



Biodiversity Conservation Under Commonwealth Law

An introduction to Biodiversity Conservation Under Commonwealth Law

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) ("the EPBC Act") contains important mechanisms for protecting biodiversity across Australia. This fact sheet explains these mechanisms, 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 environmental impact assessment processes for developments which may affect biodiversity, see [Fact Sheet 5: Environmental impact assessment in Western Australia](#) and [Fact Sheet 6: Commonwealth environmental impact assessment](#). For biodiversity protection in reserves, see [Fact Sheet 17: Marine reserves](#). and [Fact Sheet 11: Conservation Reserves](#).

What is biodiversity?

Biodiversity (or biological diversity) is the variety of all species on earth. It includes the variability within any single species; all plants, animals and micro-organisms and the variety between them; and the ecosystems and ecological complexes in which they live. Biodiversity 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.

Powers of the Commonwealth to protect biodiversity

The *Commonwealth Constitution* gives specific law-making powers to the Commonwealth Parliament. Although these powers do not specifically include the power to make laws about biodiversity or even the "environment" (in fact the environment isn't even mentioned in the Commonwealth Constitution), the Commonwealth does have powers that may be exercised for the purposes of biodiversity protection, including:

- control of interstate and overseas trade and commerce (e.g. granting export licences with conditions that protect biodiversity);
- the external affairs power, which allows the Commonwealth to implement Australia's obligations under international treaties and conventions (e.g. the Japan-Australia Migratory Bird Agreement ("JAMBA") and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES")); and
- powers to regulate matters occurring in relation to Commonwealth land or marine areas.

These powers have been used by the Commonwealth to enact the EPBC Act, which is the primary legislative means which the Commonwealth is involved in biodiversity conservation.

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The Commonwealth may also exercise its financial powers to make laws about taxation and expenditure of Commonwealth money in ways which protect biodiversity. For example, the Commonwealth may make grants to the States on conditions that the money be spent in a certain way, including ways which promote sustainable land management. It can also make agreements with the State about biodiversity protection (for example the *Biodiversity Conservation Strategy 2010 – 2030*).

Biodiversity protection in the EPBC Act

The EPBC Act is the Commonwealth's primary legal tool to protect biodiversity. However, much about biodiversity is not yet known. For this reason, the precautionary principle, which states that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage, is often required to be applied when decisions concerning biodiversity are taken under the EPBC Act.

The EPBC Act protects biodiversity in several ways:

- by requiring environmental impact assessment of developments which have a significant effect on a “matter of national environmental significance”, including listed threatened species and communities, listed migratory species, Ramsar wetlands, and World and National Heritage places. For an explanation of this process, and an explanation of the matters of national environmental significance, see [Fact Sheet 6: Commonwealth environmental impact assessment](#);
- by requiring environmental impact assessment of developments which have a significant effect on the environment in Commonwealth land or waters. For an explanation of this process, see [Fact Sheet 6 - Commonwealth environmental Impact Assessment](#).
- by listing threatened species and ecological communities, identifying their critical habitat, and making recovery plans for them;
- by listing migratory and marine species and protecting all whales and cetaceans in the Australian Whale Sanctuary (Commonwealth waters);
- by regulating trade in wildlife;
- by listing key threatening processes and making threat abatement plans for them;
- by providing for the making of conservation orders;
- by providing for the making of wildlife conservation plans; and
- by providing for the declaration of conservation or biodiversity reserves which are managed for biodiversity (and other) purposes (see [Fact Sheet 11: Conservation reserves](#)); and
- by providing for the making of voluntary conservation agreements.

Further detail about how each of these are dealt with under the EPBC Act is set out below. As some of the protections under the EPBC Act only apply on Commonwealth land and water, it is important to understand what Commonwealth land and water is.

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What is Commonwealth land and water?

Commonwealth land includes all land (and the airspace above land) which is owned or leased by the Commonwealth or a Commonwealth agency. 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.

