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## Commonwealth Environmental Laws - the EPBC Act

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*This Factsheet is for general information purposes and is not legal advice. 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 particular circumstances you should contact the EDO or your solicitor.*

### 1. Overview of what the EPBC Act does

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) or “EPBC Act” is the federal legislation that protects federally listed threatened species, migratory species, World Heritage Areas, the Great Barrier Reef, Ramsar wetlands, and other areas of importance.

It does so mainly by establishing a referral and assessment process which requires the Commonwealth Environment Minister to approve any action<sup>1</sup> which is likely to have a significant impact<sup>2</sup> on a matter of national environmental significance. The EPBC Act is therefore an extra tier of approvals which a developer may have to get before proceeding with a development. Consequently the process can be useful for conservationists to attempt to stop or get conditions on the development to protect those federal matters.

Current matters of national environmental significance protected by the EPBC Act are:

- World Heritage areas
- Cth listed migratory species
- Cth marine environment
- Cth listed threatened species & ecological communities
- Great Barrier Reef Marine Park<sup>3</sup>
- Ramsar Wetlands
- Nuclear actions
- National Heritage places

### 2. The EPBC Act referral and assessment process

#### (a) The Referral

The assessment and approval process is triggered by a referral being made to the Commonwealth Minister for Sustainability, Environment, Water, Population and

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<sup>1</sup> ‘Actions’ include such things as projects, developments, undertaking and activities, or an alteration to one of these things. A decision by government to grant approval for an action, or make a grant of funding is not an action.

<sup>2</sup> “Significant impact” is not defined in the EPBC Act, but the Department has released *Significant impact guidelines* (available from <http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf>) which list the factors they will consider when determining whether an impact is “significant”, including all on-site and off-site impacts, all direct and indirect impacts, the frequency and duration of the action, and the sensitivity of the receiving environment. Justice Branson in the *Booth v Bosworth* case said that “significant” meant “an impact that is important, notable or of consequence having regard to the *context* and intensity of the action”. Her mention of context provides the only basis on which to demand the Department assess cumulative impacts.

<sup>3</sup> Section 24B EPBC – new addition



Communities (“the Environment Minister”). The referral can be made by the person proposing the activity (they *must* refer *if* they think there is likely to be a significant impact on a matter of national environmental significance), or by a State or Commonwealth Minister that has responsibility relating to the action, or the Environment Minister can request a referral from the person (and if no referral is made, the Minister can then “call-in” the action and it is deemed to have been referred). Members of the public cannot refer actions, but can write to the Commonwealth Environment Minister and ask him to call-in an action, or write to the State government asking them to refer the action.

Once a referral has been made, it is advertised on the Environment Department website for 10 business days for the public to make comments about whether it should be declared a controlled action. The Environment Minister must consider all adverse impacts<sup>4</sup> of an action and any public comments, and if he/she decides the action is likely to have a significant impact on any of those matters of national environmental significance, it is called a “controlled action” and the assessment and approval process of the EPBC Act must be followed.

### (b) Assessment of Impacts

The next step is for the Minister to assess the “relevant” environmental impacts of the proposal – those impacts that relate to matters of national environmental significance.

The EPBC Act provides a range of ways for a controlled action to be assessed, including Environmental Impact Statements or mere Preliminary Documentation, and sets out the factors that the Minister must consider when making a decision about what kind of assessment should be done. However, since Queensland entered into a bilateral agreement with the Commonwealth government in August 2004, the state assessment processes accredited in the bilateral are followed (see section 3 below). Under these State processes, there are opportunities for public comment on the terms of reference for an EIS and on the EIS produced.

### (c) The Decision

Within 30 days of receiving the results of the environmental assessment, the Commonwealth Minister must decide whether to approve the action. In making the decision, the Minister must consider:

- The impacts on each relevant matter of national environmental significance and any impacts on the Commonwealth environment;
- Economic and social matters;
- The principles of ecologically sustainable development, which include the precautionary principle and the principle of intergenerational equity;
- The assessment report and the EIS;
- Any comments given to the Minister by another Commonwealth Minister; and
- The applicant’s environmental history.

