

Native Plants & Animals



Environment Protection and Biodiversity Conservation Act

Last updated: March 2014

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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 assessment (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.

Responsibility for environmental matters in Australia is split between the State⁵ and Australian governments. Although primary responsibility rests with States, the Australian Government has a role to play in environmental matters.

Summary of Commonwealth environmental responsibilities

The main national environmental law is the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#)⁶ (EPBC Act).⁷

Under the EPBC Act, the Australian Government is responsible for regulating matters of national environmental significance (see below).

This Fact Sheet explains how the EPBC Act works. Our [Commonwealth heritage protection](#) Fact Sheet deals with heritage matters under national law.

EPBC Act website

The Environment Department has a very [comprehensive website](#)⁸ which explains how the EPBC Act works.

It includes details about:

- What is protected,
- How to obtain approval,

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

⁴ http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

⁵ A reference in this Fact Sheet to a 'State' includes a 'Territory'.

⁶ <http://www.comlaw.gov.au/Series/C2004A00485>

⁷ There are also extensive regulations made under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*: see the [Environment Protection and Biodiversity Conservation Regulations 2000 \(Cth\)](#): <http://www.comlaw.gov.au/Series/F2000B00190>

⁸ <http://www.environment.gov.au/>

- Approved lists under the EPBC Act (e.g. nationally listed threatened species),
- How to refer a matter to the Department, and
- Notices showing the progress of applications for approval under the EPBC Act.⁹

The [EPBC Act website](#)¹⁰ allows you to find out whether there are any matters in your area that are affected by the EPBC Act. You can search an area by browsing maps, entering coordinates, or by Local Government Area. The website will then generate an EPBC Act [Protected Matters Report](#)¹¹ showing all of the Matters of National Environmental Significance in your area which are protected under the EPBC Act (e.g. World Heritage sites, National Heritage places, Ramsar wetlands or endangered species). This mapping tool should only be used as an initial guide.

What kinds of activities require Australian Government approval?

The EPBC Act applies to ‘controlled actions’. A person who wishes to carry out a controlled action must first obtain an approval from the Environment Minister unless the Minister decides that an approval is not needed for that action.¹²

It is an offence to carry out a controlled action without approval.¹³

What is a controlled action?

A controlled action¹⁴ is an action which is likely¹⁵ to have a significant impact on:

⁹ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has an extensive list of matters which the Minister is required to publish on the Internet so that the public can track the progress of applications: ss. 170A, 515A.

¹⁰ <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/protected>

¹¹ <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/protected>

¹² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 33-36, 75-77A.

¹³ Note: the prohibited action may either be a criminal offence or incur a civil penalty: see *Environment Protection and Biodiversity Conservation Act 1999* (Cth), (World Heritage) ss. 12(1), 15A; (National Heritage) ss. 15B, 15C; (Ramsar Wetlands) ss. 16, 17B; (Threatened species) ss. 18, 18A; (Migratory species) ss. 20, 20A; (Nuclear actions) ss. 21, 22A; (Marine environment) ss. 23, 24A; (Great Barrier Reef Marine Park) ss. 24B, 24C; (Protection of water resources from coal seam gas development and large coal mining development) ss. 24D, 24E.

¹⁴ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) defines a ‘controlled action’, s. 67.

¹⁵ The term ‘likely’ is not defined in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). However, when a significant impact is ‘likely’ is explained in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) *Significant Impact Guidelines 1.1 – Matters of National Environmental Significance* (October 2009) on page 3 as follows: ‘To be “likely”, it is not necessary for a significant impact to have a greater than 50% chance of happening; it is sufficient if a significant impact on the environment is a real or not remote chance or possibility.’

- a ‘matter of national environmental significance’;¹⁶ or
- Commonwealth land.¹⁷

What is an ‘action’?

An ‘action’ is defined broadly and includes a project, a development, an undertaking, an activity or series of activities, or an alteration of any one of these things.¹⁸

Examples of actions¹⁹ might include:

- Construction, alteration and demolition of buildings and infrastructure
- Mineral and petroleum resource exploration and extraction
- Industrial processes
- Storage or transport of hazardous materials
- Extraction and diversion of water
- Vegetation clearance.

The following things are *not* actions:

- a decision by a State or Commonwealth government body to grant an approval (authorisation) for another person to take an action;²⁰
- a grant of funding.²¹

What is a ‘significant impact’?

The EPBC Act does not define ‘significant’ even though the way in which ‘significant’ is interpreted is very important in working out whether an action needs approval.²²

¹⁶ These are listed in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 2, Part 3, Division 1, ss. 12-24C.

¹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 26-27A.

¹⁸ See definition of “action” in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 523.

¹⁹ See *Environment Protection and Biodiversity Conservation Act 1999* (Cth); [Significant Impact Guidelines 1.1 – Matters of National Environmental Significance](#) (October 2009) for more examples (see page 2) and information on ‘significant impacts’.

²⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 524 defines things that are not ‘actions’.

²¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 524A.

²² The term ‘impact’ is defined under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) at s. 527E to include the direct consequences of an action, and also indirect consequences if the action was a substantial cause of the event or circumstance.

However, the Commonwealth has published a number of Guidelines to assist developers, government agencies and the community in deciding whether a proposed action will have or is likely to have a significant impact, including:²³

- [Matters of National Environmental Significance](#),²⁴ and
- [Actions affecting Commonwealth land, and actions by Commonwealth agencies](#).²⁵

A significant impact is understood to be an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. Factors to take into account when deciding whether there is likely to be a significant impact include:

- The sensitivity of the environment which will be impacted;
- All on-site and off-site impacts;
- The total impact over the entire geographic area; and
- Existing levels of impact from other sources.