Commonwealth land also includes Australia's external territories such as Christmas and Cocos Islands, Ashmore and Cartier Islands and the Australian Antarctic Territory.

Commonwealth waters are 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 Australia's external territories.

Listed threatened species and ecological communities

One of the main ways that the EPBC Act provides some protection for biodiversity is by providing a mechanism for native species to be formally listed under law as "threatened". If a species is listed as threatened, it is assigned to one of the following categories:

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable; or
- conservation dependent.

The EPBC Act also allows the listing of threatened ecological communities. An ecological community is an assemblage of native species inhabiting a particular area. The categories of listed ecological communities include critically endangered, endangered and vulnerable.

Species and communities are formally listed as threatened under the EPBC Act by the Commonwealth Environment Minister ("the Minister") after following the process described below.

If a species or ecological community is listed as threatened under the EPBC Act, it is an offence to kill or injure that species in Commonwealth land or waters without a relevant approval or exemption, or unless it occurs as a result of an emergency or unavoidable accident.

Listed threatened species and communities also then become a "matter of national environmental significance". Any developments which may have a significant effect on them may require an environmental impact assessment and approval under the EPBC Act. For an explanation of the assessment and approval process, see [Fact Sheet 6: Commonwealth environmental impact assessment](#). Note that listings are only relevant to the environmental impact assessment and approval of a development if they are listed at the time the action is first referred under the EPBC Act – later listings do not have any legal effect.

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Once a species or community is listed, "conservation advice" is usually developed to assist its recovery. Conservation advice provides guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a newly listed species or ecological community. The advice is not binding but should be taken into account in land use decisions which may affect the species or community.

A full list of threatened species and ecological communities, along with species information and conservation advices are available on the EPBC Act website.

How do species and communities become listed as threatened under the EPBC Act?

Any person may nominate a native species or ecological community for listing under any of the categories specified in the EPBC Act. The process is started by an invitation to nominate from the Minister which is issued each year ahead of the new assessment cycle. The invitation can be focused on a theme, in which case nominations within that theme will be given priority.

Nominations submitted within the advertised invitation period are forwarded to the Threatened Species Scientific Committee ("Committee"), who prepares a Proposed Priority Assessment List of nominations for consideration by the Minister. The Minister then considers that list and publishes a finalised priority assessment list. Nominations included in this list are then assessed by the Committee, which invites public and expert comment on these nominations. The Committee's advice is then forwarded to the Minister, who decides whether the species or ecological community should be listed.

Recovery plans for listed threatened species and ecological communities

Once a species or ecological community is listed as threatened under the EPBC Act, a recovery plan can be put in place for that species or community. Recovery plans identify research, management and other actions necessary to stop the decline of, and support the recovery of, the listed threatened species or ecological community concerned so that its chances of long term survival in nature are maximised. There must be public consultation about draft recovery plans. The Committee also gives advice about draft plans.

Recovery plans are not binding on any person other than Commonwealth agencies and on Commonwealth land, but should also be taken into account in all land use decisions impacted by the plans. The Commonwealth may also provide financial assistance to people to implement the plan, and must also try and agree with the States about how to implement the plan.

Critical habitat for listed threatened species or ecological communities may be listed under the EPBC Act

The Minister can list a particular habitat as being critical to the survival of a listed threatened species or ecological community. The critical habitat is then listed on a register. It is an offence for a person to take an action on a Commonwealth area if they know that the action will significantly damage critical habitat.

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

Critical habitat listings, not on Commonwealth land are not binding on any person other than Commonwealth agencies, but should also be taken into account in all land use decisions which will impact critical habitat.

Conservation orders to protect listed threatened species or ecological communities

The Minister may make a conservation order prohibiting or restricting activities in Commonwealth areas if the Minister believes it is necessary to protect a listed threatened species or ecological community. It is an offence for any person to recklessly contravene the order.

