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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MALABAR HEADLAND PROTECTION BILL 2012**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Special Minister of State,

The Honourable Gary Gray, AO MP)

## **MALABAR HEADLAND PROTECTION BILL 2012**

### **GENERAL OUTLINE**

The Malabar Headland Protection Bill 2012 (the Bill) sets out provisions for the protection of the Malabar Headland, New South Wales (the Site) following divestment to the State of New South Wales (NSW). The site is defined at paragraph 1 of Background and Attachment A below.

The Site contains significant and endangered flora and fauna as well as Aboriginal heritage values. The NSW Government and the Commonwealth Government have agreed to the management principles for the Site following transfer and these are documented in the deed of transfer for each land parcel. This Bill is complementary to the transfer deed, and utilises the external affairs and the races powers in the Constitution to protect the significant flora, fauna and Aboriginal heritage values of the Site.

This Bill preserves the Site and its environmental, biodiversity and indigenous heritage values for enduring public benefit in the following ways:

- (a) The Bill draws on the Commonwealth's external affairs power to make laws to give effect to Australia's obligations under the Convention on Biological Diversity, to which Australia is a signatory. The Bill relies also on the Commonwealth's constitutional power to make laws for the benefit of indigenous peoples. The Bill is a practical application of these heads of power to protect the Site and set limitations on use.
- (b) The Bill will apply to the Site, which comprises Malabar Headland land to be transferred to NSW in the future and to the parcel of land known as Lot 102 that was transferred to the State of NSW in March 2012.
- (c) The Bill requires written consent of a Commonwealth Minister to a proposed disposition of the Site. The term 'disposition' is described in the Bill to mean sale, transfer, leasing, mortgaging or charging and any other disposition. That consent can be withheld on the grounds of environmental protection or the protection or promotion of Aboriginal cultural heritage.
- (d) The Bill provides to the Commonwealth, and other interested parties, a right to apply to the Federal Court for injunctive relief, including orders to restrain activities by the NSW Government (and any later transferees with consent) that are contrary to the terms of the Bill. The Bill also provides a right of administrative review in the Administrative Appeals Tribunal.

### **FINANCIAL IMPACT STATEMENT**

There will be costs to the Department of Finance and Deregulation if the Bill (once enacted) is used to address issues with the use, management or dispositions of the Site (for example, by taking action in the Federal Court) and requests for management consent and consent for any proposed dispositions of interests in the land.

## **Statement of Compatibility with Human Rights**

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Malabar Headland Protection Bill 2012**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

Based on the Commonwealth legislative head of power with respect to external affairs in section 51(xxix) of the Constitution (in connection with the implementation of the Convention on Biological Diversity) and the races power under section 51 (xxvi) of the Constitution, this Bill will recognise the powers of the Minister Administering the Commonwealth Property Portfolio to control the activities that can be undertaken on the Site, including by prohibiting the development of the Site, to the extent that such control is appropriate and adapted to the protection of:

- significant flora, fauna and ecosystems on the Site having regards to the terms of the international Convention on Biological Diversity; and
- Aboriginal artefacts or sites of cultural value to Aboriginal peoples.

The Bill will require that the written consent of the Minister Administering the Commonwealth Property Portfolio be obtained for any disposition of the Site by NSW. This provides an effective power of ministerial veto over development or sale of the Site, exercisable on grounds related to the protection of the environmental features with which the Convention on Biological Diversity is concerned and protection of Aboriginal artefacts and sites of cultural value.

The Bill is designed to complement the obligations contained in the Deeds of Transfer. Upon transfer of the Lots comprising the Site to the State of NSW, the terms of the Bill will operate to ensure that restrictions are placed on use and development on the Site for the appropriate and adapted application of the Convention on Biological Diversity and to protect and preserve Aboriginal artefacts and sites of indigenous cultural value.

#### **Human rights implications**

This Bill does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Bill is compatible with human rights as it does not raise any human rights issues.

