

Native Plants & Animals



Commonwealth Threatened Species Law

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Sydney: 02 9262 6989

Northern Rivers: 1800 626 239

Rest of NSW: 1800 626 239

NSW Bilateral Agreement relating to environmental impact assessment

The Australian and NSW governments have signed a [bilateral assessment agreement](#) which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

In practice, the proponent will refer projects to the Australian Government, who will determine whether the project is a [controlled action](#), and then notify the NSW Government that a referral has been made. The NSW Government will then assess the project, and as part of its usual State processes (e.g. development assessment) it will undertake an [assessment for the Australian Government](#) using its own assessment processes under the bilateral agreement.²

¹ http://www.edonsw.org.au/legal_advice

² <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.³ [Read EDO NSW's law reform submission](#) on the draft bilateral agreement for more information.⁴

Overview

It is important to remember that Commonwealth approval may be required in addition to any other approvals required under NSW law.

This Fact Sheet explains how nationally listed threatened species and ecological communities are protected under Commonwealth law, which is the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (EPBC Act).

The EPBC Act protects nationally listed threatened species by:

- Creating a process which allows them to be listed;
- Requiring activities or developments which are likely to have a significant impact upon a nationally listed threatened species to undergo environmental impact assessment and approval; and
- Requiring permits for any action in a Commonwealth area that involves the killing, injuring or taking of a listed threatened species or ecological community.

Commonwealth threatened species law operates in parallel to NSW threatened species law. A development or activity may require assessment and approval under both laws. “Threatened species” is a collective term which refers to all the species which are listed, irrespective of their level of endangerment (e.g. extinct, endangered, vulnerable, etc.).

For information on how threatened species are protected under NSW law, see our [Threatened species and ecological communities](#) Fact Sheet.

Listing nationally threatened species

Eligibility for listing

At the Commonwealth level, the following things can be listed:

³ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

⁴ http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

- Individual native species (animals, plants and fish); and
- Ecological communities (an assemblage of native species that inhabit a particular **area**).

Note: unlike the TSC Act in NSW, it is not possible to list individual populations of species under the EPBC Act. [View the lists](#) of nationally listed threatened species and ecological communities.

Individual species categories

Individual native species (including native species of marine fish⁵) are eligible to be listed under the EPBC Act under one of the following categories, depending on their level of endangerment:

- **Extinct**

No reasonable doubt that the last member of the species has died;⁶

- **Extinct in the wild**

Known only to survive in cultivation, in captivity or as a naturalised population well outside its past range;⁷

- **Critically endangered**

Facing an *extremely* high risk (50%) of extinction in the wild in the immediate future;⁸

- **Endangered**

Facing a *very* high risk (20%) of extinction in the wild in the near future;⁹

- **Vulnerable**

Facing a high risk (10%) of extinction in the wild in the medium-term future; or¹⁰

- **Conservation dependent**

The species is protected under a specific conservation program, and if the program were to stop, the species would become vulnerable, endangered or critically endangered.¹¹

⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 180.

⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(1).

⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(2).

⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(3).

⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(4).

¹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(5).

¹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 179(6)(a).

Additional criteria for listing threatened species in each of these categories are set out in the EPBC Regulations.¹²

Ecological community categories

Ecological communities are eligible to be listed under the EPBC Act under one of the following categories depending on their level of endangerment:

- **Critically endangered**

Facing an extremely high risk of extinction (50%) in the wild in the immediate future;¹³

- **Endangered**

Facing a very high risk of extinction in the wild in the near future;¹⁴ or

- **Vulnerable**

Facing a high risk of extinction in the wild in the medium-term.¹⁵

Additional criteria for listing threatened ecological communities in each of these categories are set out in the EPBC Regulations.¹⁶

Nomination and listing process

There is a [process](#) for deciding which species should be listed, and whether species should be transferred between the categories.¹⁷

Annual listing procedure

The nomination and listing process involves an annual cycle that revolves around 12-month periods known as assessment periods. Public nominations are called for each year, which are then assessed through a process which commences on 1 October every year.

The nomination and listing system involves the following steps:¹⁸

- The Environment Minister may determine conservation themes;
- The Environment Minister then invites people to nominate species, ecological communities and key threatening processes by a certain date, and gives the nominations to the [Threatened Species Scientific Committee](#);

¹² *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.01.

¹³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 182(1).

¹⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 182(2).

¹⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 182(3).

¹⁶ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.02.

¹⁷ *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth), Sch 1, cl. 194AA.

¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 194A – 194T.