The [Significant Impact Guidelines](#) provide guidance as to whether an action will have a significant impact and qualify as a controlled action.

The precautionary principle

The precautionary principle is also relevant in determining whether an action is likely to have a significant impact. The precautionary principle only applies if the likely impacts are serious or there is a risk of irreversible damage. If they are, then a lack of scientific certainty about the potential impacts of the action will not itself justify a decision that the action is not likely to have a significant impact.²⁶

²³ See: <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/epbc-act-0>

²⁴ *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.1 - Matters of National Environmental Significance* (October 2009); <http://www.environment.gov.au/epbc/publications/nes-guidelines.html>

²⁵ *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.2 - Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies* (January 2010); <http://www.environment.gov.au/epbc/publications/commonwealth-guidelines.html>

²⁶ *Environment Protection and Biodiversity Conservation Act (Cth)*, s 3(1)(b) (Objects), s 3A(b) (Principles of ecologically sustainable development); and *Environment Protection and Biodiversity Conservation Act (Cth), Significant Impact Guidelines 1.1 - Matters of National Environmental Significance* (October 2009), pages 3 and 7.

What is a ‘matter of national environmental significance’?

There are currently nine matters of national environmental significance listed (triggers) under the EPBC Act.

These are:

1. World Heritage sites (see our [Commonwealth heritage protection](#) Fact Sheet);
2. National Heritage places (see our [Commonwealth heritage protection](#) Fact Sheet);
3. Nationally protected wetlands ([Ramsar wetlands](#));
4. Nationally listed threatened species and ecological communities;
5. Listed migratory species;
6. Nuclear actions (including uranium mines);
7. Commonwealth marine areas;
8. The Great Barrier Reef Marine Park;
9. Coal seam gas or large coal mining developments likely to have a significant impact on a water resource.

Other matters of national environmental significance can be added, by regulation, *without* the agreement of the States, although the States must be consulted.²⁷

World Heritage properties

A person must not take an action that has, will have, or is likely to have a significant impact on the world heritage values of a declared World Heritage property without approval.²⁸

Each World Heritage property has its own world heritage values.²⁹ It is the values, and not the site itself, which are protected. An action is likely to have a ‘significant impact’ if there is a real chance or possibility that it will cause one or

²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 25. Regulations can also provide that a specific action is to be treated as a controlled action, *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 25A.

²⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 12(1).

²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 12(3). The world heritage values for each site are described on the Department of the Environment’s website: <http://www.environment.gov.au/heritage/places/world/index.html>

more of the World Heritage values to be lost, degraded, damaged or notably altered.³⁰

Activities outside the World Heritage property which nevertheless affect the World Heritage values may still need approval.

Case Study: Protection of Flying Foxes in Queensland³¹

In December 2000, Dr Carol Booth, a North Queensland conservationist, assisted by EDO Queensland, sought an injunction under the EPBC Act to restrain a lychee farmer from killing large numbers of Spectacled Flying Foxes through the use of electrical grids.

Expert evidence suggested that the flying foxes roosted in the adjacent Wet Tropics World Heritage Area. The action taken by the farmer was therefore having an impact on a matter of national environmental significance, being the World Heritage values of a declared World Heritage property. The farmer did not have approval under the EPBC Act to kill flying foxes.

In October 2001, Justice Branson in the Federal Court granted Dr Booth an injunction, having found that the killing of large numbers of Spectacled Flying Foxes on the farm was likely to have a 'significant impact' on the World Heritage values of the Wet Tropics World Heritage Area.

While the Court did give consideration to the financial detriment to the lychee farmer due to the injunction, it was noted that this factor was something that would rarely prevail over the protection of World Heritage values.

In [2004 the lychee farmer applied to the Federal Court](#) to have the injunction dissolved to allow the electrical grids to be used, and also asked the Court to declare that the Commonwealth cannot exercise its jurisdiction over private land. The Court found no basis for dissolving the injunction, and held that there is no exception to the Commonwealth's powers with regards to world heritage values for any type of land tenure under the EPBC Act. The lychee farmer was ordered to pay Dr Booth's legal costs.

[Sites on the World Heritage List](#) include the Greater Blue Mountains Area, Fraser Island, the Sydney Opera House, and the Great Barrier Reef.

For more information:

- See the Environment Department's website which provides [an interactive map](#) and details for each World Heritage property.

³⁰ See [Environment Protection and Biodiversity Conservation Act Significant Impact Guidelines 1.1 – Matters of National Environmental Significance](#) (October 2009), pp. 17-19, which provides guidance on determining whether an action is likely to have a significant impact.

³¹ *Booth v Bosworth* [2001] FCA 1453.

- Conduct an online [Protected Matters Search](#) to find out whether there are any World Heritage properties in your area of interest.
- See our [Commonwealth heritage protection](#) Fact Sheet.

National Heritage places

A person must not take an action that has, will have, or is likely to have a significant impact on the heritage values of a listed National Heritage place without approval.³²

A National Heritage place is a place which is on the [National Heritage List](#).³³ The Environment Minister decides, in consultation with the Australian Heritage Council, whether to include a place on the List.³⁴ The heritage values of each National Heritage place (e.g. natural, Indigenous or historic values) are shown on the List.³⁵ It is the heritage values, rather than the site itself, which are protected.

For more information about the listing and protection of National Heritage places, see our [Commonwealth heritage protection](#) Fact Sheet.