**The Hon Gary Gray AO MP, Special Minister of State**

## **BACKGROUND**

1. The land on the Malabar Headland (the Site) that is the subject of the Bill is the land identified on the aerial photograph at Attachment A as:
  - Lot 101, DP1162445 (known as the central section);
  - Lot 102, DP1162445 (known as the western section); and
  - Lot 2, DP1162445 (known as the eastern section).
2. The Site is 177 Hectares in area and has been used for various purposes since European settlement, from farming and recreational shooting to military use as a training facility, and a base and defensive position during World War II.
3. The western section of the Site was transferred from Commonwealth ownership to the State of NSW on 2 March 2012. That Lot contains largely coastal heathland, Eastern Suburbs Banksia Scrub and eucalypt woodland. Prior to remediation and transfer, the site contained some surface waste including imported fill and, construction waste.
4. The central area of the Site was previously used for sand mining and waste disposal and currently contains the ANZAC Rifle Range, previously known as the Long Bay Rifle Range. The site has been used for recreational shooting since the 1850s. It has also been used for other recreational purposes including horse riding, bush walking, jogging, bird watching, fishing, model plane flying and bush regeneration.
5. The eastern section of the Site contains the remnants of defensive positions constructed in response to the threat of sea-borne attack during World War II. Presently the eastern section contains large areas of coastal heathland, Eastern Suburbs Banksia Scrub and eucalypt woodland. The eastern section is scheduled for remediation and transfer from Commonwealth ownership to the State of NSW.

## **Natural Environment**

6. The Site has significant natural, historical, archaeological and built heritage values. It contains the endangered ecological community Eastern Suburbs Banksia and heritage-listed World War II fortifications.
7. The western section contains remnants of dunes believed to have been formed as a result of the last major glacial period. These are adjacent to sandstone outcrops and provide an opportunity for geomorphological study.
8. The Site demonstrates much of the range of landscapes that originally occurred in the Eastern Suburbs, including coastal rock platforms, sea cliffs and headlands in the coastal section, and sandstone escarpments and Aeolian sand dunes in the western section.
9. The Site holds several heritage listings. It is listed on:
  - the Commonwealth Heritage List for its natural and cultural heritage values;
  - the New South Wales State Heritage Register for its historic and landscape values; and
  - as a Heritage Conservation Area under the Randwick Local Environmental Plan.

## **Flora**

10. The Department of Sustainability, Environment, Water, Population and Communities holds the Australian Heritage Database that provides the Statement of Significance for the Malabar Headland. In terms of flora, the site contains two significant bushland remnants - referred to as the coastal section and the western section. Together, these contain a large area of essentially unmodified bushland in Sydney's Eastern Suburbs. The bushland is a significant part of one of two semi-natural corridors between Botany Bay and Port Jackson. The two sections support at least seven distinct plant communities. This diversity of habitats is only matched in the Eastern Suburbs in Botany Bay National Park.
11. The vegetation communities of Malabar Headland are of scientific and educational significance because they contain rare examples of coastal communities growing on Pleistocene sand deposits within the Sydney region. These communities have different species composition to those found elsewhere in the Sydney region.
12. Both the coastal and western sections of the Site support a high diversity of plant species, with species composition reflecting changes in aspect.
13. At least three hundred plant species occur within the Site and only fifty per cent of the Site's flora is common to both sections. The Eastern Suburbs Banksia Scrub is a nationally endangered ecological community occurring as heath and scrub in the coastal section and as a low woodland in the more protected western section. Eastern Suburbs Banksia Scrub is regarded as of extremely high conservation significance, due to the extent of previous clearing. The community was once common on Quaternary sands in the Eastern Suburbs of Sydney; now less than three per cent of the original community remains and is restricted to Malabar Headland and La Perouse.
14. The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) lists threatened ecological communities, which applies to parts of the Malabar Headland. Some of the eastern and western bushland sections of the Site have been identified as critical habitat for Eastern Suburbs Banksia Scrub in the report 'Recommendation for the Identification of Critical Habitat for the Eastern Suburbs Banksia Scrub Endangered Ecological Community, (Department of Environment and Climate Change 2006).
15. The site contains the last known population of the once extensive Port Jackson mallee (*Eucalyptus Obstans*, formerly *Obtusiflora*) in the Eastern Suburbs of Sydney.

## **Fauna**

16. The Commonwealth Government commissioned reports into the flora and fauna on the Malabar Headland to ascertain the nature of the organisms and ecosystems on the site. A number of threatened species in the locality were identified, including:
  - *Haematopus fuliginosus* - sooty oystercatcher;
  - *Lathamus discolor* - swift parrot;
  - *Neophema chrysogaster* - orange-bellied parrot;
  - *Pandion haliaetus* - osprey;
  - *Pezoporus wallicus* - ground parrot;

- Ptilinopus regina - rose-crowned fruit-dove;
- Miniopterus schreibersii - Eastern bent-wing bat; and
- Pteropus poliocephalus - grey-headed flying-fox.

