



ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.

Commonwealth Environmental Laws – the EPBC Act

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, 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 action¹ which is likely to have a significant impact² 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, so can be useful for conservationists to use to attempt to stop or get conditions on the development to protect those federal matters.

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

- World Heritage areas
- Cth listed migratory species
- Cth marine environment
- Cth listed threatened species & ecological communities
- 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 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 Commonwealth Minister can request a referral from the person (and if no referral is made, the Minister can then “call-in” the

¹ ‘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.

² “Significant impact” is not defined in the EPBC Act, but the Department has released *Administrative Guidelines* (available on their website) 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.

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 Minister must consider all adverse impacts³ of an action and any public comments, and if he 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, 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 4 below).

³ 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 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. Where it is triggered, the EPBC Act is an **extra layer** of approval which is required in addition to State or Council approvals. A development can't go ahead lawfully without all relevant approvals, and may be challenged in Court if it starts without them!

To minimise duplication where projects require assessment by both the State and Commonwealth government, the bilateral agreement between Queensland and the Commonwealth (13 August 2004-2009) accredits 3 State environmental assessment processes:

1. EIS under section 5.8 of the *Integrated Planning Act* (rarely used);
2. EIS under section 57 of the *Environmental Protection Act* (used for mining only);
3. EIS under section 35 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 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 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 Court⁴). In that case EDO North Queensland representing Wildlife Whitsunday argued that the government had failed to consider the climate change impact of the mining, transport and use (burning) of coal from two large coal mines in Central Queensland⁵ (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 of large mining projects and other emitting activities. EDO has long been advocating for a greenhouse gas trigger to be included in the 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

⁴ *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.

⁵ 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).

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 new federal government could be lobbied by conservationists on this point.

5. 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;
- Comment on assessment documentation (eg EIS terms of reference and EIS);

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 crop⁶. 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).

6. Useful References

EDO Qld:	www.edo.org.au/edoqld/
EDO NQ:	www.edo.org.au/edonq/
EDO NSW (EPBC factsheets):	www.edo.org.au/edonsw
Cth Department of Environment, Water, Heritage and the Arts:	www.environment.gov.au/epbc

⁶ *Booth v Bosworth* (2001) 114 FCR 39. For more information see www.envlaw.com.au/ffox.html.