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Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

Malabar Headland Protection Bill 2012

No. , 2012

(Special Minister of State)

**A Bill for an Act to protect the environmental
values and Aboriginal cultural heritage of the
Malabar headland, and for related purposes**

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1 **A Bill for an Act to protect the environmental**
2 **values and Aboriginal cultural heritage of the**
3 **Malabar headland, and for related purposes**

4 The Parliament of Australia enacts:

5 **Part 1—Preliminary**
6

7 **1 Short title**

8 This Act may be cited as the *Malabar Headland Protection Act*
9 2012.

Section 2

1 **2 Commencement**

2 This Act commences on the day after this Act receives the Royal
3 Assent.

4 **3 Definitions**

5 In this Act:

6 **Aboriginal cultural heritage** means the cultural heritage of people
7 of the Aboriginal race of Australia.

8 **Biodiversity Convention** means the Convention on Biological
9 Diversity, done at Rio de Janeiro on 5 June 1992, as amended and
10 in force for Australia from time to time.

11 Note: The text of the Convention is set out in Australian Treaty Series 1993
12 No. 32 ([1993] ATS 32). In 2012, the text of a Convention in the
13 Australian Treaty Series was accessible through the Australian
14 Treaties Library on the AustLII website (www.austlii.edu.au).

15 **commencement** of this Act means the time this Act commences
16 under section 2.

17 **Commonwealth Minister** means the Minister administering this
18 Act.

19 **Malabar headland property** means any land within the property
20 that, as at the end of 15 March 2011, consisted of:

- 21 (a) lots 101 and 102 of Deposited Plan 1162245, as registered on
22 that day under the *Real Property Act 1900* of New South
23 Wales; or
24 (b) lot 2 of Deposited Plan 809094, as registered under that Act.

25 **this Act** includes any regulations made under this Act.

26 **transferred Malabar headland property** means any Malabar
27 headland property that has been transferred by the Commonwealth
28 to New South Wales. This includes Malabar headland property that
29 was transferred to New South Wales before the commencement of
30 this Act.

31 Example: Malabar headland property that is lot 102 of Deposited Plan 1162245,
32 registered under the *Real Property Act 1900* of New South Wales, was

1 transferred by the Commonwealth to New South Wales on 2 March
 2 2012 under a deed of transfer dated on or around 27 February 2011
 3 (although the property was described differently in the deed). Even
 4 though the transfer was completed before the commencement of this
 5 Act, this property is *transferred Malabar headland property*.

6 Note: If transferred Malabar headland property is transferred to another
 7 person after its transfer to New South Wales, this Act applies to the
 8 other person in the same way as it formerly applied to New South
 9 Wales (see section 4).

10 **4 Application of Act—later transfers of Malabar headland property**

11 *Transfer of land from NSW*

12 (1) If, after it was initially transferred to New South Wales, transferred
 13 Malabar headland property is later transferred (whether by New
 14 South Wales or a later transferee) to another person (the *current*
 15 *owner*):

- 16 (a) this Act (apart from subsections 8(2) and 9(2)) stops applying
 17 in relation to New South Wales, or the later transferee; and
 18 (b) this Act starts to apply in relation to the current owner in the
 19 same way as it formerly applied in relation to New South
 20 Wales or the later transferee.

21 Example: Transferred Malabar headland property is transferred from the
 22 Commonwealth to New South Wales, then later transferred to a third
 23 person. While the third person owns the property, this Act applies to
 24 the third person as provided in this subsection. If the third person
 25 transfers the property to a fourth person, this Act will apply to the
 26 fourth person in the same way, and so on.

27 Note 1: After the transfer of Malabar headland property to New South Wales,
 28 the Commonwealth Minister's consent is required for any disposition
 29 of the property (including a transfer). See section 10.

30 Note 2: Subsections 8(2) and 9(2) (mentioned in paragraph (1)(a)) require a
 31 NSW Minister to be consulted before regulations are made about the
 32 use of transferred Malabar headland property or the management of
 33 such property.

34 (2) Subsection (1) applies to a later transfer whether it occurs before or
 35 after the commencement of this Act.