To find out whether there are any National Heritage places in your area of interest, you can conduct an online [Protected Matters Search](#).

Ramsar wetlands

A person must not take an action that has, will have or is likely to have a significant impact on the ecological character of a declared Ramsar wetland without approval.³⁶

A declared Ramsar wetland is a wetland which has been listed by the Australian Government under the [Convention on Wetlands of International Importance 1971](#), or declared by the Minister to be a Ramsar wetland.³⁷ The Environment Department's website has more information on the [Ramsar Convention](#) and a [full list of Ramsar Wetlands in Australia](#).

³² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 15B.

³³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 324C.

³⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 324C-324JJ.

Emergency listings are possible: *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 324JK-324JQ. The *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) prescribe the criteria which must be addressed in each listing: cl. 10.01A.

³⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 324D(2).

³⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 16(1), 17B (Offences relating to Ramsar wetlands). *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines, 1.1 – Matters of National Environmental Significance* (October 2009), p. 14, provides guidance as to what is a 'significant impact' on a Ramsar wetland.

³⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 171-7A set out the procedure for declaring Ramsar wetlands. The Convention was signed in the small town of Ramsar, Iran, in 1971, and is thus known as the Ramsar Convention: <http://www.environment.gov.au/water/topics/wetlands/ramsar-convention/index.html>. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 335 allows regulations to set out principles for the management of Australian Ramsar wetlands.

Examples of activities which might have a significant impact on a Ramsar wetland include:³⁸

- destroying or substantially modifying part of a wetland;
- substantially changing the volume, timing, duration or frequency of ground and surface water flows to and within the wetland;
- allowing salinity, pollutants or nutrients onto the wetland; or
- allowing invasive species in the wetland.

Activities outside a Ramsar wetland which affect the wetland, such as an upstream water diversion or the clearing of vegetation, could still trigger the need for approval even though they do not take place on the wetland itself.

To find out whether there are any Ramsar wetlands in your area of interest, you can conduct an online [Protected Matters Search](#).

Case study: Farmer fined \$150,000 for damaging Ramsar wetlands in the Gwydir³⁹

The [Gwydir Wetlands](#) are in north-west NSW, near the town of Moree. They are a declared wetland of international importance under the EPBC Act.

Part of the Gwydir wetlands (about 100 hectares) were on a private property owned by a farmer called Mr Greentree. In June or July 2003, Mr Greentree directed much of the wetland on his property to be cleared and ploughed. He then arranged for about 30% of the wetland to be sown with wheat. This work was done without approval from the Environment Minister. The Environment Minister prosecuted Greentree.

The Federal Court found that the clearing, ploughing and sowing of the Ramsar wetlands were likely to have a significant effect upon them, as the wetlands were effectively sterilised. It also held that the breach was deliberate.

Mr Greentree was fined \$150,000, and his company (which carried out the work) was fined \$300,000, plus ordered to pay the costs of the proceedings. Mr Greentree's appeal against the severity of the penalty was unsuccessful.

Listed threatened species and ecological communities

A person must not take an action that has, will have or is likely to have a significant impact upon a [nationally listed threatened species or endangered ecological community](#) without approval.⁴⁰

³⁸ See [Environment Protection and Biodiversity Conservation Act \(Cth\) Significant Impact Guidelines 1.1 – Matters of National Environmental Significance](#) (October 2009), p. 14.

³⁹ *Minister for the Environment and Heritage v Greentree* (No 3) [2004] FCA 1317

The kind of threatened species which are protected are those species which are listed under the EPBC Act as extinct in the wild, critically endangered, endangered or vulnerable.⁴¹ Some threatened species are also listed as migratory species under the EPBC Act.

The endangered ecological communities which are protected are those listed as critically endangered or endangered, but not those listed as vulnerable.⁴²

To find out whether there are any listed threatened species or ecological communities in your area of interest, you can conduct an online [Protected Matters Search](#).

State-based protection for threatened species

Threatened species and ecological communities can also be protected under NSW legislation. Some species and communities may be protected under both State and Commonwealth law. In order to trigger protection under the EPBC Act, the species or ecological community must be listed on the Commonwealth threatened species lists.

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

Listed migratory species

A person must not take an action that has, will have or is likely to have a significant impact on a listed migratory species without approval.⁴³

Migratory species are those which migrate to, or pass through or over, Australian territory on their annual migrations. Some migratory species are also listed as threatened species.

Examples of migratory species include:

- Birds – albatrosses, terns, plovers and egrets
- Mammals – whales, dugongs

⁴⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18-18A (Offences relating to threatened species, etc); *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 19(4), 517A allow the Minister to grant an exemption for conservation activities.

⁴¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18(1)-18(4), 178, 179: s. 178(1)(f) allows the Minister to list 'conservation dependent' species, but these are not protected under the approval and offence provisions: s. 18A(4); ss. 178-194T set out the procedures for listing threatened species and ecological communities.

⁴² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18(5)-18(6), 181, 182.

⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 20, 20A (Offences relating to listed migratory species); ss. 20B, 517A allow the Minister to grant an exemption for conservation activities.

- Reptiles – some crocodiles

The Minister maintains a [list of migratory species](#).⁴⁴ The list can only contain those species which are protected under international agreements.⁴⁵

Examples of a significant impact include activities which destroy or isolate an area of migratory bird habitat, or divert water which has the effect of altering the hydrological cycles of important habitat.⁴⁶

To find out whether there are likely to be any listed migratory species in your area of interest, you can conduct an online [Protected Matters Search](#).