For World Heritage sites (including the Great Barrier Reef), Ramsar wetlands, threatened species and ecological communities and migratory species, the Minister cannot act inconsistently with Australia’s obligations under the relevant international conventions. The Minister also cannot grant an approval that is inconsistent with a recovery plan or threat abatement plan (see section 5 below).

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<sup>4</sup> Including impacts from activities enabled by the original activity – such as the use of fertiliser applied with water made available from a dam (Nathan Dam case – *QCC v Minister for Environment*).



The Minister may attach conditions to an approval, including periodic audits, preparing management plans, carrying out monitoring or testing, compliance with an industry code, or provision of a bond to cover any repair work.



#### d) Challenging a Decision

There is no appeal against the merits of a decision to approve (or refuse) development, but the Minister must follow the proper process (including considering all relevant considerations) or be subject to judicial review. There are significant penalties for taking a controlled action without approval or breaching approval conditions, which either the Environment Minister or any member of the public can take Court action to enforce.

### 3. How does the EPBC Act interact with Queensland laws?

Most development projects will require Council or State approval. When it is triggered, the EPBC Act is an **extra layer** of approval which is required in addition to State or Council approvals. A development cannot go ahead lawfully without all relevant approvals, and may be challenged in Court if works commence without an approval.

To minimise duplication where projects require assessment by both the State and Commonwealth government, the bilateral agreement between Queensland and the Commonwealth (13 August 2004) accredits 3 State environmental assessment processes:

1. EIS under section Chapter 9, Part 2 of the *Sustainable Planning Act 2009* (Qld) (Chapter 5, Part 8 of the *Integrated Planning Act* (rarely used);
2. EIS under Chapter 3 of the *Environmental Protection Act* (used for mining only);
3. EIS under Part 4, Division 3 of the *State Development and Public Works Organisation Act* (most frequently used).

The Commonwealth Minister for the Environment still makes the approval decision under EPBC Act criteria, and the State approves under its legislation and criteria, but they use a single environmental assessment report by the proponent.

There is no relationship between the State and Commonwealth lists of threatened species, so ensure that you have checked both lists and know which list is important for which approval process (State or Cth). There is no obligation to consider species on one list (eg State) for listing on the other list (eg Cth).

### 4. How does the EPBC Act interact with the Great Barrier Reef Marine Park Act?

A recent amendment to the EPBC Act in November 2009 inserted the Great Barrier Reef Marine Park (“the Marine Park”) as a matter of national environmental significance. Referral, assessment and approval processes under the EPBC Act will therefore be triggered where an action in the Marine Park has, will have or is likely to have, a significant impact on the environment. In addition, an action outside the Marine Park that has, will have or is likely to have, a significant impact on the environment in the Marine Park is also regulated by the EPBC Act. Therefore this matter of national environmental significance is enlivened even when the majority of the development is outside the Marine Park itself because the action will still have a significant impact on the Marine Park due to its proximity.

The *Great Barrier Reef Marine Park Act 1975* (Cth) (“**GRMPA**”) is the principal Act that regulates and governs the Great Barrier Reef Marine Park. The main object of GRMPA is to provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region. GRMPA seeks to allow ecologically sustainable use of the Great Barrier Reef Region for purposes such as public enjoyment and public education as well as encouraging engagement in the protection and management of the



Region. GRMPA assists in satisfying Australia's international responsibilities under the World Heritage Convention.

Specifically, the GRMPA;

- Establishes the Great Barrier Reef Marine Park and the Great Barrier Reef Marine Park Authority (GBRMPA). GBRMPA is a Commonwealth authority responsible for the management of the Marine Park;
- Provides a framework for planning and management, through zoning plans, plans of management and a system of permissions for the Marine Park;
- Prohibits mining operations (including prospecting, exploration and recovery of minerals) in the Great Barrier Reef Region, unless permission is granted under the *Great Barrier Reef Marine Park Regulations 1983* (Cth) ("GRMP Regulations") for scientific purposes.

