

SCOPE OF THE EPBC ACT

The EPBC Act is the Australian Government's central piece of environmental legislation. The Act reflects the role of the Commonwealth to address environmental matters of national significance, provide a nationally coordinated approach to managing our environment and meet our international commitments. It establishes a national approach to a wide range of environmental protection and biodiversity conservation matters, with responsibility for decision-making bestowed primarily on the Minister for the Environment.

BACKGROUND TO THE ACT

Under the Constitution the Commonwealth has no specific power in respect of the environment and the states and territories have primary responsibility for most land use planning and environment protection. However, since the 1970s the High Court's interpretation of key Constitutional provisions – especially the external affairs power, the trade and commerce power, and the corporations power – has given the Commonwealth substantial power to make laws in relation to the environment. The Commonwealth has also assumed an increasing array of environmental obligations under international treaties. Within this context, the key issue is not so much whether the Commonwealth has the power to make environmental laws but when and how it should do so.

The desire to adopt a more streamlined, integrated and co-ordinated approach to environmental management between the different levels of government gave rise to the [1992 Intergovernmental Agreement on the Environment \(IGAE\)](#). Federal, state/territory and local governments committed to pursuing ecologically sustainable development and sought to define the respective roles of federal and state/territory governments in doing so.

Following on from the IGAE, the Council of Australian Governments initiated a major review of the environmental roles and responsibilities of the Australian Government and the state and territory governments. The outcomes of this review were formally agreed in the [1997 Heads of Agreement on Commonwealth and State roles and responsibilities for the Environment](#).

The changes required to Commonwealth environmental legislation in order to give effect to the 1997 Agreement resulted in the development of the EPBC Act.

The Act replaced five separate pieces of Commonwealth environmental legislation (the *Environment Protection (Impact of Proposals) Act 1974*; the *Endangered Species Protection Act 1992*; the *National Parks and Wildlife Conservation Act 1975*; the *World Heritage Properties Conservation Act 1983*; and the *Whale Protection Act 1980*) and in so doing incorporated a wide range of environmental issues within one legislative framework. For the first time, a direct role had been defined for the Commonwealth in the regulation of matters of national environmental significance. This contrasts with previous legislation which relied on indirect approaches such as export and foreign investment approval to trigger the Commonwealth's environmental assessment and approval processes.

INTERNATIONAL OBLIGATIONS IMPLEMENTED BY THE ACT

The Act provides the domestic legal framework for implementing Australia's obligations under a number of international conventions related to the environment, including:

- the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* done at Ramsar on 2 February 1971 (Ramsar Convention);
- the *Convention Concerning the Protection of the World Cultural and Natural Heritage* done at Paris on 23 November 1972 (World Heritage Convention);
- the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* done at Washington on 3 March 1973;
- the *Convention on the Conservation of Migratory Species of Wild Animals* done at Bonn on 23 June 1979 (Bonn Convention); and
- the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (Biodiversity Convention).

The Act also includes provisions relating to migratory bird conservation bilateral agreements. These include:

- The Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment (JAMBA), 1974;
- The Agreement between the Government of Australia and the Government of the People's Republic of China for the protection of Migratory Birds and their Environment (CAMBA), 1986; and
- The Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds (ROKAMBA), 2006.

DEVELOPMENT OF THE ACT

The Act has evolved since its commencement in July 2000 with a number of amendments expanding the scope of the Act. In particular:

- in 2001, provisions governing trade in wildlife products were incorporated into the Act, replacing the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*;
- in 2002, amendments were made to give effect to certain obligations of the Commonwealth under Regional Forest Agreements;
- in 2003, a regime to protect and manage places of national heritage significance and heritage sites in Commonwealth areas was established;
- in 2006, amendments were made aimed at improving the administrative efficiency and effectiveness of the Act;
- in 2009, amendments were made to include the Great Barrier Reef Marine Park as a matter of national environmental significance; and
- in 2013, amendments were made to make water resources a matter of national environmental significance in relation to coal seam gas and large coal mining.

A more detailed list of amendments to the EPBC Act can be found on the [Department's website](#).

THE OBJECTS OF THE ACT

Section 3 establishes the objects of the Act as:

- to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- to promote the conservation of biodiversity;
- to provide for the protection and conservation of heritage;
- to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous people;
- to assist in the co-operative implementation of Australia's international environmental responsibilities;
- to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge.

ECOLOGICALLY SUSTAINABLE DEVELOPMENT

One of the objects of the Act is to promote ecologically sustainable development (ESD). Section 3A defines the principles of ESD as:

- decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (the precautionary principle);
- the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and
- improved valuation, pricing and incentive mechanisms should be promoted.

The Act requires consideration of 'the precautionary principle' when certain decisions are made under the Act to the extent that consideration is consistent with other provisions of the Act.

MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE (MATTERS OF NES)

The primary focus of the Act is the protection of [matters of national environmental significance](#).

WHAT ARE THE MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE?