Before making an order, the Minister is required to seek the Secretary's advice and consult with any Commonwealth agencies likely to be affected. In making the order, the Minister must have regard to economic and social considerations that are consistent with the principles of ecologically sustainable development.

Once a conservation order is made, the Minister must review it at least every 5 years, and cannot vary or revoke the order unless satisfied that the order is no longer needed to protect the species or ecological community.

Listed migratory species

Many migratory species listed under the international conventions and agreements to which Australia is a party, are protected under the EPBC Act. These include a range of seabirds and migratory birds, sharks, marine mammals and marine turtles. Listed migratory species include native species which are protected under the Bonn Convention, JAMBA, China-Australia Migratory Bird Agreement, and other international agreements.

There is no public nomination process for species to be added on to the list of migratory species.

It is an offence to kill or injure listed migratory species on Commonwealth land or waters without a relevant approval or exemption.

Listed marine species

Under the EPBC Act, the Minister can list marine species for protection. Species are listed after receiving advice from the Scientific Committee on the scientific aspects of the species concerned, and after consulting relevant State Ministers.

It is an offence to kill or injure listed marine species on Commonwealth land or waters without a relevant approval or exemption.

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Whales and cetaceans protected under the EPBC Act

Under the EPBC Act all cetaceans (whales, dolphins and porpoises) are protected in the Australian Whale Sanctuary, which includes all Commonwealth waters. Within the Sanctuary it is an offence to kill, injure or interfere with a cetacean without a relevant approval or exemption.

Listed threatening processes

Key threatening processes are those which may threaten the survival, abundance or evolutionary development of a native species or ecological community. Examples of key threatening processes are invasive species such as foxes or rabbits, bycatch of sea turtles, land clearing and dieback.

Key threatening processes can be listed under the EPBC Act. The process for the listing of key threatening processes is the same as for the listing of threatened species and ecological communities described above. The processes which are currently listed on the EPBC Act website include land clearance, dieback caused by the root-rot fungus (*Phytophthora cinnamomi*) and injury and fatality to vertebrate marine life caused by ingestion of, or entanglement in, harmful marine debris.

The listing of a threatening process does not by itself impose any legal obligations on any person, or prevent any activities from taking place. However, decisions about land use (eg management of land, or development approvals) should take account of any key threatening processes where relevant.

Threat abatement plans

A threat abatement plan sets out what needs to be done to reduce a particular key threatening process to an acceptable level in order to maximise the chances of the long-term survival of native species and ecological communities affected by the threatening process.

Once a threatening process is listed under the EPBC Act, a threat abatement plan must be put into place if the Minister thinks this will be "a feasible, effective and efficient way" to abate the threatening process.

There are no criteria to guide this decision, but the Environment Minister must seek advice from the Threatened Species Scientific Committee and from affected State and Territory governments. There is no requirement for the Environment Minister to consult the public, but the Minister must publish reasons for the final decision (either way) and must reconsider the matter within 5 years.

It is not an offence for an individual to breach a threat abatement plan. However, a Commonwealth agency must not take any action which contravenes a threat abatement plan, and the Commonwealth must implement the plan to the extent to which it applies within Commonwealth areas.

Threat abatement plans are not binding on any person other than Commonwealth agencies, but (as with a listing of a key threatening process), should be taken into account in land use decisions impacted by the plans. The Commonwealth may also provide financial assistance to people to implement the plan and must also try and agree with the States about how to implement the plan.

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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 import or export a species listed in CITES, or any other specifically regulated native species, without a permit (unless an exemption applies). The EPBC Act also regulates the import of live plants and animals that (if they became established in Australia) could adversely affect native species or their habitats.

Some exemptions also apply for non-commercial trade such as for research, education, exhibition, conservation breeding or propagation.

The law in this area is particular and technical so is not suitable for inclusion in this fact sheet – specific legal advice should instead be sought.