17. The flora existing on the Site includes coastal heathland, which has been identified as a priority fauna habitat in the report ‘Rapid Fauna Assessment of the Sydney Metropolitan Catchment Management Authority Area (CMA)’ (Department of Environment and Climate Change 2008). Coastal heath supports a distinctive fauna, including several species that have become extinct within the CMA such as the eastern bristlebird and ground parrot. Potential habitat for this threatened species still exists within the coastal heathland fauna habitat type on the Malabar Headland, particularly in the southern section of eastern bushland near Boora Point.

### **Aboriginal Heritage**

18. Rock engravings have been discovered both on and in the vicinity of the Site. The La Perouse Aboriginal Land Council considers the Malabar Headland to be a culturally significant site. The Council has stated its interest in any changes and developments proposed for the site.
19. The Commonwealth can legislate to protect the environment with respect to Aboriginal people under s 51(xxvi) of the Constitution. This power supports legislation for the protection of Aboriginal heritage.

### **European Heritage**

20. The eastern section of the Site includes a World War II coastal defence site of historic significance, the Boora Point Battery. This is an imposing, purpose-built coastal landmark, which is important for providing tangible evidence of Australia's coastal defence efforts in the Sydney area during World War II.
21. The examples of the remaining structures that were constructed during World War II include fuel store foundations, substation remains, southern searchlight engine room, southern searchlight tower, observation tower, two gun emplacements and European Carvings. The remediation program will address the trip and fall hazards that these structures pose to the public and will render these structures safe prior to transferring Lot 2 to the State of NSW.

### **Convention on Biological Diversity**

22. The provisions of this Bill are, in part, derived from Australia being a signatory to the Convention on Biological Diversity. The Convention was created in response to species extinction caused by human activities. Australia became a party to the Convention on 18 June 1993. The Convention entered into force on 29 December 1993.
23. The provisions of the Convention on Biological Diversity apply in relation to each contracting party. The application is for components of biological diversity in areas within the limits of the contracting party's national jurisdiction. For Australia, this is embodied in the EPBC Act, which provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places; defined in the EPBC Act as matters of national environmental significance.

24. Once the site is transferred to the State of NSW, the NSW National Parks and Wildlife Service will protect these assets. The EPBC Act will continue to apply to protect the site, including the Eastern Suburbs Banksia Scrub, in conjunction with NSW legislation. To support and augment these controls, the Bill, together with conditions imposed on the transfer of each section of the site by agreement between the Commonwealth and NSW, will make the site more accessible to the public, but in a manner that is consistent with the protection of its environmental and Aboriginal heritage values.

### **Policy Objectives**

25. The location of the Site close to the centre of a major city highlights both the special values of the Site and the vulnerability of those values to the adverse impacts of inappropriate actions. The Site is a special resource for the local community, the people of Sydney and the Australian public at large. It provides an increasingly rare opportunity within a major city to appreciate habitats for flora and fauna and other environment and heritage values that have survived surrounding urban development and increasing levels of human encroachment. The Government announced its policy intentions for the Site in election commitments made in 2007 and 2010; that is to transfer ownership of the Malabar Headland to the State of NSW for use as national park and public open space. In order to meet its various responsibilities in relation to transfer of the site, the Commonwealth is taking appropriate actions and establishing appropriate mechanisms that seek to preserve and protect the special values of the site for future generations. The Act and consequential regulations will provide a robust mechanism for the protection and conservation of the environmental and Aboriginal cultural heritage values of the site with a view to ensuring that they continue to exist for public benefit and are unharmed by the potentially adverse effects of inappropriate actions affecting the site.
26. The Site's significant environmental and Aboriginal cultural heritage values are now contained in its eastern and western sections. The central section of the Site has lost its original values due to the uses of and actions on that section that have occurred since European settlement. While the central section now lacks comparable values, it should not be considered in isolation from the eastern and western sections. It is considered important to regulate the use and management of the central section as part of the overall strategy of imposing environmental and heritage controls on the Site as a whole. It is intended that in due course, after remediation, the central section will be transferred to the NSW Government subject to the controls under the Bill (for example, the prescription of appropriate uses for the site under clause 8 of the Bill). These controls would only apply to the extent that they would be reasonably considered as appropriate and adapted to protecting or promoting those environmental and cultural heritage values of the Site.