There are nine matters of NES, these are:

- World Heritage properties – in particular, the world heritage values of such properties.
- National Heritage places – in particular, the national heritage values of such places.
- Wetlands of international importance ('Ramsar wetlands') – in particular, the ecological character of such wetlands.
- Listed threatened species and ecological communities.
- Listed migratory species.
- Nuclear actions (including uranium mines).
- Commonwealth marine areas.
- The Great Barrier Reef Marine Park.
- A water resource, in relation to coal seam gas development and large coal mining development.

The Act also provides for the recognition of additional matters of NES through the EPBC Regulations.

MATTERS INVOLVING THE COMMONWEALTH

In addition to protecting matters of NES, the Act also regulates matters involving the Commonwealth or Commonwealth land, and protects:

- the environment – for actions taken on Commonwealth land;
- the environment on Commonwealth land – for actions taken outside Commonwealth land;
- the environment – for actions taken by the Commonwealth and Australian Government agencies; and
- the environment in overseas Commonwealth Heritage places listed under the Act – for actions taken outside Australia by persons to whom the Act applies.

Under the Act, 'environment' includes:

1. ecosystems and their constituent parts, including people and communities;
2. natural and physical resources;
3. the qualities and characteristics of locations, places and areas;
4. heritage values of places; and
5. the social, economic and cultural aspects of a thing mentioned in (1), (2), (3) or (4).

Collectively, the matters of NES and matters involving the Commonwealth or Commonwealth land are referred to as 'protected matters'. The following are referred to collectively as 'protected matters' under the EPBC Act:

- matters of NES;
- environment in general (for actions by the Commonwealth or Australian Government agencies and actions on Commonwealth land);

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- environment on Commonwealth land (for actions outside Commonwealth land); and
- environment in an overseas Commonwealth Heritage place listed under the Act (for actions taken outside Australia).

Under the Act an action that has, will have or is likely to have a significant impact on a protected matter, requires approval from the Minister. There are substantial penalties for taking such actions without approval – civil penalties up to \$10.5 million and criminal penalties up to seven years imprisonment.

WHAT IS AN ACTION?

An ‘action’ is defined in the Act as including a project, development, undertaking, activity or series of activities, and an alteration of any of these things. An action does not include a government decision to issue a governmental authorisation or award a grant. By way of example, actions include: construction, expansion, alteration or demolition of buildings, structures, infrastructure or facilities; industrial processes; mineral and petroleum resource exploration and extraction; waste disposal; earthworks; impoundment, extraction and diversion of water; agricultural activities; and vegetation clearance.

WHAT IS AN ‘IMPACT’?

‘Impact’ is defined in section 527E of the Act to include both direct and indirect consequences of an action. It applies to all indirect consequences of the taking of an action by a person, which meet the criteria in the section.

The meaning of ‘impact’ has been a major issue. The Federal Court interpreted ‘impact’ to include both direct and indirect impacts. A new definition of ‘impact’ was inserted in the Act in 2006.

WHAT IS A ‘SIGNIFICANT’ IMPACT?

A definition of ‘significant impact’ has been provided in a number of judicial decisions. This is now reflected in administrative Policy Statements issued by the Department such as the [‘Significant impact guidelines 1.1 – matters of national environmental significance’](#). A ‘significant impact’ is defined as ‘an impact which is important, notable, or of consequence, having regard to its context or intensity’. Whether or not an impact is significant will depend on the circumstances, such as the sensitivity, value, and quality of the environment that is impacted.

The test of significance necessarily creates a broad ministerial discretion.

ACTIONS THAT DO NOT REQUIRE APPROVAL UNDER THE ACT

There are a number of circumstances where proposed actions are not required to go through the prescribed environmental assessment and approval process under Parts 7 to 9 of the Act. These circumstances include where the action:

- is authorised by an approvals bilateral agreement or a declaration made by the Minister pursuant to section 33 of the Act; or
- is taken in accordance with a ministerially approved bioregional plan, strategic assessment, or a conservation agreement.

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Also, certain actions do not require approval under the Act where there is an alternative management regime, including:

- actions taken in accordance with a zoning plan made under the *Great Barrier Reef Marine Park Act 1975*; or
- actions covered by a Regional Forest Agreement (RFA) – in the case of RFA forestry operations that are undertaken in accordance with an RFA. However, approval may still be required if the RFA forestry operations are in a World Heritage property, a Ramsar wetland, or incidental to another action whose primary purpose does not relate to forestry.

In addition, actions with prior authorisation (i.e. actions with specific environmental authorisation under Commonwealth, state or territory law which was granted prior to the commencement of the Act) and actions which are a lawful continuation of use of land, sea or seabed that was occurring prior to the commencement of the Act, do not require approval under the Act.

The Minister may also exempt actions from the requirements for assessment and approval under the Act where the Minister is satisfied that it is in the national interest to do so.

The review acknowledges the Traditional Owners of country throughout Australia and their continuing connection to land, sea and community. We pay our respects to them and their cultures and to their elders both past and present.

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