



Commonwealth Impact Assessment

An introduction to Commonwealth Impact Assessment

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("the EPBC Act") sets out how the Commonwealth Government is involved in the environmental impact assessment of projects in Western Australia. This Fact Sheet describes which projects the EPBC Act applies to, and how the Commonwealth Government assesses and approves those projects. Note that projects which need assessment under the EPBC Act will probably also require approval under the Western Australian environmental impact assessment process. For more information, see [Fact Sheet 5: Environmental Impact Assessment in Western Australia](#).

What projects does the EPBC Act apply to?

The EPBC Act applies to:

- "actions" undertaken by any person which are likely to have a "significant impact" on the specifically listed "matters of national environmental significance" (see below for this list);
- "actions" undertaken by Commonwealth government agencies (see below for who these are) which are likely to have a significant impact on the environment anywhere in the world; and
- "actions" undertaken by any person which are likely to have a significant impact on Commonwealth land (see below for what this is).

If a project may be an "action" described above, it must be referred to the Commonwealth Minister for the Environment, who then decides whether it needs to be the subject of environmental impact assessment and approval under the EPBC Act. Substantial penalties may apply to a person for taking an action without approval. People or groups with an interest in the environment can also ask the Court to stop an action which does not have an approval or exemption under the EPBC Act.

If the project is not an action which is likely to have a significant impact on a matter of national environmental significance (or if it is not on Commonwealth land or being done by a Commonwealth agency), the environmental impact assessment and approval provisions of the EPBC Act probably do not apply to it. The project may still be subject to the Western Australian environmental impact assessment process though – see [Fact Sheet 5: Environmental Impact Assessment in Western Australia](#).

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 carrying out a project or undertaking an activity (for example, building a road), the government activity will not be an "action".

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What is a “significant impact” on the environment?

An “impact” includes direct, and some indirect, impacts. For an action with an indirect impact on the environment to be covered by the EPBC Act, the indirect impact must be a substantial cause of the environmental event or circumstance which results. Indirect impacts of an action can also include the impact of a second action done by another person, as long as the second action being done was a reasonably foreseeable consequence of the action. (For example, if a dam is built by a company to facilitate increased agriculture in an area, the impact on waterways of increased fertiliser use by farmers in that area could be an indirect impact).

There is no single definition of what constitutes a “significant impact on the environment” in the EPBC Act. However, as a general concept, significant impact is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. It also depends on the particular listed matter of national environmental significance (see below).

The Department of the Environment (“Environment Department”) has developed guidelines on whether a proposed action is likely to have a significant impact on any of the matters of national environmental significance, or on Commonwealth land or if done by Commonwealth agencies. The Guidelines can be found on the EPBC Act website.

When is the significant impact “likely”?

To be “likely”, it is not always necessary for a significant impact to have a greater than 50% chance of happening. It may be sufficient if a significant impact on the environment is simply a real or not remote chance or possibility. If there is scientific uncertainty about the impacts of an action and the potential impacts are serious or irreversible, the precautionary principle is applicable. The use of this principle in the EPBC Act means that a lack of scientific certainty about the potential impacts of an action alone will not justify a decision that the action is not likely to have a significant impact on the environment.

What is a “matter of national environmental significance”?

The following is the current list of the classes of “matters of national environmental significance” under the EPBC Act:

- World Heritage properties (including in WA, Shark Bay, Purnululu National Park and the Ningaloo Coast);
- National Heritage Places (including the Stirling Ranges and the West Kimberley);
- Ramsar wetlands (there are currently 12 Ramsar wetlands in WA, including Lake Argyle, Thomsons Lake and Lake Toolibin);
- Species which are listed as threatened under the EPBC 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);
- migratory species which are listed under the EPBC Act (including certain migratory marine mammals, birds, reptiles, fish and insects);

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- activities relating to nuclear energy, including uranium mining; and
- the Commonwealth marine environment (any part of the sea, including the waters, seabed, and airspace, between coastal (State) waters and the boundary of Australia's exclusive economic zone. The Commonwealth marine environment is generally the area between 3 and 200 nautical miles off the coast). The Commonwealth marine environment also includes waters around Christmas Island, Cocos Island and Heard and McDonald Islands.