- The Threatened Species Scientific Committee then prepares a list of items that it thinks should be assessed (proposed priority assessment list) and gives it to the Environment Minister;
- The Environment Minister finalises the list of items that will be assessed (finalised priority assessment list);
- The Threatened Species Scientific Committee invites people to make comments on the finalised priority assessment list;
- The Threatened Species Scientific Committee carries out an assessment of the finalised list and gives the assessments to the Environment Minister; and
- The Environment Minister makes the final decision as to whether a species, ecological community or key threatening process is listed or not.

If the Minister decides against listing a particular species, ecological community or threatening process, then, within 10 days of making the decision, the Minister must publish the decision on the internet and give the person who nominated the item reasons why the species, community or process was not listed.¹⁹

The nomination process is quite technical. If you wish to nominate a species yourself you will need detailed evidence to support your nomination. There are some conservation groups who are experienced in preparing nominations for threatened species.

What are the implications of listing?

Once a species or ecological community has been listed as threatened, it can trigger the following actions:

- If the listed threatened species is on Commonwealth land (and no EPBC Act approval has been granted), a permit is required to kill, injure, take, trade, keep or move the threatened species (see Permits below);²⁰
- Activities or developments (anywhere in Australia) which are likely to significantly affect a listed threatened species or ecological community will require assessment and approval under the EPBC Act (see Threatened Species and Development below);
- The Environment Minister can choose to prepare a recovery plan for the species or community (see Threat Abatement Plans below).
- The Environment Minister can choose to list the species' habitat as "critical habitat" ;

¹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 194Q(8).

²⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s..201.

Critical habitat

If a species or ecological community is listed as threatened, the Environment Minister may choose to list its habitat as “critical habitat”.²¹ The Minister may consider things such as whether the habitat is used for foraging, breeding, nesting or roosting, whether it is used as a corridor to allow the species to move freely between sites, and whether the site is necessary to ensure the long term future of the species or ecological community through reintroduction or re-colonisation.²²

The Environment Minister may declare any land within Australia to be critical habitat, but if the habitat is not in a Commonwealth area, the Minister must be satisfied that reasonable steps have been taken to consult with the owner of the property where the habitat is located.²³

There are two consequences under the EPBC Act which flow from a listing of critical habitat:

- If the habitat is in or on a Commonwealth area, it is an offence for a person to do something if they know that it will significantly damage the critical habitat,²⁴ and
- The Commonwealth must not sell or lease land that contains critical habitat without a covenant in the contract which protects the habitat.²⁵

The Environment Department has a [register of critical habitat](#).²⁶

Recovery plans

Once a species or ecological community is listed as threatened, the Environment Minister can decide to prepare a recovery plan for it. A recovery plan sets out what must be done to stop the decline of, and to support the recovery and survival of, a listed threatened species or ecological community.²⁷

It is not obligatory for a recovery plan to be prepared once a species or ecological community is listed as threatened. However, the Environment Minister must make a decision on whether to have one prepared within 90 days of the species or community being listed.²⁸ In making this decision, the Environment Minister must have regard to the advice given by the Threatened Species

²¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 207A.

²² *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.09

²³ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.09(3)(b).

²⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 207B.

²⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 207C.

²⁶ <http://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl>

²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 270(1), *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.11.

²⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 269AA(1).

Scientific Committee as to whether there should be a recovery plan at the time that the Committee recommended the species or community be listed.²⁹

It is not an offence for an individual to breach a recovery plan. The plan simply guides Commonwealth action. In particular, a Commonwealth agency must not take any action that contravenes a recovery plan, and the Commonwealth must implement the plan to the extent to which it applies in Commonwealth areas.³⁰

The Environment Department has a [registry of recovery plans](#).³¹

Other categories of protected species

In addition to threatened species, there are three other categories of species which are specifically protected under the EPBC Act. These are described below.

Migratory species

In addition to nationally listed threatened species, some migratory species are also protected under the EPBC Act. Migratory species are those species which migrate to, or pass through or over, Australian territory on their annual migrations. Only those migratory species which are protected under international agreements can be listed.

Examples of categories of migratory species which are protected include:

- Birds – albatrosses, terns, plovers and egrets
- Mammals – whales, dugongs
- Reptiles – some crocodiles.

Some migratory species which are native to Australia can also be listed as nationally threatened species. The regime for listing and protecting migratory species under the EPBC Act is different to that of threatened species.

The Environment Minister may make and implement a wildlife conservation plan for listed migratory species (but not if they are listed as threatened).³² There is currently a [Wildlife Conservation Plan for Migratory Shorebirds](#).³³

For more information on how migratory species are protected under the EPBC Act, see our [EPBC Act Fact Sheet](#).

