



COMMONWEALTH ENVIRONMENTAL IMPACT ASSESSMENT

*The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('the Act') sets out the way in which the Commonwealth Government is involved in the environmental impact assessment of certain projects in Western Australia. This Factsheet describes in general terms when and how the EPBC Act applies to projects. Note that projects will probably require approval under the Western Australian environmental impact assessment process, as well as approval under the EPBC Act – see **Factsheet #5, Environmental Impact Assessment in Western Australia** – <http://www.edowa.org.au/factsheets.html>*

What projects does the EPBC Act apply to?

The Act applies to:

- “actions” which have a “significant impact” on “matters of national environmental significance”
- “actions” undertaken by Commonwealth Government agencies which have a significant impact on the environment anywhere in the world
- “actions” undertaken by any person which have a significant impact on Commonwealth land (even if the activity is not actually carried out on the Commonwealth land).

If a project is an action as described above, it will be an offence to carry out that action without an environmental impact assessment and the approval of the Commonwealth Minister for the Environment. If the project is not an action described above, the environmental impact assessment provisions of the Act will not apply and there is no need to obtain the approval of the Minister.

What is an action?

An action includes a project, development, undertaking, activity, or an alteration of any of those things. It does not, however, include the provision of government funding or the grant of government approval. Therefore, unless the government is actually involved in a project (for example, by building a road or providing some infrastructure) government activities will not be “actions”.

What is a significant impact on the environment?

Impact has been defined in the Act to include direct and indirect impacts. There is no definition of what constitutes a “significant impact on the environment” in the Act. However, the Department of Environment and Water Resources has developed guidelines on whether a proposed action is likely to have a significant impact on any of the particular matters of national environmental significance. The guidelines can be found at www.environment.gov.au/epbc/index.html

What is a “matter of national environmental significance”?

The following are currently defined as “matters of national environmental significance”:

- World Heritage properties (Shark Bay and Purnululu National Park are currently the only World Heritage properties in WA)
- Ramsar wetlands (there are currently 12 Ramsar wetlands in WA, including Lake Argyle, Thomsons Lake and Lake Toolibin)
- threatened species listed under the Act (such as the quokka or loggerhead turtle) and threatened ecological communities (including aquatic root mats in the caves of the Leeuwin Naturaliste Ridge and Swan Coastal Plain)
- listed migratory species (including certain birds, reptiles and fish and insects)
- activities relating to nuclear energy, including uranium mining

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This Factsheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of law. If you require legal advice relating to your specific circumstances you should contact the EDO or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any errors in this Factsheet.

- the Commonwealth marine environment (any part of the sea, including the waters, seabed, and airspace between coastal waters (generally three nautical miles) and the boundary of Australia's exclusive economic zone (generally 200 nautical miles). This also includes waters around Christmas Island, Cocos Island and Heard and McDonald Islands)
- National Heritage Places (including the Stirling Ranges).

Any person may nominate a threatened species or ecological community for listing on the threatened species list. The Minister may choose themes for nominations each year. Subject to a few exceptions, the Minister must pass on the nomination to the scientific committee for assessment whether or not the nomination is in keeping with the theme set by the Minister. You may like to seek legal advice if your nomination has been rejected. See **Factsheet #9, Biodiversity under Commonwealth Law** for more information – www.edowa.org.au/factsheets.html

The same principles apply to National Heritage listing. The Minister may choose themes and any person may make a nomination. The Minister must pass on the nomination (subject to a few exceptions) to the National Heritage Council for consideration.

The EPBC Act website contains an up-to-date list of the above matters of national environmental significance.

Actions affecting Commonwealth land

Commonwealth land includes all land (and airspace above land) which is owned or leased by the Commonwealth or a Commonwealth agency. It also includes Australia's external territories. Actions on Commonwealth land which will have a significant impact on the environment, and actions outside Commonwealth land which will have a significant impact on Commonwealth land, require approval. A significant impact on the environment is considered by reference to all environmental impacts, not just the seven matters of national environmental significance.

Actions by Commonwealth agencies

Actions carried out by Commonwealth agencies, such as the Department of Defence, which will have a significant impact on the environment anywhere in the world, need approval under the EPBC Act. As with actions affecting Commonwealth land, the relevant environmental impacts are not limited to the seven matters of national environmental significance.

Actions exempt from the EPBC Act

Some actions or types of actions are exempt from parts or all of the EPBC Act even though they may have a significant impact on a matter of national environmental significance or be carried out by a Commonwealth agency or on Commonwealth land. For example, forestry operations which are undertaken in accordance with a Regional Forest Agreement are exempt, except if those forestry operations are incidental to another action whose primary purpose is unrelated to forestry.