The EPBC Act website contains an up-to-date list of the specific matters of national environmental significance. Note that listings are only relevant to an action if they are listed at the time the action is first referred under the EPBC Act – later listings do not affect the legal status of the action.

Any person may nominate a National Heritage place, threatened species or ecological community for listing under the EPBC Act, and the Minister may also choose themes for nominations each year. See [Fact Sheet 9: Biodiversity conservation under Commonwealth law](#) for more information about the listing process for threatened species and ecological communities.

What are Commonwealth agencies?

Commonwealth agencies include Commonwealth Ministers, agencies and departments such as the Department of Defence, and Commonwealth corporations in which the Commonwealth owns at least half the shares. When a Commonwealth agency carries out an activity, the relevant environmental impacts are not limited only to the matters of national environmental significance. Also note that it doesn't matter where the Commonwealth agency is carrying out the activity - the impacts of Commonwealth agencies are regulated under the EPBC Act anywhere in the world.

What is Commonwealth land?

Commonwealth land includes all land (and the airspace above land) which is owned or leased by the Commonwealth or a Commonwealth agency. It also includes Australia's external territories. A significant impact on the environment on Commonwealth land is considered by reference to all environmental impacts, not just the matters of national environmental significance. Also note that an activity can have a significant impact on Commonwealth land even if it is not actually carried out on the Commonwealth land.

Actions exempt from the EPBC Act

Some 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 is not exempt and may need to be assessed and approved under the EPBC Act.

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Other times when the EPBC Act may not apply or will have only limited operation include where there is a bioregional plan (usually used in marine planning), a conservation agreement between the Commonwealth and another person, usually about conserving a particular place (such as the Burrup Peninsula), or a State management plan or authorisation process which is accredited by the Commonwealth (usually used for fisheries actions). A list of all of these plans and agreements is on the EPBC Act website.

What happens if an action may have a significant impact on matters covered by the EPBC Act?

The assessment and approvals process under the EPBC Act is triggered by the referral of an action to the Commonwealth Environment Minister. A referral must be made by the person proposing the action if they think the action will have a significant effect on the environment, and even if they only think that the action may be likely to have that impact. People or groups with an interest in the environment can also ask the Court to stop an action which does not have an approval or exemption under the EPBC Act (see below for more information).

All of the parts of an action must be referred at one time. If actions are referred in a piecemeal way, the Minister can refuse to accept the referral and require that the whole action be referred. The referral of all of the parts of an action is important to allow all of the impacts (including cumulative impacts) to be assessed at the same time, and to prevent pressure being put on the Minister later on to approve separate parts of the action because the first parts have already been approved. This means that a mine, rail and port should all be referred together if they are part of the same development (which will usually be the case if the rail and port are unlikely to go ahead without the mine), and that all of the stages of a subdivision should be referred at the outset.

A referral can also be made by any Commonwealth or State government agency or 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 action.

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 or ask a State or Commonwealth agency to make a referral.

Once a referral of an action is made, it is an offence for any person to take the action (or part of the action) until the Minister has decided whether or not approval is required (and if it is required, has given that approval).

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 have 10 business days to comment. The Minister then must consider that public comment, comment from other government agencies, and the potential impacts of the action on matters of national environmental significance, and 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.

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No approval required

If the Minister decides that the action does not require approval or any further regulation under the EPBC Act, the action may go ahead and does not need further approval or exemption as long as it is undertaken in the manner set out in the referral. Note, however, that the action may still require approval under other laws, including State environmental laws, and may need approval under the EPBC Act if it changes or expands.