²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 269AA(3), 189(1B)(c).

³⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 268 – 269.

³¹ <http://www.environment.gov.au/topics/biodiversity/threatened-species-ecological-communities/recovery-plans>

³² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 285.

³³ <http://www.comlaw.gov.au/Details/F2006L00594/Explanatory%20Statement/Text>

The Environment Department keeps a [list of migratory species](#) protected under the EPBC Act.

Marine species

Some marine species are also protected under the EPBC Act, even if they are not listed as threatened.

The EPBC Act protects marine species (called “listed marine species”) within the following categories:³⁴

- Sea snakes;
- Seals;
- Crocodiles;
- Dugongs;
- Marine turtles;
- Leatherback turtles;
- Seahorses, sea-dragons and pipefish;
- Birds in marine areas (e.g. penguins, albatross, pelican, ibis, etc.).

- **Permits for marine species**

Listed marine species are protected through a permit system.³⁵ A person is guilty of an offence if they kill or injure a member of a listed marine species in a Commonwealth area.³⁶ It is also an offence to take, trade, keep or move a listed marine species which is in a Commonwealth area.³⁷

However, it is a defence if the person:³⁸

- Had a permit from the Environment Minister to kill, take or otherwise deal with the listed marine species;
- Had an approval under the EPBC Act; or
- Took the action in a humane manner to relieve or prevent the suffering of the animal (eg by releasing it from a net).

³⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 248.

³⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 257 – 264.

³⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 254 – 254A.

³⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 254B – 254E.

³⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 255.

The Environment Minister may make a wildlife conservation plan for listed marine species (but not if they are listed as threatened).³⁹

Note: Marine species which are also listed as a threatened species will be protected under the threatened species provisions, rather than the marine species provisions, e.g. a development which is likely to have a significant impact on a threatened species will trigger the environmental impact assessment provisions of the EPBC Act, see below.

The Environment Department keeps a list of [marine species](#) protected under the EPBC Act.

For more information on how marine species are protected under the EPBC Act, see our [Marine & Fisheries Management Fact Sheet](#).

- **Marine mammals**

Whales, dolphins and porpoises (marine mammals or cetaceans) enjoy special protection under the EPBC Act through the Australian Whale Sanctuary and under a specialised permit system.⁴⁰

The EPBC Act establishes the Australian Whale Sanctuary.⁴¹ The Sanctuary covers waters within Australia's exclusive economic zone, which is up to 200 nautical miles from the Australian coast, but does not generally include coastal waters within three nautical miles of the coast as these are regulated by the States.⁴² The Australian Whale Sanctuary also extends 200 nautical miles into Antarctic waters from the coast of the Australian Antarctic Territory.

It is an offence to kill, injure, take, trade, or interfere with a cetacean within the Australian Whale Sanctuary.⁴³

There is a long list of circumstances where these offences do not apply which include:⁴⁴

- If the activity was authorised by a permit;
- Whale watching (in accordance with the regulations), but not for commercial purposes; or
- Actions which are covered by an approval under the EPBC Act.

Permits regarding cetaceans are issued by the Environment Minister.⁴⁵ Decisions regarding permits can be reviewed (appealed) in the Administrative Appeals Tribunal, but not if the decision was made by the Minister personally.⁴⁶

³⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 285.

⁴⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 224 – 247.

⁴¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 225.

⁴² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 225(2) and 227.

⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 229 – 229C.

⁴⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 231.

There are a range of offences and regulations specifying things such as how close boats and aircraft can come to cetaceans and their calves; prohibitions on feeding, touching and swimming with cetaceans; and how whale watching must be carried out.⁴⁷

The Environment Minister may make a wildlife conservation plan for cetaceans in the Australian Whale Sanctuary.⁴⁸

For more information on how marine mammals are protected under the EPBC Act, see our [Marine & Fisheries Management Fact Sheet](#).

Saving whales in the Australian Whale Sanctuary⁴⁹

EDO NSW acted for the Humane Society International Inc (HSI) against Japanese whaling company, Kyodo Senpaku Kaisha Ltd (Kyodo) in a long running case that concluded in 2008.

The proceedings were brought in the Federal Court of Australia. HSI sought a declaration that Kyodo breached the EPBC Act by whaling in the Australian Whale Sanctuary adjacent to Antarctica and an injunction to prevent them from continuing to kill whales there. In response, Kyodo claimed that it does not recognise Australia's sovereignty over the Antarctic waters which constitute the whale sanctuary.