## NOTES ON CLAUSES

### **PART 1 – Preliminary**

This part of the Bill sets out the title, commencement, definitions, application, constitutional operation, compensation for acquisition and relationship with transfer deeds pertaining to the Malabar Headland Site.

#### **Clause 1 Short title**

The title of the Bill is the Malabar Headland Protection Bill 2012.

#### **Clause 2 Commencement**

This section provides that the Act will take effect on the day after Royal Assent.

#### **Clause 3 Definitions**

This section defines terms used throughout the Bill. The definition of Commonwealth Minister as meaning the Minister administering the Act is phrased to avoid assigning it to a specific portfolio. This will allow the ongoing application of the Act irrespective of machinery of government issues that may impact on portfolio responsibilities.

Malabar Headland property describes all the land covered by the Bill. This is the land identified in the aerial photograph at Attachment A as:

- Lot 101, DP1162445; (the central section)
- Lot 102, DP1162445; (the western section) and
- Lot 2, DP1162445 (the eastern section).

Transferred Malabar Headland property describes the sections of Malabar Headland property that have been transferred by the Commonwealth to the State of NSW and which are covered by the Bill. This term is a shorthand reference to such property. It currently encompasses only the western section of the property, which was transferred on 2 March 2012, but will cover other sections of Malabar Headland property once transferred to the State of NSW.

#### **Clause 4 Application of Act – later transfers of Malabar Headland property**

This clause is intended to ensure that if any transferred Malabar Headland property is transferred by the State of NSW to a third party with the consent of the Commonwealth (for example, as a managing agent), the Act will apply to the third party as well as to any later transferees in the way in which it initially applied to State of NSW.

If the third party were to transfer the Malabar Headland to a fourth party, this Act would also apply to the fourth party as if the fourth party were the State of NSW. The Act would apply to the current owner of the Malabar Headland as if the owner were the State of NSW.

The Act (apart from subsections ^8(2) and ^9(3)) will cease to apply to the State of NSW, or a subsequent transferee, and will apply in relation to a current transferee (owner), irrespective of whether a transfer to a transferee occurs before or after this Bill has commenced.

The Act will not have effect if the land vests in the Commonwealth after transfer to the State of NSW.

## **Clause 5 Constitutional operation of this Act**

This section describes the two heads of power that are the basis for this Bill. These two heads of power are:

1. the external affairs power in s 51(xxix) of the Constitution, which provides the basis for introducing domestic legislation that implements international environmental protection objectives; and
2. the legislative power with respect to Aboriginal people under s 51(xxvi) of the Constitution, which supports legislation for the protection of Aboriginal heritage, including Aboriginal artefacts and sites of cultural value.

Australia is a signatory to the Convention on Biological Diversity. The Convention text covers many aspects of environmental protection. One of the sections that is most relevant to activities and processes permitted on in-situ conservation, such as to be conducted on the Malabar Headland site can be found in article 8, paragraphs (a)-(f) and (i)-(k). Australia's obligations under the Convention relevantly provide that Australia shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas;
- (f) Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies;

...

(i) Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components;

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of Aboriginal and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; and

(k) Develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations.

### **Clause 6 Compensation for acquisition of property**

This clause is intended to ensure, for the purposes of paragraph 51(xxxi) of the Constitution, that if the operation of the Act results in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay reasonable compensation to the person.

The Federal Court of Australia will have jurisdiction.

### **Clause 7 Malabar transfer instruments — exercise of power**

This clause provides that the Act and any Malabar transfer instruments (such as deeds of transfer between the Commonwealth and the NSW Government) operate independently, and neither affects the other. Court order proceedings that are applied for under the Act and a Malabar transfer document are a matter for the Court to assign priority.

## **Part 2 – Protection of Malabar Headland Property**

This part of the Bill sets out provisions for the protection, management, sale and other dispositions with the Malabar Headland property.

### **Clause 8 Use of property for purposes of National Park etc.**

This clause lists two of the methods by which the Malabar Headland will be protected. The first of these is the provision for the use of the property for purposes for which a National Park may be used. It is intended that the environmental values of the site will be protected for the purposes of the Convention on Biological Diversity. This will be achieved by reference to conservation purposes described in the *National Parks and Wildlife Act 1974* (NSW).