No approval if carried out in a particular manner

If the Minister decides that the action can go ahead but only in a particular manner, the Minister can specify that particular manner in the decision about the referral. It is then an offence for the person to carry out the action in a way that is inconsistent with this particular manner, but no further approval is required under the EPBC Act. "Particular manner" decisions are usually that the action go ahead in accordance with a specific management plan and/or to only take a certain period to be completed. Again, note that the action may still require approval under other laws, including State environmental laws.

Action clearly unacceptable

If the Minister decides the action is clearly unacceptable, the Minister must advise the person proposing to take the action, who can then withdraw it, or ask the Minister to re-consider. The Minister must re-consider the decision, but only after an additional 10 day public comment period and receiving a formal report about the action from the Environment Department. The Minister then makes his decision again.

Formal assessment is required before approval is decided

If the Minister decides there needs to be an assessment of the environmental impacts of the action before deciding whether to approve it or not, a level of assessment for the action must be set. See below for these levels.

Reviewing the Minister's decision about a referral

The Minister must provide reasons for his/her decision about how to deal with an action if asked for them by the person taking the action, or by the State. Members of the public may need to use the Freedom of Information process to obtain copies of these reasons (See Fact Sheet 41: Freedom of information under Commonwealth law).

In some circumstances, such as where there is substantial new information available, or there has been a substantial change in circumstances, or because it becomes clear that the action won't be assessed under or carried out in the way the Minister first believed, you can request the Minister to reconsider the decision about the referral. Contact the EDO if you would like advice about this.

Process and levels for assessment of environmental impacts

If the Minister decides there needs to be an assessment of the environmental impacts of an action, the level of assessment and the assessment process for that action depends upon the potential environmental impact of the action, and also on whether a Bilateral Agreement on Assessment between the Commonwealth and WA applies.

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Assessment process if the Bilateral Agreement between Cth and WA applies

At the time of writing this Fact Sheet, a Bilateral Agreement is in force between the WA and Commonwealth Governments which applies to any proposal which is wholly within the state of WA, and which the WA Environmental Protection Authority decides should be assessed at the level of Public Environmental Review under Part IV of the *Environmental Protection Act 1986* (WA).

Where the Bilateral Agreement applies, the state's environmental assessment process is effective to fulfil both Federal and WA environmental assessment requirements, provided that the conditions of the Bilateral Agreement are met in relation to the assessment of each action. Where the Bilateral Agreement does not apply, the Commonwealth can still decide that a WA process should apply, but has to decide this and then "accredit" the WA process in each individual case. If a WA process applies to an action, see Fact Sheet 5: Environmental Impact Assessment in Western Australia.

It is important to know that even if a WA process applies (because of the Bilateral Agreement or an accredited process), both the State and federal Environment Ministers still have to make their own separate decisions whether to approve the action, and both Ministers have to approve the action before it can go ahead.

Assessment Process if the Bilateral Agreement or a WA accredited assessment does not apply

If the Bilateral Agreement or an accredited assessment does not apply, the Minister must decide how to assess the action under one of the processes in the EPBC Act by setting a particular level of assessment, and specifying the reasons the action is "controlled" (that is, specify what matters of national environmental significance it will affect).

There are 4 different levels of assessment under the EPBC Act:

- Assessment on referral information. This means the assessment is undertaken solely on the information provided in the referral form. The Environment Department prepares an assessment report for the Minister which is then open for public comment for 10 days.
- Assessment on preliminary documentation. This means the assessment is undertaken on the information in the referral form and any additional material which the Minister requires from the person who wants to take the action. The additional material must be published for public comment and then revised by the proponent. The Environment Department then prepares an assessment report for the Minister.
- Public environment report ('PER'). Under this level, the Minister first sets standard or tailored guidelines for the preparation of the PER. The PER is then published for public comment (for a minimum of 20 days) and then revised by the proponent. The Environment Department then prepares an assessment report for the Minister.
- Environmental impact statement ('EIS'). The same process is used as for PER, but an EIS is usually used when there are more significant impacts likely, there is likely to be more difficulty managing the impacts, or there is more public concern about the action.