Nuclear actions

A person must not take a nuclear action that has, will have, or is likely to have a significant impact on the environment without approval.⁴⁷

A nuclear action includes, but is not limited to:⁴⁸

- Establishing or significantly modifying a nuclear reactor;
- Transporting spent nuclear fuel or radioactive waste;
- Establishing a large-scale disposal facility for nuclear waste;⁴⁹ and
- Mining or milling uranium ore.⁵⁰

Note: the Minister is expressly prohibited from approving a nuclear power plant, enrichment plant or reprocessing facility.⁵¹

⁴⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 209(1);

<http://www.environment.gov.au/biodiversity/migratory/list.html>

⁴⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 209(3). The [international agreements](#) are:

- the China – Australia Migratory Bird Agreement (CAMBA);
- the Japan – Australia Migratory Bird Agreement (JAMBA);
- the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention); and
- any other native species listed under an international agreement for the conservation of migratory species approved by the Minister.

⁴⁶ More detail on how a 'significant impact' is determined can be found in the *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.1 – Matters of National Environmental Significance* (October 2009), p. 13

⁴⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 21, 22A (Offences relating to nuclear actions).

⁴⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 22. See also *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 2.01, 2.02 which specify minimum radioactive levels.

⁴⁹ *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 2.03 which specifies minimum radioactive levels for large-scale disposal facilities.

⁵⁰ Further examples of the significant impact criteria for nuclear actions can be found in the *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.1 – Matters of National Environmental Significance* (October 2009), p. 24.

Commonwealth marine areas

A person must not take an action in a Commonwealth marine area that has, will have, or is likely to have a significant impact on the environment without approval.⁵²

The Commonwealth marine area⁵³ includes waters:

- Between three nautical miles and 200 nautical miles off Australia's coastline (exclusive economic zone); and
- Over the continental shelf,⁵⁴

excluding State or Northern Territory waters (territorial waters).⁵⁵

The Commonwealth marine area includes the seabed under those waters, and the airspace over the waters.⁵⁶

Actions which take place outside a Commonwealth marine area but which still have a significant impact on the environment within the marine area may still require approval.⁵⁷

Examples of actions which might require approval include:⁵⁸

- Introducing a pest species in the Commonwealth marine area;
- Actions affecting the breeding, feeding or migration behaviour of a population of marine species or whales; and
- Introducing persistent organic chemicals, heavy metals or other harmful chemicals.

To find out whether your area of interest is in a Commonwealth marine area you can conduct an online [Protected Matters Search](#).

⁵¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 140A.

⁵² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 23, 24A (Offences relating to marine areas).

⁵³ A 'Commonwealth marine area' is defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 24.

⁵⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 24 (d).

⁵⁵ Waters within 3 nautical miles of the coast are generally State waters (territorial waters): *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 24(a), 24(d).

⁵⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 24.

⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 23(2); *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.1 – Matters of National Environmental Significance* (October 2009), p. 15.

⁵⁸ For more detail on the significant impact criteria in Commonwealth marine areas, see [Environment Protection and Biodiversity Conservation Act \(Cth\) Significant Impact Guidelines 1.1 – Matters of National Environmental Significance](#) (October 2009), p. 15.

Coal seam gas or large coal mining developments likely to have a significant impact on a water resource

A person must not undertake a coal seam gas or large coal mining development that is likely to have a significant impact on a water resource without approval.⁵⁹

Examples of actions which might require approval include.⁶⁰

- A large open-cut coal mine in a water catchment that includes storage dams for mine affected water; and
- A coal seam gas development which impacts aquifers that are connected to a permanent watercourse which is of high utility to other users.

To find out whether your area of interest is a protected water resource you can conduct an online [Protected Matters Search](#).

[Read our Fact Sheets](#) for more information on how mining and coal seam gas developments are assessed.

Activities on Commonwealth land

A person must not take an action on Commonwealth land that has, will have, or is likely to have a significant impact on the environment without an approval.⁶¹

An approval is also required for actions taken *outside* Commonwealth land if the action will still impact on Commonwealth land.⁶²

- **What is Commonwealth land?**

'Commonwealth land' is:

- land owned by the Commonwealth (or a Commonwealth agency);
- land held under lease by the Commonwealth (or a Commonwealth agency);
or
- land in an external Territory or Jervis Bay.

It includes the airspace over these areas,⁶³ but does not include a Commonwealth marine area.⁶⁴

⁵⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 24D, 24E.

⁶⁰ For more detail on the significant impact criteria for Coal seam gas and large coal mining developments - impacts on water resources see:

<http://www.environment.gov.au/resource/significant-impact-guidelines-13-coal-seam-gas-and-large-coal-mining-developments-impacts>

⁶¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 26, 27A (Offences relating to Commonwealth land).

⁶² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 26(2), 27A(3), 27A(4) (Offences).

⁶³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 525(1).

Activities by the Commonwealth (or Commonwealth agencies)

The Commonwealth (or a Commonwealth agency) must not take an action that has, will have, or is likely to have a significant impact on the environment without approval.⁶⁵

The provision applies to Commonwealth actions both inside and outside Australia.⁶⁶ Similarly, it is the environment both inside and outside Australia which is protected.⁶⁷

Note that certain exceptions apply.⁶⁸

- **What is a Commonwealth agency?**

A Commonwealth agency⁶⁹ includes:

- A Commonwealth Minister,
- A body corporate established by the Commonwealth or a Minister,
- A company owned or controlled by the Commonwealth, and
- A person holding office or appointed under a Commonwealth law.