The relationship between the EPBC Act and GRMPA is distinguished by mutual recognition of referral, assessment and permission requirements.

The GRMPA outlines that an where approval under the GRMP Regulations is required and a referral of the action is also required under the EPBC Act, then only one application need be submitted.<sup>5</sup> However, a copy of the referral must be supplied to the Great Barrier Reef Marine Park must as soon as practicable.<sup>6</sup> So the application under the EPBC Act will be assessed under the GRMP Regulations as would normally be required but only one application need be submitted.

GRMPA also sets out that the Great Barrier Reef Marine Park Authority cannot grant permission to undertake an action permitted under the GRMP Regulations, if the action is a controlled action under the EPBC Act, and the Minister has not yet approved the taking of the action.

An action within a zone of the Marine Park will not need Approval under the EPBC Act, provided it is for a purpose for which the zone may be used or entered without permission.<sup>7</sup>

## 5. How does the EPBC Act deal with climate change?

### (a) Climate change in Court

The Act does not explicitly address climate change. However, the Act requires the Minister to consider "all adverse impacts" of an activity when deciding whether EPBC Act approval is required - so it would seem plausible to argue that climate change impacts should be considered.

Yet this argument was unsuccessful in the first federal climate change court case in 2005-6 (the "Bowen Coal Case" in the Federal Court<sup>8</sup>). In that case EDO North Queensland representing Wildlife Whitsunday argued that the government had failed to consider the

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<sup>5</sup> s37AB(1) *Great Barrier Reef Marine Park Act 1975* (Cth)

<sup>6</sup> Section 73A *Environment Protection and Biodiversity Conservation Act 1999*

<sup>7</sup> s 43 *Environment Protection and Biodiversity Conservation Act 1999*

<sup>8</sup> *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors* [2006] FCA 736 (Dowsett J). For more information see [www.edo.org.au/edonq/images/stories/documents/Media%20Release%20FINAL%20-%202015%20June%202006.pdf](http://www.edo.org.au/edonq/images/stories/documents/Media%20Release%20FINAL%20-%202015%20June%202006.pdf).



climate change impacts of the mining, transport and use (burning) of coal from two large coal mines in Central Queensland<sup>9</sup> (in the process of considering whether federal assessment of the mines was required because of any likely significant impact on matters of national environmental significance). The government found the mines were not likely to have that impact, and the statement of reasons for those decisions made no mention of the consideration of greenhouse gas emissions. However, two weeks before trial, the government filed an affidavit saying they had considered greenhouse gas emissions from the mines and had concluded that when judged against the scale of past, present and future global emissions, the emissions from the mines would not be measurable or identifiable, and, therefore, would not be likely to cause a significant impact on matters of national environmental significance (like the sensitive Great Barrier Reef or Wet Tropics) protected by the EPBC Act.

Wildlife Whitsunday unsuccessfully argued that since the EPBC Act operates nationally (not internationally), the question of significance should be addressed by asking whether the contribution to global warming of the likely emissions from the mines are significant at the national level compared with other actions in Australia contributing to global warming. The judge dismissed these arguments and found that since there was no specific link between the emissions from the mines and any discernible impact on a protected matter, the mines did not require federal approval. The judge was particularly dubious about whether the burning of coal overseas could be said to cause an impact on a matter protected by the EPBC Act.

#### (b) The need for a greenhouse trigger

The Bowen Coal case highlights the need for law reform of the EPBC Act to require decision makers to consider the greenhouse gas emissions from large mining projects and other emitting activities. EDO has long been advocating for a greenhouse gas trigger to be included in the EPBC Act, to require the federal government to assess actions which emit more than 500,000 tonnes of greenhouse gases each year. This is something that conservationists could advocate for.