Actions which are a lawful continuation of a development or project which was occurring, or fully authorised, immediately before 16 July 2000 are also exempt from the EPBC Act. However, any expansion, enlargement or intensification of such a project will need to be assessed and approved under the Act.

There are a further five categories where the EPBC Act may not apply or have limited operation:

(1) Bioregional Plans

If there is a relevant bioregional plan the Minister may make a declaration that an action does not require approval under the EPBC Act. The declaration must be made by reference (wholly or partly) to the fact that the proposed action is in accordance with the bioregional plan. In making the declaration, the Minister must take into account certain factors. A person may then take that action without approval under the Act.

(2) Conservation Agreements

The Minister may enter into Conservation Agreements with landholders. A conservation agreement may include a declaration that actions of a certain type do not need approval under the EPBC Act. The Minister can not include the declaration unless the Minister is satisfied that the action allowed by the declaration won't have a significant impact on the subject matter protected by the Act. A person may then take that action without further approval.

(3) Strategic Assessments

A strategic assessment may be undertaken for large projects which are completed over a longer period of time. The Minister may agree to undertake a strategic assessment. The agreement is with the person responsible for implementation of a policy, plan or program. The Minister endorses the policy, plan or program (note that the mechanism for endorsement is embedded in the agreement, not the legislation). The Minister may then approve of an action in accordance with the policy, plan or program. In granting the approval, the Minister must take into account certain factors, such as certain international conventions (for example the Ramsar Convention if the action involves a Ramsar wetland), and economic and social matters.

(4) Bilateral Agreements

Where there is a high level state assessment and a bilateral agreement exists between that state and the Commonwealth (as is the case with Western Australia) a joint assessment will be conducted with the state to avoid duplication. See below for more detail.

(5) Accredited Management Arrangements / Accredited Authorisation Processes

If an action or type of action is in accordance with an Accredited Management Arrangement or Process the Minister may declare that the action (or type of action) does not need approval under the EPBC Act. In making a declaration the Minister must take into account certain factors – for example, a fishing company seeking approval from the Department of Agriculture, Fisheries and Forestry (DAFF) for crayfishing in Commonwealth waters. If DAFF's authorisation processes are accredited, the Minister may declare that there is no need for a separate approval of the crayfishing under the Act.

What is the process for assessment?

Referral to Commonwealth Minister

The assessment and approvals process is triggered by the referral of an action to the Commonwealth Environment Minister. A referral can be made by the person proposing the activity or any Commonwealth or State government agency, including a local council, which has responsibilities relating to the action. The Commonwealth Environment Minister may also “call in” a referral from any person proposing the activity.

The general public does not have a right to refer proposals. However, if you believe a development should be assessed, you may ask the Commonwealth Minister to call the action in. Alternatively, you could ask a State or Commonwealth agency to make a referral.

Commonwealth Minister decides whether approval is required

Once a referral is made the Minister must publish the referral on the internet for public comment as soon as practicable. The public then has 10 business days to comment. The Minister then must decide whether the proposal is a controlled action and therefore needs approval under the EPBC Act. The Minister has 20 business days from the date of the referral to decide whether the action requires approval or not. In limited circumstances you can request the Minister to reconsider the decision.

If the Minister decides that the action does not require approval, the action may go ahead. Note, however, that the action may require approval under other laws, including State environmental impact assessment laws.

Process for assessment of environmental impacts

If the Bilateral Agreement applies

A Bilateral Agreement signed by the WA and Commonwealth governments in 2002 means that the normal assessment processes under the EPBC Act will not apply to an action in WA which is assessed at the level of Public Environmental Review (PER) or Environmental Review and Management Programme (ERMP). The agreement does not cover actions in a Commonwealth area, or actions taken by the Commonwealth or Commonwealth agencies.

It will be sufficient compliance with the EPBC Act if the steps below are followed for any development proposal in WA:

1. the Commonwealth Environment Minister notifies the WA Environment Minister that the proposed action is a controlled action

2. the WA Environmental Protection Authority (EPA) sets a level of assessment for a development proposal at either PER or ERMP
3. the EPA prepares guidelines for the assessment of that development proposal
4. the EPA publishes the draft guidelines in 2) above and seeks comment on them if the EPA believes the issues involved are complex, there will be high level of public interest in the issues, or the Commonwealth Environment Minister requests that the EPA do so
5. the proponent prepares the PER or ERMP
6. there is a public review period of the PER or ERMP for at least 28 days
7. the proponent prepares a revised or supplementary PER or ERMP to take any public submissions into account
8. the EPA prepares an assessment report.