In a judgment handed down on 15 January 2008, His Honour Justice Allsop made a declaration that Kyodo was in breach of Australian law by whaling in the Australian Whale Sanctuary and granted HSI an injunction to restrain Kyodo from further breaches of the EPBC Act.

Key threatening processes

A list of key [threatening processes](#) must be established by the Environment Minister under the EPBC Act.⁵⁰ A key threatening process is one that threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.⁵¹

Listed key threatening processes include:

- Predation by European Red Fox;
- Competition and land degradation by rabbits and unmanaged goats;

⁴⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 237 and 238.

⁴⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 243A.

⁴⁷ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 8.01 – 8.12.

⁴⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 285.

⁴⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3

⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 183.

⁵¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 188(3).

- Incidental bycatch of sea birds (e.g. Albatross) during longline fishing operations;
- Land clearing;
- Ingestion or entanglement by marine species in harmful marine debris; and
- Lethal toxic ingestion caused by eating cane toads.

Nominating a new key threatening process

The [nomination process](#) for adding new key threatening processes to the list is the same as the 12-month revolving assessment process for adding threatened species (see above) in that the public can nominate new key threatening processes for consideration by the Threatened Species Scientific Committee within the annual timeframe.

Once a threatening process is listed under the EPBC Act the Minister must decide whether to prepare a threat abatement plan.

Threat abatement plans

The listing of a key threatening process can trigger the need for a threat abatement plan. A threat abatement plan sets out what needs to be done in order to reduce a particular key threatening process to an acceptable level in order to maximise the chances of the long-term survival in nature of native species and ecological communities affected by the threatening process.⁵²

The listing of a key threatening process does not automatically require the preparation of a threat abatement plan. Within 90 days of a process being listed, the Environment Minister must decide whether or not having a threat abatement plan is a feasible, effective and efficient way to reduce the threat.⁵³

There are no criteria to guide this decision, but the Environment Minister must seek advice from the Scientific Committee and from affected State and Territory governments.⁵⁴ 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.⁵⁵

It is not an offence for an individual to breach a threat abatement plan. The plan simply guides Commonwealth action. In particular, a Commonwealth agency must not take any action that contravenes a threat abatement plan, and the

⁵² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 271(1), and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 7.12.

⁵³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 270A(1), and (2).

⁵⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 270A(3).

⁵⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), sub-ss. 270A(8) and 270A(1)(b).

Commonwealth must implement the plan to the extent to which it applies in Commonwealth areas.⁵⁶

Threat abatement plans include plans covering land degradation caused by goats and rabbits, dieback and incidental bycatch of seabirds (Albatross) during long line fishing operations.

The Environment Department keeps a list of [approved threat abatement plans](#).

Permits to kill, injure, etc. threatened species

It is an offence to harm nationally listed threatened species without a permit. However, a permit is only required if the threatened species or ecological community is in or on a Commonwealth area. Note: if the threatened species or ecological community is on non-Commonwealth land, then the assessment and approval provisions will apply – see Threatened Species and Development below.

Permits regarding nationally listed threatened species are issued by the Environment Minister under the EPBC Act.⁵⁷

What is a “Commonwealth area”?

A “Commonwealth area” is:⁵⁸

- Land owned by the Commonwealth or a Commonwealth agency (including land owned in Norfolk Island), and includes airspace over the land;
- Land held under lease by the Commonwealth or a Commonwealth agency, including an area held under lease in Norfolk Island and airspace over the land;
- Land in an external Territory and in the Jervis Bay Territory and airspace over the land;
- The coastal sea, continental shelf and the waters and airspace above the continental shelf, and waters within Australia’s exclusive economic zone, the seabed under those waters and the airspace above those waters.

Offence to kill, injure, take or trade

It is an offence to take an action that results in the death or injury of a member of a listed threatened species or part of an ecological community in a Commonwealth area.⁵⁹ It is also an offence to take, trade, keep or move a listed

⁵⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 268 – 269.

⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 201.

⁵⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 525; defines “Commonwealth area”.

⁵⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 196 – 196A.

threatened species or part of an ecological community which is in or on a Commonwealth area.⁶⁰

Defences

Defences include:⁶¹

- If the person holds a permit to take the action;
- If the action is done in accordance with a recovery plan;
- If the action is covered by an approval under the EPBC Act; or
- If the action was taken in a humane manner and was reasonably necessary to relieve or prevent the suffering of the listed threatened species.

Applications for permits

Applications for permits regarding threatened species are made to the Environment Minister, who is responsible for issuing permits.⁶²

The public can comment on permit applications.

The Environment Department has more information on permits on its [website](#).