36 (3) However, subsection (1) does not apply in relation to a transfer that
 37 contravenes section 10 (which requires the prior written consent of
 38 the Commonwealth Minister to the transfer).

Section 5

1 *Later transfer back to the Commonwealth*

- 2 (4) If, after it was initially transferred to New South Wales, transferred
3 Malabar headland property later becomes vested in the
4 Commonwealth, this Act stops applying to the property unless and
5 until it is transferred back to New South Wales.

6 Note: The deed of transfer of Malabar headland property that is lot 2 of
7 Deposited Plan 1162245, mentioned in the example to the definition
8 of *transferred Malabar headland property* in section 3, requires the
9 property to be transferred back to the Commonwealth unless it is
10 reserved as a national park under the *National Parks and Wildlife Act*
11 *1974* of New South Wales within 5 years after the initial transfer to
12 New South Wales.

13 **5 Constitutional operation of this Act**

14 This Act operates only to the extent that:

- 15 (a) its operation is reasonably appropriate and adapted for either
16 or both of the following purposes:
17 (i) the fulfilment of Australia's obligations under the
18 Biodiversity Convention;
19 (ii) the protection or promotion of Aboriginal cultural
20 heritage; or
21 (b) the exercise of a power or the performance of a function or
22 duty under, or for the purposes of, this Act by the
23 Commonwealth Minister is reasonably appropriate and
24 adapted for either or both of the purposes mentioned in
25 paragraph (a).

26 **6 Compensation for acquisition of property**

- 27 (1) If the operation of this Act would result in an acquisition of
28 property from a person otherwise than on just terms, the
29 Commonwealth is liable to pay a reasonable amount of
30 compensation to the person.
31 (2) If the Commonwealth and the person do not agree on the amount
32 of the compensation, the person may institute proceedings in the
33 Federal Court of Australia for the recovery from the
34 Commonwealth of such reasonable amount of compensation as the
35 court determines.

1 (3) In this section:

2 *acquisition of property* has the same meaning as in paragraph
3 51(xxxi) of the Constitution.

4 *just terms* has the same meaning as in paragraph 51(xxxi) of the
5 Constitution.

6 **7 Malabar transfer instruments—exercise of power etc.**

7 (1) Nothing in this Act affects the exercise of a power, or the
8 performance of a function or a duty, by the Commonwealth, New
9 South Wales or any other person under an instrument (a *Malabar*
10 *transfer instrument*) under which transferred Malabar headland
11 property is transferred to New South Wales.

12 (2) Nothing in a Malabar transfer instrument affects the exercise of a
13 power, or the performance of a function or a duty, by the
14 Commonwealth under this Act.

15 Note: If transferred Malabar headland property is transferred to another
16 person after its transfer to New South Wales, this section applies to the
17 other person in the same way as it formerly applied to New South
18 Wales (see section 4).
19

Section 8

1 **Part 2—Protection of Malabar headland property**
2

3 **8 Transferred Malabar headland property—use for purposes of**
4 **national park etc.**

5 (1) New South Wales must use transferred Malabar headland property,
6 or cause it to be used, for:

- 7 (a) a purpose for which a national park may be reserved under
8 the NSW National Parks and Wildlife Act, with the primary
9 purpose being conservation; or
10 (b) a purpose prescribed in relation to the property by any
11 regulations made for the purposes of this paragraph.

12 (2) Before regulations are made for the purposes of paragraph (1)(b),
13 the Commonwealth Minister must consult a Minister nominated by
14 the Premier of New South Wales for the purpose.

15 Note: If transferred Malabar headland property is transferred to another
16 person after its transfer to New South Wales, subsection (1) applies to
17 the other person in the same way as it formerly applied to New South
18 Wales (see section 4).

19 (3) In this section:

20 *NSW National Parks and Wildlife Act* means the *National Parks*
21 *and Wildlife Act 1974* of New South Wales, as in force at the
22 commencement of this Act.

23 **9 Transferred Malabar headland property—management**

24 *Management in accordance with regulations or with consent*

25 (1) New South Wales must manage transferred Malabar headland
26 property, or cause it to be managed, in accordance with:

- 27 (a) regulations prescribed for the purposes of this paragraph; or
28 (b) in relation to a particular action or omission proposed in the
29 course of the management of the property—the prior written
30 consent of the Commonwealth Minister to that action or
31 omission, subject to any conditions stated in the consent.