Exemptions from the need for approval

In some cases, an action will not require approval from the Environment Minister despite triggering the EPBC Act.⁷⁰

An action will not require approval if it falls within one of the exemptions described below.

Prior authorisation and continuing use exemptions

If an action:

- was already authorised before 16 July 2000;
- did not need any further authorisation as at 15 July 2000; and
- has remained within the scope of the authorisation,

⁶⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 27.

⁶⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 28(1), 28(2).

⁶⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 28(1).

⁶⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 28(1).

⁶⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 28(2), 28(3), 28(4).

These exceptions include actions which are declared to be for Australia's defence or security, dealing with a national emergency, or actions which are covered by a general Ministerial declaration.

⁶⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 528 (Definitions).

⁷⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 29-43B describe the cases in which environmental approvals are not needed.

it will not need approval under the EPBC Act (because it had prior authorisation).⁷¹

Lawful continuing uses which commenced before 16 July 2000 are also exempt.⁷²

Note: An enlargement, expansion or intensification of an existing use is probably not covered by the exemption and will require assessment and approval.

For more information on the prior authorisation and continuing use exemptions, see [Prior Authorisation and Continuing Use Exemptions](#).⁷³

Ministerial declarations

The Minister can declare that actions taken in accordance with accredited management plans,⁷⁴ bioregional plans,⁷⁵ or conservation agreements⁷⁶ do not require approval under the EPBC Act.

Regional forest agreements

Forestry operations which are carried out in accordance with a regional forest agreement do not require approval.⁷⁷

However, approval will still be required if the forestry operation is:⁷⁸

- in a property on the World Heritage List
- on a Ramsar wetland, or
- only incidental to another action (ie for which the primary purpose is not forestry).

See our [Fact Sheet on Forestry](#) for more information about forestry.

⁷¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 43A.

⁷² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 43B.

⁷³ See the *Practice Guide 1* on the Environment Department's website entitled *Prior Authorisation and Continuing Use Exemptions*, ss. 43A and 43B (2009):

<http://www.environment.gov.au/epbc/publications/exemptions.html#appendix-1>

⁷⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 4 Division 2 (Ministerial declarations and accredited management plans), ss. 32-36A.

⁷⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 4 Division 3 (Actions covered by Ministerial declarations and bioregional plans), ss. 37-37J.

⁷⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 4 Division 3 (Actions covered by conservation agreements), s. 37M.

⁷⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 38-42. Regional Forest Agreements are regulated under the *Regional Forests Agreement Act 2002* (Cth).

⁷⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 42.

Certain activities in the Great Barrier Reef Marine Park

No approval is required if the action is authorised by a zoning plan, plan of management, permission, authority, approval or permit under the *Great Barrier Reef Marine Park Act 1975* (Cth).⁷⁹

Referring a matter to the Environment Minister

If a controlled action will have, or is likely to have, a significant impact on a matter of national environmental significance, then it must be referred to the Environment Minister for assessment and approval before the activity begins.⁸⁰

Failure to refer a matter caught by the EPBC Act and to obtain approval will mean that the action is unlawful and the person or organisation carrying out the activity may be prosecuted, or fined,⁸¹ or an injunction may be granted to stop the action.⁸²

How is a matter referred to the Minister?

There are 4 ways that a proposed action can be referred to the Environment Minister.⁸³ These are described below.

Referral by person taking the action

The person or organisation proposing to take an action can refer their proposal to the Environment Minister for a decision as to whether it is a 'controlled action'.⁸⁴

They can still refer a matter even if they think that their activity is not a controlled action, or if they are unsure.⁸⁵ In this way, the proponent can obtain a definitive answer as to whether their activity requires assessment and approval under the EPBC Act or not.

Where a State government or local council is the proponent, they can refer their own actions to the Minister.⁸⁶

⁷⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 43.

⁸⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 67A.

⁸¹ The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) provides for civil penalties: ss. 481-485.

⁸² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 475-480.

⁸³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 72 sets out the form and content of referral; the *EPBC Regulations 2000* set out further details that must be included in referrals: cl 4.01 – 4.03, and Sch 2.

⁸⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 68.

⁸⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 68(2), 68(3).

⁸⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 68.

Referral by a State government or local council

A State or Territory government or agency that is aware of a proposal and has some administrative responsibilities regarding the proposed action can refer the matter to the Environment Minister.⁸⁷

For example, State government departments which deal with planning, land and water or national parks will often have some role to play in relation to a proposed activity. A local council can also make a referral if it has some role to play in approving the action, eg by granting development consent.⁸⁸

Environment Minister can ‘call in’ a controlled action

If the Environment Minister believes that somebody is about to take a controlled action, the Minister can request the person or the State (or State agency) responsible to refer the proposal to him or her.⁸⁹ If no referral is made within the set time period, the Minister can deem the action to be referred.⁹⁰

Referral by a Commonwealth agency

A Commonwealth agency⁹¹ that becomes aware of a proposal can refer the matter to the Environment Minister for a decision as to whether the proposal is a controlled action if the agency has some administrative role.⁹²

The Environment Department has produced a [referral of proposed action](#)⁹³ for use in referring matters to it.

Can members of the public refer proposals?

No, a proposal can only be formally referred to the Minister by one of the 4 processes listed above.

If you want a proposal to be referred to the Environment Minister you could:

- write to the government bodies listed above asking them to refer the proposal to the Environment Minister;
- write to the Environment Minister and ask the Minister to request that the proponent refer the matter to the Minister;⁹⁴ or

⁸⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 69.

⁸⁸ See the definition of “agency” of a State under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 528.

⁸⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 70.