Appeals

An applicant who is unhappy with a decision to issue, refuse, vary, revoke, suspend or impose a condition on a permit can seek a review of the decision in the Administrative Appeals Tribunal.⁶³ This right of review does not apply if the Environment Minister made the decision personally, and not through a delegate.⁶⁴

Threatened species and development

Activities and developments that are likely to have a significant impact on a threatened species or ecological community may be “controlled actions” under the EPBC Act, and cannot proceed unless they are assessed and approved by the Environment Minister under the EPBC Act.⁶⁵ This applies to threatened species and ecological communities wherever they are found in Australia, not just within Commonwealth areas.

⁶⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 196B, 196C, 196D, 196E.

⁶¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 197.

⁶² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 200 – 201.

⁶³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), sub-s. 206A(1).

⁶⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), sub-s. 206A(2).

⁶⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18 – 19

It is an offence for a person to take an action that has, or will have, a significant impact on a listed threatened species or ecological community without approval or some other listed authorisation.⁶⁶

For more information on how the assessment and approval process works, see our [EPBC Act Fact Sheet](#).

Remember that a threatened species or ecological community can be protected under both NSW law and Commonwealth law at the same time. If you are concerned about a particular species, you should check both the NSW and Commonwealth threatened species databases.

[Click here](#) to go to the Commonwealth threatened species database.

[Click here](#) to go to the NSW threatened species database.

Bilateral (assessment) agreements

The EPBC Act allows for the Commonwealth to enter into bilateral (assessment) agreements with each State. This allows the Commonwealth to accept an environmental assessment done by the State if the assessment was done in accordance with the agreement.⁶⁷ Where this occurs, the assessment under State law replaces the need for assessment under the EPBC Act. After assessment, the proposed action still requires approval from the Australian Minister for Environment. The purpose of bilateral agreements is to reduce duplication of environmental assessment between the Commonwealth and States.

NSW Bilateral Agreement relating to environmental impact assessment

The Australian and NSW governments have signed a [bilateral assessment agreement](#) which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

In practice, the proponent will refer projects to the Australian Government, who will determine whether the project is a [controlled action](#), and then notify the NSW Government that a referral has been made. The NSW Government will then assess the project, and as part of its usual State processes (e.g. development assessment) it will undertake an [assessment for the Australian Government](#) using its own assessment processes under the bilateral agreement.⁶⁸

⁶⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18, 18A, 19 and 517A.

⁶⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 45 – 65A.

⁶⁸ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.⁶⁹ [Read EDO NSW's law reform submission on the draft bilateral agreement for more information.](#)⁷⁰

Enforcement

The Environment Minister, through the Environment Department, is responsible for enforcing the provisions of the EPBC Act.

If you think that someone has unlawfully interfered with a threatened species or ecological community, you should [report it](#) to the Compliance and Enforcement Branch of the Environment Department.

Alternatively, you can report a breach to, and seek advice from, EDO NSW by calling 02 9262 6989, or if you are in the Northern Rivers region, 1300 369 791.

Conservation orders

The Environment Minister can make a conservation order to protect nationally listed threatened species or ecological communities in Commonwealth areas.⁷¹

Court action

The Environment Minister has various enforcement powers to protect threatened species, including bringing a criminal prosecution, or a civil enforcement action such as an injunction or declaration that the EPBC Act has been breached. Enforcement cases are heard in the Federal Court.

If the Environment Minister fails to take action, it is possible for an individual or organisation to bring proceedings to enforce the EPBC Act, if they are:

- an individual whose interests are affected, or who has been engaged in activities to protect the environment during the previous two years (called an “interested person”);⁷² or
- an organisation (incorporated in Australia) whose interests are affected, or which, during the previous 2 years, has had the protection of the environment as one of its objects and purposes and which has been engaged in environmental protection.⁷³

⁶⁹ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

⁷⁰ http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

⁷¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 464.

⁷² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 475(6). An individual can take action on behalf of an unincorporated association: ss 475(1)(c).

⁷³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 475(7).

Glossary

Key to terms used in this Fact Sheet

Department means the Australian Department of the Environment

Environment Minister means the Australian Minister for the Environment

EPBC Act means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Minister means the Australian Minister for the Environment

TSC Act means the *Threatened Species Conservation Act 1995* (NSW)

Useful resources

- [Australian Environment Department website](#) on threatened species and ecological communities
- Lyster, Lipman, Franklin, Wiffen and Pearson, *Environmental & Planning Law in New South Wales*, (Federation Press 2012)
- Farrier and Stein, *The Environmental Law Handbook*, (5th ed, 2011) Chapter 7, pp 273-304
- Bates, G, *Environmental Law in Australia*. (7th ed, 2010)