Even though the WA assessment processes outlined above takes the place of the Commonwealth process, the approval of the Commonwealth Minister will still be required before any development proposal can go ahead. The Commonwealth Minister must decide whether to approve the action within 40 business days of receiving the EPA's assessment report.

If the Bilateral Agreement doesn't apply

Western Australia is under an obligation to ensure that a proposed action is assessed to the greatest extent practicable. Therefore, it is unlikely that the State would set a level of assessment lower than the Commonwealth. Further, the Western Australian assessment process is accredited, and the Commonwealth Minister has the discretion to rely on the Western Australian assessment process. Therefore, where a higher level of assessment is required at State level than at the Federal level it is likely that the Commonwealth will rely on the State assessment.

However, it is technically possible that two assessments must be carried out for the purposes of State and Commonwealth legislation. You may like to seek legal advice if one action triggers two different assessments and/or two different conclusions. This is unlikely to occur, as the purpose of bilateral agreements and assessment accreditation is to prevent this from arising.

The Federal EIA system follows the procedure set out below:

- The person proposing to take the action, or a Commonwealth agency, can refer the proposed action to the Minister, or the Minister can "call in" the proposed action
- The Minister then decides whether the proposed action is a controlled action and needs approval
- If so, the Minister must decide on an approach to assess the impacts of the proposal.
- There are six approaches:
 1. **Assessment by an accredited assessment process** –
The Minister may accredit a State or Territory assessment process
 2. **Assessment on referral information** –
Before deciding on this approach, the Minister must take into account any matter prescribed by the regulations. Generally, the matter must be a minor matter and the referral information must have sufficient information to make a decision. The Minister can't take into account economic or financial matters
 3. **Assessment on preliminary documentation** –
Before choosing this method, the Minister must first decide that this approach will be sufficient to make an informed decision
 4. **Public environment reports** (PERs, similar to WA's Public Environmental Review mechanism) –
 - There can be standard or tailored guidelines for the preparation of the report
 - The proponent then prepares the draft PER and there is a minimum of 20 days for public comment.
 5. **Environmental Impact Statement** (EIS, similar to WA's ERMP) –
 - There can be standard or tailored guidelines for the preparation of the report
 - The proponent then prepares the EIS and there is again a minimum of 20 days for public comment.
 6. **Assessment by public inquiry**
Public inquiries are intended to be the most rigorous of the impact assessment options. The inquiry is conducted as a kind of trial. It is generally to be held in public, but all or part of it may be held in private if it is deemed to be in the public interest to do so.
 - The Minister appoints one or more Commissioners
 - The Minister specifies terms of reference for the inquiry

- Commissioner(s) can summons witnesses and apply for warrants
- At the conclusion of the inquiry, the Commissioner(s) must report to the Minister and the report must be published
- If aspects of the hearing were in private, those parts of the report which relate to the private aspects of the hearing must not be published.
- Guidelines may be published by Gazette setting out the criteria for deciding which approach to use – at the time of writing this had not been done
- Once the assessment process is complete, the Minister then decides whether to allow the proposed action in full or in part, and what conditions (if any) to place on the approval
- The EPBC Act website contains a useful flowchart on the assessment selection process – www.environment.gov.au/epbc/assessmentsapprovals/pubs/flow-chart.pdf

Commonwealth Minister decides whether to grant approval

In making a decision, the Minister must take into account:

- anything relating to the particular issue that triggered the assessment, *eg* the World Heritage values of a World Heritage sites
- economic and social matters
- the principles of ecologically sustainable development
- the EPA's assessment report relating to the action
- the public environmental impact assessments or reports prepared by the proponent
- any other information the Minister has on the relevant impacts of the action
- any relevant comments given to the Minister by another Minister
- the precautionary principle
- the proponent's environmental history.

The Minister may approve the taking of the action and may require that an action be carried out only on specified conditions. These can include conditions requiring that a bond be provided by the proponent as security, or that the development be subject to independent environmental auditing. The approval and all relevant conditions will generally be publicly available. Some or all of the documents may be exempt where the document is exempt under the *Freedom of Information Act 1982* (Cth) or the Minister believes it is in the national interest not to provide the document or parts of the document.

What can I do if I disagree with the Minister's decision under the EPBC Act?

Appeals

There is no general right of appeal against the Minister's decision to approve the taking of an action, or to appeal any conditions of the approval. However, if the Minister has made an error of law in making the decision, it may be possible to have that decision reviewed in the Federal Court. Note that Federal Court appeals can be difficult and expensive.