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In rare cases, assessment may be by way of 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 EPBC Act website contains a useful flowchart on the EPBC Act assessment selection process.

What issues should you raise in the public comment periods?

You should consider the following in making submissions during any of the public comment periods on referrals, assessment guidelines and assessment reports:

- Does the document contain up-to-date, sufficient and correct information about the existing environment?
- Does the document contain sufficient information about the action to allow you to comment on its likely impacts?
- Does the document contain sufficient and correct information about the likely impacts (and indirect impacts) on matters of environmental significance?
- Does the document adequately assess and make reasonable conclusions about the significance of the environmental impacts of the action?
- Does the document contain sufficient information about the proposed management of environmental impacts?
- Have alternatives to the action been properly considered?
- Have other actions in the area (especially those which will have a cumulative impact with this action) been properly considered?

You can also raise other issues which you think are relevant to the assessment of the action. If your submission is long, consider including a summary, and always consider what references and evidence you can provide in support of your submission.

Commonwealth Minister decides whether to grant approval

Once the Minister receives an assessment report from the Environment Department (or the WA Environmental Protection Authority if a WA assessment approach applies), the Minister must decide on whether or not the action can go ahead, and if so, on what conditions.

Before publishing this decision, the Minister must consult with other relevant Commonwealth Ministers about the proposed decision, and can also consult other State Ministers. The Minister must also seek comment from the person taking the action and can seek public comment, but does not have to. You should consider asking the Minister to seek this comment when you make submissions during the public comment periods.

In making a decision about whether or not the action can go ahead, the Minister must take into account:

- anything relating to the particular matter of national environmental significance that triggered the assessment, eg the World Heritage values of a World Heritage sites;

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- economic and social matters;
- the principles of ecologically sustainable development;
- any relevant comments given to the Minister by another Minister, the public or the proponent;
- the precautionary principle; and
- the proponent's environmental history.

The Minister is not allowed to consider things outside of the matters which the EPBC Act deals with.

In setting the conditions for an action, the Minister can set any condition which is necessary or convenient for protecting, repairing or mitigating damage to a matter of national environmental significance (whether or not there is a risk to those matters from the action).

Once the Minister has made a decision, any person can ask for a copy of an Environment Department report which the Minister used to make his decision.

Can an approved action be changed?

The Minister can amend the conditions of approval if the action has had a significant impact on a matter of national environmental significance that was not identified in the assessment of the action, or is substantially greater than the impact which was assessed. The Minister can also amend the conditions by an agreement with the person taking the action as long as the change is necessary or convenient for protecting a matter of national environmental significance affected by the action.

If the person taking the action wants to change the scope or way they are carrying out the action, and that change will affect a matter of national environmental significance (or affect Commonwealth land or be done by a Commonwealth agency), they may need to refer the change under the EPBC Act. The change will then be dealt with as if it were a new action.

Strategic assessments

Strategic assessments can be undertaken to assess the impacts of actions under an overarching policy, plan or program. Strategic assessments are usually for large projects which are completed over a longer period of time, such as:

- regional-scale development plans and policies;
- large-scale industrial development and associated infrastructure;
- fire, vegetation, resource or pest management policies, plans or programs;
- water extraction/use policies;
- infrastructure plans and policies; or
- industry sector policies.

Strategic assessments can only be commenced if the Commonwealth Minister agrees on this assessment type with the person who is responsible for the overarching plan. This is usually a State or local government,

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but can also be a representative group. Members of the public can suggest that a strategic assessment is the best approach, but cannot actually compel it. The scope and process for a strategic assessment is set out in specific Terms of Reference which are developed for that assessment. These Terms of Reference must be open for public comment for 28 days.