1 *Regulations*

2 (2) Before regulations are made for the purposes of paragraph (1)(a),
3 the Commonwealth Minister must consult a Minister nominated by
4 the Premier of New South Wales for the purpose.

5 (3) Regulations made for the purposes of paragraph (1)(a) may apply,
6 adopt or incorporate, with or without modification, any matter
7 contained in any other instrument or writing, as existing at a
8 particular time.

9 Example: The regulations may incorporate a plan of management as in force at a
10 particular time under a deed by which transferred Malabar headland
11 property is transferred from the Commonwealth to New South Wales,
12 whether it is transferred before or after the commencement of this Act.

13 (4) The Commonwealth Minister must, as soon as practicable after
14 regulations are made to which subsection (3) applies, cause the text
15 of the matter applied, adopted or incorporated by the regulations to
16 be published on the Department's website.

17 *Consent*

18 (5) The Commonwealth Minister must not make a decision to give
19 consent, to give consent subject to conditions or to refuse to give
20 consent, for the purposes of paragraph (1)(b), if making the
21 decision would be inconsistent with either or both of the following
22 purposes:

- 23 (a) the fulfilment of Australia's obligations under the
24 Biodiversity Convention;
25 (b) the protection or promotion of Aboriginal cultural heritage.

26 (6) A consent given by the Commonwealth Minister under
27 paragraph (1)(b) is not a legislative instrument.

28 Note: If transferred Malabar headland property is transferred to another
29 person after its transfer to New South Wales, this section (apart from
30 subsection (2)) applies to the other person in the same way as it
31 formerly applied to New South Wales (see section 4).

Section 10

1 **10 Transferred Malabar headland property—sale and other**
2 **disposition**

3 *Consent—requirement*

4 (1) After transferred Malabar headland property has been initially
5 transferred to New South Wales, New South Wales must not
6 dispose of a legal or equitable interest in the property, or do
7 anything for the purpose of effecting such a disposition:

- 8 (a) without obtaining the prior written consent of the
9 Commonwealth Minister; or
10 (b) without complying with any condition stated in such a
11 consent.

12 Examples: A disposition of a legal or equitable interest in transferred Malabar
13 headland property may be effected, with the consent this subsection
14 requires, by methods including the following:

- 15 (a) sale;
16 (b) transfer;
17 (c) lease;
18 (d) mortgage;
19 (e) charge.

20 (2) Immediately following a disposition of an interest in transferred
21 Malabar headland property that contravenes subsection (1), the
22 interest is vested (again) in New South Wales by operation of this
23 subsection.

24 *Consent—other matters*

25 (3) The Commonwealth Minister must not make a decision to give
26 consent, to give consent subject to conditions or to refuse to give
27 consent, for the purposes of subsection (1), if making the decision
28 would be inconsistent with either or both of the following
29 purposes:

- 30 (a) the fulfilment of Australia's obligations under the
31 Biodiversity Convention;
32 (b) the protection or promotion of Aboriginal cultural heritage.

33 (4) A consent given by the Commonwealth Minister under
34 subsection (1) is not a legislative instrument.

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Note: If transferred Malabar headland property is transferred to another person (with the prior written consent of the Commonwealth Minister, as required under subsection (1)) after its transfer to New South Wales, this section applies to the other person in the same way as it formerly applied to New South Wales (see section 4).

1 **Part 3—Enforcement**
2

3 **11 Injunctions for contravention of the Act**

4 *Applications for injunctions*

5 (1) If a person has engaged, engages or proposes to engage in conduct
6 consisting of an act or omission that constitutes a contravention of
7 this Act:

8 (a) the Commonwealth Minister; or

9 (b) an interested person (other than an unincorporated
10 organisation); or

11 (c) a person acting on behalf of an unincorporated organisation
12 that is an interested person;

13 may apply to the Federal Court of Australia for an injunction.