#### (c) Climate change a key threatening process?

The EPBC Act allows the Minister to prepare recovery plans for threatened wildlife and to declare a process to be a “key threatening process” (if it threatens the survival, abundance or evolutionary development of a native species or ecological community) for which a “threat abatement plan” may be made. Threat abatement plans can be made federally or in conjunction with states, to provide for the research, management, and any other actions necessary to reduce the impact of a listed key threatening process on a threatened species or ecological community. Threat abatement plans for key threatening processes bind the Commonwealth and Commonwealth agencies, and thus guide government action, but it is not an offence for an individual to breach a threat abatement plan. Land clearing has been listed as a key threatening process since 2001, but a threat abatement plan has never been made. These provisions could be used to deal with climate change impacts on biodiversity, and the federal government could be lobbied by conservationists on this point.

## 6. Summary of opportunities for public participation

Public participation opportunities:

- Comment on whether Environment Minister should find referred action should be “controlled action”, meaning assessment and approval under EPBC Act required;

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<sup>9</sup> The mines were expected to produce 48 million tonnes of coal over the next 15 years, equivalent to about 1.5% of Australia’s annual emissions each year, or 0.04% of global emissions. This evidence could not be put before the Court as the proceeding was a judicial review (not merits review – not available under the EPBC Act).



- Comment on assessment documentation (eg EIS terms of reference and EIS);
- Written comments may be made to the Great Barrier Reef Marine Park Authority where an action may restrict the reasonable use by the public of a part of the Great Barrier Reef Marine Park<sup>10</sup>

Public enforcement opportunities in Court – seek legal advice first:

- Seek injunction to restrain actions without approval (*Booth v Bosworth* Flying-fox case, see below), or in breach of approval conditions or manner specified conditions (ss 475, 77A);
- Seek declaration that referral is false or misleading (*Mees v Roads Corporation*) (ss 489-491);
- Judicial review decisions of the Minister (*HSI v Minister* Flying-fox 2; *QCC v Minister*: Nathan Dam) – not merits review; subject to extended standing provisions in s 487.

The EPBC Act was successfully used by Dr Carol Booth in 2001 to stop a lychee farmer using electric grids to kill Spectacled Flying-foxes to protect his crop<sup>11</sup>. The Judge found that the farmer had killed almost 20% of the entire population of that species, which was a “significant impact”, without having an EPBC permit. The farmer subsequently applied for an EPBC permit and this was the first refusal by the Minister of such a permit (there have been only four to date since the Act commenced in 2000).

Another example of the use of the EPBC Act was in the Paradise Dams case. This case involved an application by the Wide Bay Burnett Conservation Council (WBBCC) for a declaration and an injunction to restrain an alleged contravention of an approval condition under the EPBC Act for the Paradise Dam. The approval condition that was alleged to have been breached was that Burnett Water Pty Ltd was obliged to install a fish transfer device on the Burnett River Dam suitable for the lungfish. WBBCC argued that the fishway was not "suitable for lungfish". The judgment has not been handed down to date.

## 7. Useful References

Environmental Defenders Office (Qld) Inc.  
 Ph: (07) 3211 4466  
 Email: edoqld@edo.org.au  
 Website: <http://www.edo.org.au/edoqld/home.html>

Department of Environment and Resource Management  
 Ph: 13 7468  
 Website: [www.derm.qld.gov.au](http://www.derm.qld.gov.au)

Department of Sustainability, Environment, Water, Population and Communities  
 GPO Box 787  
 Canberra ACT 2601  
 Ph: 61 2 6274 1111  
 Website: <http://www.environment.gov.au/>

<sup>10</sup> s88D *Great Barrier Reef Marine Park Regulations 1983* (Cth)

<sup>11</sup> *Booth v Bosworth* (2001) 114 FCR 39. For more information see [www.envlaw.com.au/ffox.html](http://www.envlaw.com.au/ffox.html).