⁹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 70(3).

⁹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 528 defines ‘Commonwealth agency’.

⁹² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 71.

⁹³ <http://www.environment.gov.au/epbc/assessments/referral-form.html>

⁹⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 70.

- report the proposal to the [Compliance and Enforcement Branch](#) of the Environment Department.

It is an offence to take an action if a referral has been made (and the proponent knows about the referral) but a decision is still pending.⁹⁵

Right to comment on referrals

As soon as practicable after receiving a referral, the Environment Minister must [publish the referral](#) on the internet.⁹⁶ The public has 10 business days to comment on whether the action is a controlled action.⁹⁷

There are no formal requirements for commenting on referrals. However, all submissions should include your name, address and contact details.

It is important to comment at this stage because if the Minister decides that the proposal is not a controlled action, there will be no environmental impact assessment carried out at the Commonwealth level.

When making your comments you should:

- Read the referral documents carefully and point out any missing or incorrect information (e.g. any listed threatened species not mentioned, any wrong hydrological information);
- Attach any evidence or reports that you have which support your comments (e.g. lists of migratory birds or threatened species spotted in the area);
- Make reference, if possible, to the things set out in the Guidelines on significant impact,⁹⁸ and
- Comment on the type of assessment that you think should follow.

[Read our Fact Sheet](#) for more information about writing a submission.

Reporting a breach

If you think someone is about to take a controlled action without approval, you can [report the breach](#) to the Environment Department directly and ask it to investigate the matter. Callers can remain anonymous.

Minister decides whether action needs approval

⁹⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 74AA.

⁹⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 74(3), s. 170A.

⁹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 74(3)(b), 75(1A)(b).

⁹⁸ *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.1 - Matters of National Environmental Significance*, October 2009; and *Environment Protection and Biodiversity Conservation Act (Cth) Significant Impact Guidelines 1.2 - Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies*, January 2010

If a proposal is referred, it is the Environment Minister who decides whether a proposed activity is a 'controlled action'.⁹⁹

The Environment Minister must make a decision as to whether a proposal is a controlled action within 20 days of receiving a referral,¹⁰⁰ unless further information is requested, in which case the clock stops.¹⁰¹

If the Minister decides that a proposal is a controlled action, it will need to be assessed and approved by the Minister before it can go ahead.

How does the Minister decide whether a proposal is a 'controlled action'?

Decision that action is clearly unacceptable

The Environment Minister may make a quick decision that the environmental impacts of a proposed action are clearly unacceptable, without having to decide whether something is a 'controlled action'.¹⁰²

The Minister must make this decision within 20 days of receiving a referral, and if so, must then notify the person proposing the action of the decision as soon as possible.

Case example: Galilee Coal Project, Shoalwater Bay, Queensland

In September 2008, the Environment Minister used this procedure to reject a proposal by Waratah Coal Incorporated to build a port and coal loading facility in the relatively pristine area of the Shoalwater Bay Military Training Area, Queensland. The Minister cited the potential impacts on Ramsar wetlands and Commonwealth land as being clearly unacceptable.

Minister must apply the precautionary principle

In deciding whether an action needs approval, the Minister must take into account the precautionary principle.¹⁰³ The precautionary principle states that, if a proposal involves a threat of serious or irreversible environmental harm, then lack of scientific certainty about the potential impacts of that proposal should not be used as a reason for postponing preventative measures.¹⁰⁴ In other words, the Minister should err on the side of caution.

If the Minister decides that a proposal is not a 'controlled action' and therefore no approval is required, the proponent cannot be prosecuted under the EPBC Act

⁹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 75.

¹⁰⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 75(5).

¹⁰¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 75(6).

¹⁰² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 74B-74D.

¹⁰³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 391.

¹⁰⁴ See the definition in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 391(2).

for carrying out the work, even if it does end up significantly affecting a matter of national environmental significance or Commonwealth land.¹⁰⁵

Minister must take into account public comments

The Minister must take into account any comments received during the 10-day period during which the public could comment on whether the action was a controlled action.¹⁰⁶

Assessment

Minister must choose type of assessment

If the Environment Minister decides that a proposal is a ‘controlled action’, then the next step is for the Minister to choose what kind of environmental impact assessment is required.¹⁰⁷ This decision must be made within 20 business days of receiving the referral.¹⁰⁸

The Minister must choose one of the following assessment methods:¹⁰⁹

- An accredited assessment process;¹¹⁰
- An assessment on the referral information only;¹¹¹
- An assessment on preliminary documentation;¹¹²
- A public environment report (PER);¹¹³

¹⁰⁵ Where the Minister has made a decision that an action is not a “controlled action”, the prohibition and offence provisions do not apply: see *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 12(2)(c), 15A(4)(c), 15B(8)(c), 15C(16)(c), 16(2)(c), 17B(4)(c), 19(3)(b), 20(2)(c), 20A(4)(c), 21(4)(c), 22A(8)(c), 23(4)(c), 24A(8)(c), 25(2)(c), 26(3)(d), 27A(6)(c), 27C(5)(c), 28(2)(d).

¹⁰⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 75(1A).

¹⁰⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 87.

¹⁰⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 88(1), 156 (General rules about time limits).

¹⁰⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 87 sets out the process which the Minister must follow in deciding which level of assessment is required.

¹¹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 87(4), 91(2). This is otherwise known as ‘one-off accreditation’. The assessment is carried out under another law of the Commonwealth or State, and a report is given to the Minister.

¹¹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 92-93; *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 5.03A.

