that impact on the health and welfare of Australians. The increase in shark strikes in Western Australia's waters to well above historic norms has drawn national attention to the matter of public safety of water activities. The approaches and lessons learnt from the Western Australian trial will inform the mitigation approaches of other governments. The matter of public safety is therefore a matter of national interest.

Effectiveness of non-lethal methods

14. The Western Australian Government is investing in non-lethal approaches to manage the interaction between human users and sharks, but these approaches have not proven feasible in reducing shark strikes to date. The Western Australian Government is investing in research on electronic methods to deter sharks from surf boards, mask beach users' noise, research on shark biology associated with strikes and a separate project aimed at detecting sharks as they approach beaches.

15. Other Australian States also support research, for example on electro-magnetic shark barriers, that may reduce sharks approaching swimming beaches or beach users, but the evidence to date is that these methods require further development before they can effectively protect large areas.

Issues with the proposed approach

16. The approach proposed by the Western Australian Government is targeted at large sharks that are most likely to fatally injure humans in an unprovoked strike; the three species being targeted are considered responsible for 86% of recorded human fatalities from shark strikes worldwide. Moreover, investigation under the Queensland Shark Control Program identified that there have not been any major developments in new shark proofing technologies and that the traditional capture methods of using nets and drum lines remain the most effective measures to reduce the risk of shark strikes.

17. The Western Australian Premier in his application to me identified that his Government remained committed to continuing other shark mitigation methods and minimising the environmental impact from the proposed drum line deployment, including:

    - the use of a large hook size on the baited drum lines reducing the chance of small shark by-catch;
    - the size of the hooks and proposed use of shark as bait should reduce the targeting of the baits by other marine predators (for example sea lions);
    - the depth below water at which the hooks are proposed to be set, and the size of the hooks, should make incidental catch of seabirds unlikely;
    - the timing of the proposed deployment is before most Humpback Whales and Southern Right Whales will occur in Western Australian waters;
    - the monitoring of the drum lines will assist in identifying any other entanglements of cetaceans or sea turtles; and
    - that the Western Australian Department of Parks and Wildlife has recognised expertise in the disentanglement of marine wildlife.

18. The Premier also advised me that the program will be assessed throughout and after its operation by relevant stakeholders; including technical experts and that records of catches would be shared with my Department.

Timeliness of implementation and interaction with the EPBC Act

19. The warmer months of the year are the period when there is the greatest use of Western Australian waters by the public. In order to provide confidence to the public about the safety of water based activities additional shark mitigation measures are needed at the time of greatest use, which is over the summer and autumn months. Requiring the Western Australian Government to comply with the processes under the EPBC Act for referral for the action and potential assessment and approval would likely prevent the deployment of drum lines until after the peak period of use of the marine environment.

Reasons

20. In light of the matters discussed in paragraphs 7 - 19 above, I was satisfied that it was in the national interest that all of the provisions of Part 3 of the EPBC Act not apply in relation to the deployment and management of up to 72 drum lines as described in the above action.

21. Accordingly, I decided to exempt the State of Western Australia, and those acting on behalf of the State of Western Australia, from the application of all of the provisions of Part 3 of the EPBC Act in relation to the action described above.

22. Shark mitigation activities other than those in the action described above are not covered by this exemption. Therefore, if those activities have, will have, or are likely to have, a significant impact on a matter protected by Part 3 of the EPBC Act, they will require assessment and approval under the EPBC Act.

23. Failure to abide by the terms set out in paragraph 17 and my accompanying letter to Premier Barnett will give cause for review and possible revocation of the exemption.

Minister for the Environment

15 / 1 / 2014