The Act relaxes the rules of "standing" (which say who can go to court) so that, for example, conservation organisations with a history of environmental activity within the previous two years can bring proceedings. If you believe the Minister has made the wrong decision you may wish to contact the EDO for legal advice.

A decision of a delegate of the Minister to allow or refuse a permit for

- the international movement of a wildlife specimen
- actions relating to listed threatened species or ecological communities
- actions relating to migratory species
- actions relating to cetaceans
- actions relating to listed marine species

may be appealed to the Administrative Appeals Tribunal. Only permit decisions by a delegate may go to the AAT. Permit decisions of the Minister can only be appealed to the Federal Court, and only then if there is an error of law (as distinct from a decision said to be "wrong").

Reasons for decision

You should request reasons for any decision with which you are unhappy. If you have standing to have the decision reviewed in the Federal Court the Minister must give reasons.

There are also specific provisions in the EPBC Act which require the Minister to give reasons, for example:

- Reasons must be given to a proponent if the Minister decides the proposed action is clearly unacceptable
- Reasons must be given to a proponent upon request where the Minister decides the proposed action is a controlled action
- ***If the Minister finds that an action does not require approval, then a person or conservation group may request that the decision be reconsidered. If the request for reconsideration is unsuccessful then the person or community group may (and ought to) request reasons***
- The Minister must give reasons if he or she does not grant protected status to a nominated species or ecological community put to the Minister by the Scientific Committee
- In the case of listing a marine species or deleting a marine species from the list the Minister must table reasons in Parliament
- The Minister must give reasons to the person who nominated a place to be included in the Commonwealth Heritage List if the Minister decides not to include the place
- Note that a member of the Scientific Committee must not disclose matters relating to the nomination or their reasons for including or not including a nomination in the list until a decision is made by the Minister.

What happens if approval is not obtained for a proposal or a condition of approval is breached?

It is an offence to carry out an action which requires approval, without first obtaining that approval. The maximum penalty is \$1.1million and/or seven years' gaol for an individual, or \$5.5 million for a corporation. It is also an offence to breach the conditions of an approval.

The Minister can take legal action to prevent an action from continuing, and prosecute or take civil action against the developer for any illegal activity that has taken place. The Minister can also suspend or revoke an approval where a breach of an approval or condition has occurred, or where the impacts identified were inaccurate because of negligent or deliberate omission.

The Minister can also seek an order that the developer repair the damage, for example, by replanting trees. The orders to repair the damage can be detailed, extensive and very expensive.

It is possible for some individuals or conservation groups to take their own legal action, such as an action for an injunction to stop illegal works from proceeding and an action for an order to repair the damage. Whether an injunction will be granted depends upon factors such as:

- the extent of the breach
- the public interest
- local community interests
- interests of national and international importance
- the economic effects of the injunction on the person alleged to have breached the Act.

Consult the EDO for legal advice immediately if you believe illegal works may be taking place.

Note that the Federal Court may require an undertaking or surety for damages from the individual or conservation group before granting the injunction.

Does the EPBC Act override State and Territory law?

The EPBC Act puts in place approval requirements that are additional to existing approvals under State and Territory laws. A proposed activity still needs to be approved under all applicable State or Territory laws and other Commonwealth laws, even if approved under the Act.

Summary: key opportunities for public involvement

The Act allows any person to:

- nominate a species to be included on the list of threatened species or an ecological community to be included on the list of threatened ecological communities
- request that a heritage place be included on the National Heritage list
- request that a property be nominated for World Heritage status
- request that the Commonwealth Environment Minister call in a proposal that they believe is a controlled action
- make submissions to the Commonwealth Environment Minister as to whether a proposal should be assessed and whether it needs approval under the Act
- Request reasons for a decision.

The WA assessment procedures which apply to assessment of proposals also provide opportunities for people to make submissions to the EPA, and opportunities for people to appeal to the State Minister for the Environment from the EPA's decisions. See **Factsheet #5 Environmental Impact Assessment in Western Australia** for more details about these opportunities – www.edowa.org.au/factsheets.html

In addition, a person or organisation can, in some circumstances, take legal action against

Where can I go for more information?

- Department of Environment and Water Resources, Community Information Unit, GPO Box 787, Canberra ACT 260. Phone 1800 803 77, email ciu@deh.gov.au
- EPBC website – www.environment.gov.au/epbc
- Convention on Migratory Species website – www.wcmc.org.uk/cms
- World Heritage Convention website – <http://whc.unesco.org>
- Ramsar Convention website – www.ramsar.org