14 Note: For who is an *interested person*, see subsections (6) and (7).

15 *Prohibitory injunctions*

16 (2) If a person has engaged, is engaging or is proposing to engage in
17 conduct constituting a contravention of this Act, the Court may
18 grant an injunction restraining the person from engaging in the
19 conduct.

20 *Additional orders with prohibitory injunctions*

21 (3) If the Court grants an injunction restraining a person from
22 engaging in conduct and in the Court's opinion it is desirable to do
23 so, the Court may make an order requiring the person to do
24 something (including repair or mitigate damage to the environment
25 or to Aboriginal cultural heritage).

26 *Mandatory injunctions*

27 (4) If a person has refused or failed, is refusing or failing, or is
28 proposing to refuse or fail to do an act, and the refusal or failure
29 did, does or would constitute a contravention of this Act, the Court
30 may grant an injunction requiring the person to do the act.

1 *Interim injunctions*

- 2 (5) Before deciding an application for an injunction under this section,
3 the Court may grant an interim injunction:
4 (a) restraining a person from engaging in conduct; or
5 (b) requiring a person to do an act.

6 *Meaning of interested person—individuals*

- 7 (6) For the purposes of an application for an injunction relating to
8 conduct or proposed conduct purportedly affecting the
9 environment or Aboriginal cultural heritage, an individual is an
10 ***interested person*** if the individual is an Australian citizen or
11 ordinarily resident in Australia or an external Territory, and:
12 (a) the individual's interests have been, are or would be affected
13 by the conduct or proposed conduct; or
14 (b) the individual engaged in a series of activities for protection
15 or conservation of, or research into, the environment, or
16 Aboriginal cultural heritage, as the case may be, at any time
17 in the 2 years immediately before:
18 (i) the conduct; or
19 (ii) in the case of proposed conduct—making the
20 application for the injunction.

21 *Meaning of interested person—organisations*

- 22 (7) For the purposes of an application for an injunction relating to
23 conduct or proposed conduct purportedly affecting the
24 environment or Aboriginal cultural heritage, an organisation
25 (whether incorporated or not) is an ***interested person*** if it is
26 incorporated (or was otherwise established) in Australia or an
27 external Territory and one or more of the following conditions are
28 met:
29 (a) the organisation's interests have been, are or would be
30 affected by the conduct or proposed conduct;
31 (b) if the application relates to conduct—at any time during the 2
32 years immediately before the conduct:
33 (i) the organisation's objects or purposes included the
34 protection or conservation of, or research into, the

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- 1 environment or Aboriginal cultural heritage (as the case
2 may be); and
- 3 (ii) the organisation engaged in a series of activities related
4 to the protection or conservation of, or research into, the
5 environment or Aboriginal cultural heritage (as the case
6 may be);
- 7 (c) if the application relates to proposed conduct—at any time
8 during the 2 years immediately before the making of the
9 application:
- 10 (i) the organisation's objects or purposes included the
11 protection or conservation of, or research into, the
12 environment or Aboriginal cultural heritage (as the case
13 may be); and
- 14 (ii) the organisation engaged in a series of activities related
15 to the protection or conservation of, or research into, the
16 environment or Aboriginal cultural heritage (as the case
17 may be).

18 *Other proceedings*

- 19 (8) In considering an application, or in making an order, in relation to
20 a matter for the purposes of this section, the Court may take into
21 consideration any pending or current proceedings in another court
22 or a tribunal, or any decision or order of another court or a tribunal,
23 in relation to the matter.
24

Part 4—General**12 Review by Administrative Appeals Tribunal**

Applications may be made to the Administrative Appeals Tribunal for review of the following decisions:

- (a) the following decisions of the Commonwealth Minister for the purposes of paragraph 9(1)(b) (which deals with the management of transferred Malabar headland property):
 - (i) to give consent;
 - (ii) to give consent subject to conditions;
 - (iii) to refuse to give consent;
- (b) the following decisions of the Commonwealth Minister for the purposes of subsection 10(1) (which deals with the sale and other disposition of interests in transferred Malabar headland property):
 - (i) to give consent;
 - (ii) to give consent subject to conditions;
 - (iii) to refuse to give consent.

13 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.