¹¹² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 94-95C. This type of assessment is usually chosen if the impacts of the proposal are expected to be few, or confined to a small area, or are well understood and can be confidently predicted.

¹¹³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 96-100; *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 5.04. This type of assessment is likely to be chosen if the proposal raises a small number of issues which require further information to ensure adequate assessment.

- An environmental impact statement (EIS);¹¹⁴ or
- A public inquiry.¹¹⁵

There are two exceptions to this process:

- where the Commonwealth has signed an *assessment bilateral agreement* with a State.¹¹⁶ A bilateral assessment agreement exists with NSW (see below).
- if there is a *Ministerial declaration* in force exempting the action.¹¹⁷

The Minister's decision about which approach is to be used must be [published on the Internet](#).¹¹⁸

Assessment bilateral agreements

The Australian Government can enter into assessment bilateral agreements with each State. Under these agreements, the Australian Government can accept an environmental assessment carried out by the State if the assessment was done in accordance with the bilateral agreement.¹¹⁹ 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 Environment Minister.

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

¹¹⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 101-105; *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl. 5.04. An EIS will be required if the proposal raises a large number of issues or complex matters, and the Minister requires further detailed information.

¹¹⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 106-129. A public inquiry can be used in conjunction with a PER or EIS (s 90). It provides a forum for more extensive public involvement in the assessment where the impacts are expected to be extensive.

¹¹⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 83. In this case, the Commonwealth environmental assessment will be replaced by the assessment which is done under State law.

¹¹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 84.

¹¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 170A(d); <http://www.environment.gov.au/epbc/notices/index.html>

¹¹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 45-65A.

assess the project, and as part of its usual State assessment (e.g. development assessment) it will undertake an [assessment for the Australian Government](#) using its own assessment processes under the bilateral agreement.¹²⁰

The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.¹²¹ [Read EDO NSW's law reform submission on the draft bilateral agreement for more information.](#)¹²²

Are all environmental impacts assessed?

No. In deciding what sort of assessment is required (and whether to approve an action), the Minister can only consider those environmental impacts which are caught by the EPBC Act, i.e. those which relate to a matter of national environmental significance, Commonwealth land or an action by the Commonwealth.¹²³

Environmental impacts which are not covered by the EPBC Act do not have to be assessed or considered by the Environment Minister, although they may require assessment under State law.

Opportunities for public comment

There is no opportunity for the public to comment on, or participate in, the Minister's decision about the type of assessment to be undertaken. However, the public will usually have an opportunity to comment on the draft assessment documentation before the Minister makes a decision about whether to approve a proposal.

For example, the following types of assessment must be published on the Internet¹²⁴ and the public given an opportunity to comment within a fixed time limit:

- Assessment on referral information¹²⁵
- Assessment on preliminary documentation (if so directed by Minister)¹²⁶
- Public environment report.¹²⁷

¹²⁰ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

¹²¹ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

¹²² http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

¹²³ These are called the 'relevant impacts' of the proposed action: *Environment Protection and Biodiversity Conservation Act (Cth)*, ss. 82, 87.

¹²⁴ *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, ss. 170A, 515A.

¹²⁵ *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, s. 93(3).

¹²⁶ *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*, s. 95 and 96.

- Environmental Impact Statement.¹²⁸

[Click here](#) to view the public notices and invitations to comment under the EPBC Act.

Approvals

What must the Environment Minister consider?

The Environment Minister decides whether to approve a controlled action.¹²⁹

In making the decision, the Minister must take into account:¹³⁰

- The impacts on each matter of national environmental significance;
- Economic and social matters;
- The principles of ecologically sustainable development (see below);
- The environmental assessment material and any subsequent reports;
- Public comments;¹³¹ and
- Comments from other Ministers.

The Minister cannot act inconsistently with Australia's obligations under the relevant international conventions when granting an approval relating to World Heritage sites,¹³² National Heritage places,¹³³ Ramsar wetlands,¹³⁴ threatened species or ecological communities¹³⁵ or migratory species.¹³⁶ Similarly, the Minister must not grant an approval that is inconsistent with a recovery plan or a threat abatement plan.¹³⁷

¹²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 98.

¹²⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 103.

¹²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 9 deals with approvals; s. 133 (Grant of approval).

¹³⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 136.

¹³¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 136(2)(f), but only those public comments made in response to an invitation under s. 131A.

¹³² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 137. The Minister must also not act inconsistently with the Australian World Heritage management principles or a management plan: ss. 137(b), 137(c).

¹³³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 137A. The Minister must also not act inconsistently with a management plan: s. 137A(c).

¹³⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 138.

¹³⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 139. The Minister must also have regard to any approved conservation advice: s. 139(2).

¹³⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 140.

¹³⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 139(1)(b).

The principles of ecologically sustainable development

The EPBC Act sets out the principles of ecologically sustainable development¹³⁸ which apply to certain decisions made under the Act.

These principles are:

- The need to integrate economic, environmental, social and equitable considerations;
- The precautionary principle;¹³⁹
- The principle of inter-generational equity;
- The conservation of biological diversity; and
- Improved valuation, pricing and incentive mechanisms.

Conditions of approval

Approvals are often granted subject to a detailed set of conditions.¹⁴⁰

Examples of the kinds of conditions that the Minister might impose¹⁴¹ include:

- conditions requiring a financial contribution to a person or group seeking to protect a matter protected by the EPBC Act,¹⁴²
- a bond or guarantee to meet any costs in repairing damage to the site, and
- ongoing monitoring.