The assessment process results in a report which must be open for public comment for 28 days, and then the Minister decides whether to endorse the policy plan or program, and what conditions should apply to it. Once the policy plan or program is endorsed, people can refer actions under it, and then as long as the action is in accordance with the policy and any conditions placed on it, the Minister can approve those actions without following the usual assessment process.

Strategic assessment notices are available on the EPBC Act website.

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

The EPBC Act only provides one formal way in which members of the public can ask the Minister to re-consider a decision – see the Minister's decision about a referral above. However, you can also ask the Minister to re-consider any decisions as a political (rather than legal) right, and you can ask the State to request the Commonwealth Minister to re-make a decision.

There is no right of appeal on the merits against the Minister's decisions about the assessment process, or the Minister's final decision to approve the taking of an action or the conditions of the approval. However, if the Minister has made an error of law in making any decision, it may be possible to have that decision reviewed in the Federal Court. See Fact Sheet 1: Overview of Environmental Law in WA for an explanation of errors of law, and how decisions can be reviewed in the Federal Court.

To decide whether there is an error of law, you will usually need to know the Minister's reasons for their decision. If you are considering challenging a decision, you should lodge a request for reasons within 28 days of receiving notice of the decision. Reasons can be requested by any person with 'standing' (including individuals or conservation organisation with a history of environmental activity or research within the previous 2 years).

What happens if approval is not obtained for an action, or a condition of approval is breached?

It is an offence to carry out an action which requires approval, without first obtaining that approval. It is also an offence to breach the conditions of an approval.

Once a referral of an action is made, it is also an offence for any person to take the action (or part of the action) until the Minister has decided whether it requires approval or not (and if approval is required, approval has been given).

It is a condition of all approvals that the person taking the action must take all reasonable steps to ensure that any person who might undertake work for them is aware of the approval conditions and complies with them. It is therefore no defence to a breach of the conditions that "the subcontractor did it".

The Minister can take legal action to prevent an unlawful 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

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revoke an approval (or change the approval conditions) where a breach of an approval or condition has occurred, or where the impacts identified were inaccurate because of negligent or deliberate omission.

Members of the public who have 'standing' under the EPBC Act (including individuals or conservation organisation with a history of environmental activity or research within the previous 2 years) can bring civil proceedings to stop threatened or ongoing breaches of the EPBC Act. For example, a bat researcher in Queensland has obtained court orders in the Federal Court on several occasions to stop Lychee Farmers from killing threatened flying foxes without approval under the EPBC Act. Before commencing legal proceedings, you should seek legal advice.

Does the EPBC Act override State and Territory law?

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

Opportunities for public involvement

If you would like to be involved in the Commonwealth environmental impact assessment process, there are a number of opportunities. Some of these are:

- Although you cannot refer a proposal to be assessed, you can encourage the Commonwealth Minister for Environment to call a proposal in for assessment, or a State or Commonwealth agency to refer it.
- If you are involved in an environmental group or have a past history of activity in the environment matter at hand, you may be able use the Court to stop an action which does not have approval or exemption under the EPBC Act but would be a breach of the Act.
- You can provide comments on the assessment of a proposal during the period open for public comment.
- If you disagree with the Commonwealth Minister's decision on an assessment, you can lobby them to reconsider, or lobby the State Minister to request the Commonwealth Minister to reconsider.
- Once a proposal has approval, you can monitor the implementation of the project to ensure that it is meeting the conditions of its approval, and alert the Environment Department to any potential breaches.

Contacts and further information

Department of the Environment Department
Tel: 1800 803 772 or (02) 6274 1111, or visit www.environment.gov.au

For the Environment Protection and Biodiversity Conservation Act website,
visit www.environment.gov.au/epbc/indec.html

For copies of legislation contact Comlaw (Commonwealth legislation) at www.comlaw.gov.au

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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 and State Attorney-General's Departments.

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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Freecall: 1800 175 542 (for WA callers outside the Perth metropolitan region)

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