



Factsheet

9. Biodiversity conservation under Commonwealth law

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act') contains a number of important mechanisms for protecting biodiversity which are relevant to Western Australia. This fact sheet explains what these mechanisms are and the extent to which they are relevant in Western Australia.

For Western Australian biodiversity laws, see **Fact Sheet 8: Biodiversity conservation in Western Australia**. For developments likely to have a significant impact on matters of national environmental significance, see **Fact Sheet 6: Commonwealth environmental impact assessment**.



What is "biodiversity"?

Biodiversity (or "biological diversity") is defined in the *Convention of Biological Diversity* as:

"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."

Biodiversity is therefore the diversity of plants, animals and microorganisms, the genes they contain, and the ecosystems of which they form a part. It is not static, but constantly changing; it is increased by genetic change and evolutionary processes and reduced by processes such as habitat degradation, population decline, and extinction.



What powers does the Commonwealth have to protect biodiversity?

Under the federal Constitution, the Commonwealth has the power to pass laws in relation to the following matters:

- Obligations under international treaties and conventions (for example, the Biodiversity Convention);
- Matters referred to it by the States;
- International trade; and
- Matters occurring in relation to Commonwealth land or marine areas.

These powers provide significant scope for the Commonwealth to exercise authority over environmental matters. This fact sheet examines the Commonwealth laws with respect to biodiversity conservation. For information on State biodiversity laws, refer to **Fact Sheet 8: Biodiversity conservation in WA**.



Biodiversity protection in Commonwealth areas

What are "Commonwealth areas"?

Commonwealth areas are defined to mean:

- **Commonwealth land** - land which is owned or leased by the Commonwealth or a Commonwealth agency (for example, SAS Campbell Barracks at Swanbourne);
- **External territories** – being Christmas Island, Cocos (Keeling) Islands, and the Coral Sea Islands; and
- **Commonwealth marine areas** (also known as the Australian Whale Sanctuary) – any part of the sea, including waters and seabed, between three and (generally) two hundred nautical miles from the coast. Commonwealth marine areas also includes waters around Christmas Island, Cocos Island and Heard and McDonald Islands.

Important disclaimer:

This Fact Sheet is for general information purposes. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your specific circumstances you should contact the Environmental Defender's Office WA (Inc) or your solicitor. The EDO takes no responsibility for any loss or damage resulting from any error in this Fact Sheet.

What things are protected within Commonwealth areas?

The EPBC Act provides for protection of listed species and critical habitats within a Commonwealth area. It also protects certain animals occurring on Christmas, Cocos and the Coral Sea Islands. These matters will be considered in turn.

The Act also makes it an offence for a person to take action which may have a significant impact on the environment within a Commonwealth area without obtaining approval to do so (see [Fact Sheet 6: Commonwealth environmental impact assessment](#)).

Listed species in Commonwealth areas

For the purposes of this fact sheet, there are three types of *listed species*:

(i) *Listed threatened species and ecological communities*

“Listed threatened species” means any native animal or plant which is listed as extinct, extinct in the wild, critically endangered, endangered, vulnerable, or conservation dependent.

The EPBC Act also applies to “ecological communities” which are listed as threatened. An ecological community means an assemblage of native species inhabiting a particular area. For details of the current listed species and ecological communities, see the [EPBC web page](#).

Any person can nominate a species or ecological community to be listed under the EPBC Act. See “How can you become involved” below.

It is an offence for a person to kill, injure, take, trade, keep or move any listed threatened species or listed threatened ecological community in a Commonwealth area without a permit or other lawful authority. The maximum penalty is \$110,000 or imprisonment for up to two years, or both. It is also an offence for a person not to inform Environment Australia where the person kills, injures, trades, keeps or moves a member of a listed threatened species (except a conservation dependent species), or a member of a listed threatened ecological community in a Commonwealth area which is not authorised by a permit and which is not otherwise an offence under the Act.

The Commonwealth Environment Minister may also make a conservation order restricting activities in Commonwealth areas if the Minister believes it is necessary to protect a listed threatened species or threatened ecological community. Before making an order, the Minister is usually required to consult with any Commonwealth agencies likely to be affected. Once a conservation order is made the Minister must review it every 5 years, and cannot vary or revoke the order unless satisfied that the protection of the species or ecological community is assured. It is an offence not to comply with the terms of a conservation order the maximum penalty for which is \$55,000.

(ii) *Listed migratory species*

“Listed migratory species” means any species which are defined in certain international treaties. The Minister may also declare species under other relevant international agreements to be listed as “migratory species”. No other species can be included on the list. The current list of migratory species is available from the [EPBC Act web page](#).

It is an offence for a person to kill, injure, take, trade, keep or move any listed migratory species in a Commonwealth area without a permit or other lawful authority. The maximum penalty is \$110,000 or imprisonment for up to two years, or both.