Conditions are legally enforceable.¹⁴³

Approval bilateral agreements

The EPBC Act allows the Commonwealth to enter into agreements with the States which allow a State approval to be recognised for the purposes of the EPBC Act.¹⁴⁴ In other words, the State approval process replaces the

¹³⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 3A.

¹³⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 391 sets out a table of decisions in which the precautionary principle must be considered.

¹⁴⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 134.

¹⁴¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 134(3) sets out a detailed list of examples of conditions that can be attached.

¹⁴² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 134(3)(aa), 134(3)(ab).

¹⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 142. It is an offence to breach a condition: ss. 142A, 142B.

¹⁴⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Part 4, Division 1, ss. 29-31 set out the exemption; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 3 sets out the process for making bilateral agreements.

Commonwealth process. These agreements are called ‘approval bilateral agreements’ (which are different to assessment bilateral agreements).

If an action has been approved in accordance with an approval bilateral agreement, then it will not require the approval of the Environment Minister.

In NSW, there is currently an approval bilateral agreement between the Commonwealth and State Government regarding the Sydney Opera House.¹⁴⁵ The Australian Government has [issued a notice of intent](#) to enter into a more comprehensive approval bilateral agreement for matters of national environmental significance with the NSW Government.¹⁴⁶

How is the EPBC Act enforced?

There are significant penalties for taking a controlled action without approval. The maximum penalty for an individual is \$850,000, and the maximum penalty for a body corporate is \$8.5 million.¹⁴⁷ Certain offences are punishable by up to 7 years imprisonment.¹⁴⁸

The EPBC Act contains a broad range of mechanisms to investigate and enforce the Act. For example:

- the Minister can order an audit to investigate any suspected breach;¹⁴⁹
- the Federal Court can grant an injunction stopping any further activity or work on a site.¹⁵⁰ An injunction can be made on an urgent basis (interim injunction);¹⁵¹

¹⁴⁵ [Sydney Opera House Agreement between the Australian Government and the State of NSW \(December 2005\)](#).

¹⁴⁶ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

¹⁴⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 12(1) (World Heritage); s. 15B (National Heritage); s. 16 (Ramsar wetlands); s. 18 (Threatened species); s. 20(1) (Migratory species); s. 21 (Nuclear actions); s. 23 (Marine environment); s. 26 (Actions on Commonwealth land) (max penalty \$170,000); s. 27B (Commonwealth Heritage places overseas) (max penalty \$170,000); s. 28 (Commonwealth agencies) (max penalty \$170,000). Penalty units are defined in the *Crimes Act 1914* (Cth), s. 4AA. At the time of writing (March 2013), a penalty unit is \$170.

¹⁴⁸ See, for example, s. 15A(3) (World Heritage); s. 15C(13) (National Heritage places); s. 17B(3) (Ramsar wetlands); s. 18A(3) (Threatened species); s. 20A(3) (Migratory species); s. 22A(7) (Nuclear actions); s. 24A(7) (Marine areas); s. 27A(5) (Commonwealth land) (max penalty 2 years); s. 27C(3) (Commonwealth Heritage places overseas) (max penalty 2 years).

¹⁴⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 458-462. These are called ‘directed environmental audits’.

¹⁵⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Division 14 (Injunctions); ss. 475-480.

¹⁵¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 475(5).

- the Federal Court can impose significant civil penalties (fines) and criminal penalties (fines and imprisonment) for individuals and corporations who breach the Act;¹⁵²
- the Minister or Federal Court can order an offender to fix any environmental damage (remediation orders);¹⁵³
- Power to publicise a breach of the Act.¹⁵⁴

Who can bring legal proceedings?

Injunctions

The following people can apply to the Federal Court for an injunction to enforce the EPBC Act:

- The Environment Minister¹⁵⁵ (this is the person most likely to bring proceedings);
- 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');¹⁵⁶ 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.¹⁵⁷

Challenging decisions made under the Act

You may wish to challenge a decision made under the EPBC Act, for example, a decision by the Environment Minister that something is not a controlled action, or a decision to grant an approval to a controlled action.

¹⁵² Civil penalties: for individuals up to \$550,000, and corporations up to \$5.5 million (eg s 12(1), 15B(1), 16(1), 18(1)); criminal penalties of 7 years imprisonment and/or a fine up to \$46,200 (eg s 15A(3), 15C(13), 17B(3), 18A(3), 20A(3), 22A(7), 24A(7)).

¹⁵³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 480A-480C (Federal Court's power to make remediation orders); s. 480D-480N (Minister's power to make remediation determinations).

¹⁵⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 498.

¹⁵⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 475(1)

¹⁵⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 475(6). An individual can take action on behalf of an unincorporated association: s. 475(1)(c).

¹⁵⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 475(7).

The EPBC Act allows the following people (called an interested person¹⁵⁸) to bring legal proceedings (usually in the Federal Court) challenging a decision made under the EPBC Act:

- An individual who lives in Australia and who has been engaged in environmental protection during the previous two years;
- An organisation or association whose objects and purposes include environmental protection and which has been actively engaged in environmental protection during the previous 2 years.

What to do if you think there might be a breach of the Act

If you are concerned about a potential breach of the EPBC Act, you could:

- [Call EDO NSW to seek free initial legal advice about your options](#) on 02 9262 6989 for NSW, or 1300 369 791 if you are in the Northern Rivers region.
- [Contact the Environment Department](#) and ask them to investigate the breach.

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

States means States and Territories of Australia

¹⁵⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 487 (Extended standing for judicial review) extends the meaning of the term *person aggrieved* in the *Administrative Decisions (Judicial Review) Act 1977* and allows them to bring proceedings.