Voluntary conservation agreements

A conservation agreement is an agreement between the Minister and another person for the protection and conservation of biodiversity in an area of land or sea. A conservation agreement may provide for activities that promote the protection and conservation of biodiversity, or other matters which are protected under the EPBC Act. The agreement can require the landowner to manage the land for conservation, can deal with financial, technical or other assistance from the Commonwealth, and can require monitoring to assess compliance with the agreement.

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 by another person bound by the agreement seeking an injunction in the Federal Court.

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 EPBC Act. A person may then take that action without further approval. See [Fact Sheet 6: Commonwealth environmental impact assessment for more information](#).

Wildlife conservation plans

The Minister may make wildlife conservation plans for the purposes of the protection, conservation, and management of listed migratory and marine species, for cetaceans that occur in the Australian Whale Sanctuary, and for conservation dependent species. In making the plans the Minister must consider the advice of the Scientific Committee and provide the plan for public comment.

The Minister must seek co-operation from relevant States about making and implementing a wildlife conservation plan.

Commonwealth agencies must take all reasonable steps to act in accordance with a wildlife conservation plan, but the plan is not legally binding. However, it should be taken into account in any decision which will affect the species.

Wildlife conservation plans cease to have effect in the event that the species become a listed threatened species.

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Other biodiversity protection under the EPBC Act - specific protected areas

The EPBC Act provides for the declaration of various types of specific protected terrestrial and marine areas, which are then managed for biodiversity protection (amongst other things). See [Fact Sheet 17: Marine reserves](#) and [Fact Sheet 11: Conservation reserves](#) for more information about these.

What can I do if I disagree with decisions made under the EPBC Act?

There is no general right of legal appeal against the Minister's decisions, the Committee's advice, or about 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 6: Commonwealth environmental impact assessment](#) for an overview of what errors of law are, 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 on what basis the Minister made the decision. You should request reasons for any decision with which you are unhappy. These reasons can be requested by any person who has "standing" (any person who can go to court). The EPBC Act relaxes the general rules of standing so that, for example, individuals or conservation organisations with a history of environmental activity or research within the previous 2 years can bring proceedings.

A decision of a delegate of the Minister to allow or refuse a permit for the international movement of a wildlife specimen or the taking of listed species in Commonwealth land and waters may be appealed to the Administrative Appeals Tribunal. However, decisions which were made directly by the Minister cannot be appealed.

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

The Minister can take legal action to prevent the continuation of an unlawful action, and prosecute or take civil action against a person for any illegal activity that has taken place. The Minister can also require the person repair any environmental damage caused as a result of the unlawful action. Orders to repair can be detailed, extensive and very expensive to implement.

The Minister can also suspend or revoke a permit (or change the permit conditions) where a breach of an approval or condition has occurred or the Minister has reasonable grounds for believing that if an application for the permit was being considered again, it would not be granted.

Members of the public can report actions or activities which they think are unlawful to the Department of Sustainability, Environment, Water, Population and Communities.

Members of the public cannot commence a criminal prosecution for breach of the EPBC Act, however individuals or conservation groups who meet the definition of an "interested person" (see below) may commence legal proceedings for an injunction to stop threatened illegal works from proceeding, and an action for an order to repair the damage.

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An interested person under the EPBC Act is an Australian citizen or resident whose interests have been, are or would be affected by the conduct, or who has engaged in a series of activities for the protection or conservation of, or research into, the environment at any time in the 2 years immediately before the conduct.

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

Does the EPBC Act override State and Territory law?

The EPBC Act puts in place approval requirements that are additional to approvals 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

There are a number of opportunities for you to be involved in the protection of biodiversity under Commonwealth law. Some of these are:

- Visit the EPBC Act website and make yourself aware of the listed species, threatening processes and ecological communities that are currently listed.
- Provide comment on draft recovery plans and wildlife conservation plans.
- Report any activity which you think may be illegal under the EPBC Act to the Department of Sustainability, Environment, Water, Population and Communities.

Contacts and further information

Department of Sustainability, Environment, Water, Population and Communities, 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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