(iii) *Listed marine species*

The Act includes a specific list of marine species, which includes seals, crocodiles and seahorses. This list can be amended by the Minister. Before adding or deleting a species from the list, the Minister must obtain and consider advice from the Threatened Species Scientific Committee (“Scientific Committee”) on the scientific aspects of the addition or deletion of the species concerned. The Scientific Committee is appointed by the Minister to provide advice on threatened species. The Minister must consult with other Commonwealth Ministers with an interest in the marine area before adding a species to the list. The current list of marine species is available from the [EPBC Act web page](#).

It is an offence for a person to kill, injure, take, trade, keep or move any listed marine species in a Commonwealth area without a permit or other lawful authority. The maximum penalty is \$110,000 or imprisonment for up to two years, or both.

Critical habitats within Commonwealth areas

The Commonwealth Minister for the Environment can list habitat which is critical to the survival of a listed threatened species or threatened ecological community. Whether or not habitat is critical to a species or ecological community will depend largely on the particular requirements of that species or community. For example, areas only incidentally used by a threatened species may not be critical to its survival. The public cannot nominate the selection of critical habitat.

If a Commonwealth agency wants to sell or lease land that contains a critical habitat, the agency must ensure that the sale contract includes a covenant to protect the habitat.

It is an offence for a person to significantly damage a critical habitat – penalty up to \$110,000 or imprisonment for up to two years, or both.

Protection of certain animals in Australia's external territories

The EPBC Act protects all mammals, birds, reptiles, amphibians and some species of crabs and shrimps in Christmas Island, Cocos (Keeling) Islands and Coral Sea Islands. These species are known as “protected species”.

It is an offence to kill, injure or take a protected species without a permit. The maximum penalty is \$5,500. This is in addition to penalties for taking listed threatened species or communities (considered above).



Protection of whales, dolphins and porpoises (“cetaceans”) in Commonwealth marine areas

It is an offence to kill, injure, take, trade, keep, move, interfere with, treat (divide or cut up, or extract any product from) or possess any cetacean in Commonwealth marine areas without a permit. It is also an offence for Australian people or Australian corporations to do any of these things without a permit beyond the outer limits of the Commonwealth marine area (in international or foreign waters). See also [Fact Sheet 19: Fishing](#).

The maximum penalty is \$110,000 or imprisonment for up to two years, or both.



Regulation of international trade in native species

The EPBC Act regulates international trade in wildlife and wildlife products. Specifically, the Act makes it an offence for a person:

- to export or import a species identified by the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (“CITES”) without a permit unless an exemption applies;
- to export any native species without a permit or unless an exemption applies; and
- to import any live species without a permit or unless the species is listed by the Minister as suitable for live import.

Many fisheries are currently exempt from the requirement to obtain a permit for export. However, the Commonwealth has indicated that these exemptions will be removed unless the managers of these fisheries (Fisheries Department in Western Australia) can establish by 1 December 2003 that the fishery is managed in an ecologically sustainable manner. For additional information, see [Fact Sheet 19: Fishing](#).



Management plans for the protection of biodiversity

The Commonwealth Environment Minister has authority to develop management plans for the protection of biodiversity. These plans are generally binding on Commonwealth agencies and help to guide the Minister in deciding whether permits should be issued under the EPBC Act.

Threat abatement plans for native species or communities

Threat abatement plans are developed to manage the impacts of a “key threatening process” on native species or ecological communities. Importantly, the plans are not limited to listed species or communities.

A “key threatening process” means an activity or process which threatens the survival, abundance or evolutionary development of a native species or ecological community (for example, fox predation).

Once a key threatening process is listed under the EPBC Act, the Commonwealth Environment Minister must decide within 90 days whether or not to implement a threat abatement plan, although the Minister is not required to make such a plan.

Before preparing a threat abatement plan, the Minister must consult with the Scientific Committee, and any interested Commonwealth, State or Territory agency. If the Minister decides to make a plan, the Minister must again consult with the Scientific Committee and any State involved. The draft plan must be advertised and open for public comment for at least three months.

Once established Commonwealth agencies cannot take any action which contravenes a Plan and the Commonwealth Environment Minister cannot issue any approval for an action which would be inconsistent with a Plan.

Recovery plans for threatened species and ecological communities

The Commonwealth Environment Minister must make a recovery plan to provide for protection, conservation and management of any listed threatened species (other than an extinct or conservation dependent species) or a listed threatened ecological community. The time limit for the Minister making a plan is set out in the Act, and is generally between two and five years from the date the species or community was listed.

Recovery plans set out the research and management actions necessary to stop the decline of, and support the recovery of, listed species and communities. The Minister must publish a copy of the draft plan in the *Commonwealth Government Gazette* and a newspaper circulating in the State where the species or community occurs. The public has three months to comment on the draft plan. Before finalising the plan, the Minister must take into account any public comments as well as the views of the relevant State or Territory and the advice of the Scientific Committee.

Once established Commonwealth agencies cannot take any action which contravenes a Plan and the Commonwealth Environment Minister cannot issue any approval for an action which would be inconsistent with a Plan.

Wildlife conservation plans for listed migratory species, marine species, cetaceans and conservation dependent species

The Commonwealth Environment Minister may (but is not required to) make wildlife conservation plans to identify the research and management actions necessary to support the survival of a conservation dependent species, listed migratory species, listed marine species or cetacean. The Minister must publish a copy of the draft plan in the *Commonwealth Government Gazette* and a newspaper circulating in each State. Before making a plan, the Minister must take into account any public comments as well as the views of the relevant State or Territory and the advice of the Scientific Committee.