A second method by which the Malabar Headland will be protected is the requirement that any use is consistent with the objectives and management principles of the Act. It is intended that regulations will be made under section 12 regarding the protection of the Malabar Headland.

Regulations made for the purpose of reserving the site for purposes of a National Park will be drafted following consultation between the Commonwealth Minister and the Minister of State for New South Wales who administers the *National Parks and Wildlife Act 1974* (NSW). Another Minister nominated by the Premier of New South Wales may also perform this role.

The Commonwealth intends to transfer the central section of the Site to the State of NSW. Due to the nature of the site it is envisaged that it will not be suitable for use as a National Park. Regulations will be able to be made under clause 8 prescribing other suitable purposes, consistent with the application of the Act under clause 5. This clause allows for parcels of land to be prescribed by the regulations for use as public open space or National Park in order to create buffer zones for adjoining lots that will assist in protecting their environmental, biodiversity and indigenous heritage values.

The site is yet to be divided into lots for the purposes of successive divestment; however, it may be that not all lots share the same inherent environmental value as the adjoining lots. In order to achieve the protection of the environmental and Aboriginal cultural values of the site, the regulations may restrict the uses on this parcel of land to be consistent with the Convention on Biological Diversity.

#### **Clause 9 Transferred Malabar Headland property–management**

This clause requires that transferred Malabar Headland property be managed in accordance with:

- regulations; or
- the prior written consent of the Commonwealth Minister.

Prior to making regulations, the Commonwealth Minister must consult a Minister nominated by the Premier of New South Wales for the purpose of consultation.

The regulations may apply, adopt or incorporate a document in force at a particular time. This is intended to allow the regulations to apply a plan of management agreed between the Commonwealth and the NSW Government for the purposes of a deed of transfer of the property.

To allow for free public access to such a document, the clause requires that it be posted on the Department's website.

The Commonwealth Minister can only make a decision to consent (or refuse to consent) within the Constitutional parameters set by clause 5 (reproduced in clause 11). A person affected by such a decision may apply for review of the decision by the Administrative Appeals Tribunal (see clause 12).

A consent given by the Commonwealth Minister is not a legislative instrument because it does not come within the meaning of that term under section 5 of the *Legislative Instruments Act 2003*.

#### **Clause 10 Transferred Malabar Headland property – sale and other disposition**

This clause provides for the requirement for consent from the Commonwealth Minister for

dispositions with transferred Malabar Headland. The Commonwealth Minister may give conditional consent to dispositions.

This clause also provides that immediately following a disposition of an interest to which the Commonwealth Minister has not consented, the interest again vests in the transferor.

The Commonwealth Minister can only make a decision to consent (or refuse to consent) to a disposition of transferred Malabar Headland property within the Constitutional parameters set by clause 5 (reproduced in clause 11). A person affected by such a decision may apply for review of the decision by the Administrative Appeals Tribunal (see clause 12).

A consent given by the Commonwealth Minister is not a legislative instrument. The consent is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

### **Part 3 Enforcement**

#### **Clause 11 - Injunctions for contravention of the Act [EPBC Act, 475]**

This section provides for the enforcement of the protection measures in the Bill. The main type of enforcement is by way of injunction. This section states the categories of parties who may apply for an injunction and the type of injunction available to them.

In terms of enforcement, where there are other proceedings that may be related to a matter before the court, the court may take this into consideration. This would confirm that the Federal Court has the power, for example, to stay proceedings under clause 11 if necessary to allow for the prior resolution of any related proceedings in, for example, the NSW Supreme Court or the Administrative Appeals Tribunal.

### **Part 4 – General**

#### **Clause 12 Review by Administrative Appeals Tribunal**

This clause allows for interested persons affected by a decision of the Commonwealth Minister to consent, or to refuse to consent, to an act of management (under clause 8) or to a disposition of land (under clause 9) to apply to the Administrative Appeals Tribunal for a review of the decision.

#### **Clause 13 - Regulations**

This clause will allow the Governor-General to make regulations for the purposes of the Act. The Act will provide for regulations to be made for the purposes of clause 7 (use) and clause 8 (management).

ATTACHMENT A - THE MALABAR HEADLAND



**NOTE:**

The red outline denotes the boundary of the transferred Malabar Headland property (Lot 102). The black outline denotes the remaining area of the site that is yet to be transferred. Boundaries are subject to change due to remediation requirements.