Wildlife conservation plans cease to have effect in the event that a recovery plan is prepared for that species.

Commonwealth agencies must take all reasonable steps to comply with a wildlife conservation plan.

Bioregional plans

Bioregional plans set out objectives relating to biodiversity and set priorities and strategies to achieve those objectives within a bioregion. The term “bioregion” is not defined in the EPBC Act, but is likely to refer to the Interim Biogeographical Regionalisation of Australia (IBRA) regions.

Bioregional plans may be made by the Commonwealth Environment Minister for bioregions within Commonwealth areas, or jointly by the Commonwealth and State for bioregions that are partly in a Commonwealth area and partly in a State.

The Commonwealth Environment Minister must have regard to a bioregional plan when making any decision under the EPBC Act.

Management plans for Commonwealth reserves

Management plans are required to be prepared for Commonwealth terrestrial and marine reserves as soon as practicable after the reserve is created. These management plans control activities within Commonwealth reserves and are required to be complied with. For information on how management plans operate in respect to Commonwealth marine reserves, see [Fact Sheet 17: Marine reserves](#).



Voluntary conservation agreements

The Commonwealth Environment Minister can make a “conservation agreement” with a person to promote the protection and conservation of biodiversity, and for financial, technical or other assistance from the Commonwealth. The Minister may also enter into a conservation agreement covering land with an indigenous person or indigenous corporation which has a usage right relating to the land.

Conservation agreements are legally binding on all parties to the agreement and any person who gains an interest in the land after the agreement is entered into. Contraventions of conservation agreements can be remedied by the Minister or other person bound by the agreement seeking an injunction in the Federal Court. See also [Fact Sheet 14: Voluntary conservation agreements](#).



Environmental impact assessment for significant proposals

Development proposals that are likely to have a significant impact on listed species, threatened ecological communities or migratory species must be referred to the Commonwealth Environment Minister for an impact assessment. See [Fact Sheet 6: Commonwealth environmental impact assessment](#) for details about this.

How can you become involved?

Listing threatened species or ecological communities

Any person can nominate a species or ecological community to be listed under the EPBC Act. Nominations must be sent to the Commonwealth Environment Minister, who will forward the nomination to a Threatened Species Scientific Committee for advice. After receiving this advice, the Minister must decide whether or not to list the species or community. If the Minister decides not to list a species or community, written reasons for that decision must be given to the person who made the nomination.

Register as a consultant on permit applications

Members of the public can register an interest to comment on permit applications when the Minister publishes a notice in a newspaper seeking registrations – such notices are published every 12 months in the *Commonwealth Government Gazette* and in a daily newspaper that circulates in the State. The Minister must consider any submission received from registered people about the permit.

Nominating a key threatening process

Any person can nominate a process to be listed as a “key threatening process”. The same process for listing threatened species applies to the listing of key threatening processes.

Public comment periods on draft management plans

A person has a minimum of three months to comment on any draft:

- threat abatement plan;
- recovery plan; or
- wildlife conservation plan.

Draft plans must be advertised in the *Government Gazette* and in a daily newspaper that circulates generally in the relevant State or Territory. Management plans for Commonwealth reserves are open for public comment for a minimum of 30 days.

Appeals against Minister’s decision under the Act

There is no general right of appeal against the Commonwealth Environment Minister’s decisions under the EPBC Act. However, if the Minister has made an error of law in making the decision, it is possible to have that decision reviewed in the Federal Court. The Act relaxes the rules of “standing” (which say who can go to court) so that, for

example, conservation organisations with a history of two years or more can bring proceedings. If you believe the Minister has made a bad or unlawful decision, contact the EDO.

Injunction to restrain breach of the Act

If a person commits or proposes to commit an act or omission that constitutes an offence or other contravention of the Act or its regulations, then an “interested person” or “interested organisation” may apply to the Federal Court for an injunction to restrain that conduct.

An “interested person” means an Australian citizen or resident:

- whose interests have been, are or would be affected by the conduct or proposed conduct or
- who has engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before the matter arose.

An “interested organisation” means an organisation (whether incorporated or not) established in Australia where:

- the organisation’s interests have been, are or would be affected by the conduct or proposed conduct; or
- at any time in the two years immediately before the matter arose, the organisation’s objects or purposes included the protection or conservation of, or research into, the environment and the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment.

Contacts and further information

Environment Australia Community Information Unit, Canberra

Freecall: 1800 803 772

EPBC Act website

Department of Conservation and Land Management, Crawley

Tel: (08) 9442 0300

Biodiversity Convention website

Convention on migratory species website

World Heritage Convention website

Ramsar Convention website

For copies of Commonwealth legislation considered in this fact sheet, visit the [Australasian Legal Institute website](#).

The Environmental Defender’s Office WA (Inc)

The Environmental Defender’s Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General’s Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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This fact sheet was produced with the assistance of:

