



Legal briefing

Number 82 | 4 June 2007

Commonwealth environment and heritage law

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is the key Commonwealth law relating to the protection of the environment and conservation of biodiversity. Among other things, the Act regulates proposals, developments and actions that are likely to have a significant impact on certain matters of national environmental significance (such as World Heritage areas and nationally threatened species). It also applies to Commonwealth actions that are likely to have a significant impact on the environment. Accordingly, the Act has the potential to impact upon all Commonwealth agencies that engage in activities related to the use of land or sea.

Amendments to the EPBC Act that commenced operation in February 2007 have clarified many aspects of the operation of the Act, extensively modified the process for assessment and approval of actions, and improved the strength and flexibility of compliance and enforcement measures.

This briefing aims to provide AGS clients with an outline of the core provisions of the EPBC Act that regulate environmentally significant activities of the Commonwealth. It also introduces some specific obligations of the Commonwealth relating to the protection of threatened species and heritage values on Commonwealth land. This information is intended to assist clients to identify situations where they need to consider the possible application of the EPBC Act and perhaps seek assistance from the Department of the Environment and Water Resources.

Overview of the EPBC Act

The EPBC Act replaced several pieces of Commonwealth legislation that dealt with environmental protection and biodiversity conservation, including the *Environment Protection (Impact of Proposals) Act 1974* and the *Australian Heritage Commission Act 1975*. As such, the EPBC Act contains a number of distinct but frequently overlapping regimes. In summary, the principal functions of the Act are as follows:

- Regulation of actions that have, will have or are likely to have a significant impact on a matter of 'national environmental significance'. Currently those matters of national environmental significance protected by the Act are:
 - World Heritage properties¹
 - National Heritage places²
 - wetlands of international importance³
 - listed threatened and migratory species, and ecological communities⁴
 - the environment, in respect of nuclear actions⁵
 - the marine environment⁶



Canberra

Greg Prutej AGS Counsel to the
Department of the Environment
and Water Resources
T 02 6274 1826 F 02 6274 1105
greg.prutej@ags.gov.au

The Act has the potential to impact upon all Commonwealth agencies that engage in activities related to the use of land or sea.

- regulation of Commonwealth actions that have, will have or are likely to have a significant impact on the environment. This includes:
 - actions taken anywhere by the Commonwealth and Commonwealth agencies⁷
 - actions taken by anyone on Commonwealth land,⁸ and actions taken by anyone outside Commonwealth land that have a significant impact on the environment on Commonwealth land or a Commonwealth Heritage place outside the Australian jurisdiction⁹
- protection and conservation of listed threatened species and ecological communities, listed migratory species, listed marine species, and cetaceans (i.e. whales and dolphins)¹⁰
- management and protection of areas of especial importance (i.e. World Heritage areas, National Heritage places, wetlands of international importance, biosphere reserves, Commonwealth Heritage places, Commonwealth reserves and conservation zones, and overseas places of historic significance to Australia)¹¹
- control of international trade in endangered species¹².

The main focus of this briefing is the regulation of environmentally significant actions of the Commonwealth under Subdivision B of Division 2 of Part 3 of the EPBC Act. Most of the concepts that arise in this analysis bear a corresponding relevance to the other kinds of actions that are controlled under Part 3 of the Act, such as an action (by anyone, including the Commonwealth or a Commonwealth agency) that has a significant impact on a matter of national environmental significance.

This briefing also outlines the other key Commonwealth responsibilities under the EPBC Act in relation to the protection of the environment and conservation of biodiversity on Commonwealth land.

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.

Regulation of Commonwealth actions with a significant impact on the environment

The form of regulation employed by Part 3 of the EPBC Act is a prohibition, to which limited categories of exemptions apply. For example, s 28(1) provides that 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.¹³ ‘Commonwealth agency’ is defined in s 528 of the EPBC Act and includes:¹⁴

- a Minister
- a body corporate established for a public purpose by a law of the Commonwealth
- a body corporate established by a Minister
- a Commonwealth-owned company
- a person holding a Commonwealth office or appointment.

A civil penalty is prescribed for a breach of s 28(1) by a Commonwealth agency.¹⁵ Perhaps more importantly, a breach of s 28(1) by the Commonwealth or a Commonwealth agency could be restrained by third party proceedings in the Federal Court for an injunction under s 475 of the Act. An injunction could potentially be combined with other orders, such as an order to repair or mitigate damage to the environment.¹⁶ Standing to apply for an injunction is broadly conferred on individuals and organisations who have a history of activities for the protection of the environment.¹⁷

The following sections of this briefing analyse the key concepts that apply when trying to determine whether a proposed activity by the Commonwealth or a Commonwealth agency is subject to s 28 of the EPBC Act:

- what is an ‘action’?
- what is the ‘impact’ of an action?
- when is an impact ‘likely’?
- when is an impact ‘significant’?
- does an exemption apply?

These are followed by a simplified outline of the referral, assessment and approval process that applies when an action comes within the coverage of s 28 and is not otherwise exempted from the prohibition on the taking of the action.

What is an ‘action’?

The EPBC Act defines ‘action’ to include something as broad and general as a ‘project’, ‘development’ or ‘undertaking’, and something as specific as an ‘activity’.¹⁸ Thus, an action can be identified at varying levels of generality. The most appropriate degree of specificity in the identification of an action depends on a balancing of competing considerations. On one hand, an action should generally include all of the components of an integrated set of activities, as this promotes an efficient assessment process and is conducive to the effective setting and implementation of measures to protect the environment.¹⁹ On the other hand, if a referred action includes components that are insufficiently planned to be capable of meaningful assessment, the process may be unduly delayed as a result.

The definition of ‘action’ contains important exclusions. Section 524 excludes the grant of a governmental authorisation, while s 524A excludes the provision of grant funding. Thus, many Commonwealth activities which would once have been regulated under the *Environment Protection (Impact of Proposals) Act 1974* are excluded from the definition of ‘action’. The EPBC Act might apply to the taking of an action that is authorised or funded by a government agency, but it does not need to be complied with by the relevant government agency in granting the authorisation or funding.

In *Save the Ridge Inc. v Commonwealth* [2005] FCAFC 203, the Full Court of the Federal Court took a very broad approach to the exclusion of governmental authorisations. The majority (Black CJ and Moore J) held that amendments to the National Capital Plan were a governmental authorisation in respect of a proposed road in the Australian Capital Territory, because they removed a legislative constraint on the construction of the road. Therefore the amendments to the National Capital Plan were not an ‘action’ and did not require approval under the EPBC Act.

Following this decision, any administrative decision by a government that removes a statutory barrier to the taking of an action is itself not an ‘action’.²⁰ For example, an amendment to a planning scheme or the grant of an approval for a subdivision does not constitute an action. It does not matter whether these processes result in the issue of a permit or other form of specific approval for the taking of an action.

Government decisions that do not directly remove any legislative constraint on the taking of an action need to be considered separately. For example, a sale or lease of Commonwealth land is not a governmental authorisation because it does not operate directly in relation to any legislative constraint on the use of the land by the purchaser or lessee. Some judicial statements in *Save the Ridge*

The EPBC Act might apply to the taking of an action that is authorised or funded by a government agency, but it does not need to be taken into account by the relevant government agency in granting the authorisation or funding.

Any administrative decision by a government that removes a statutory barrier to the taking of an action is itself not an ‘action’.

may appear to suggest that the question whether such an activity could be an 'action' depends on whether it entails actual direct or indirect interactions with the physical environment.²¹

What is the 'impact' of an action?

The amendments to the EPBC Act which commenced operation in 2007 inserted a new definition of 'impact' of an action in s 527E of the Act. That definition covers both of the following types of impacts:

- the 'direct' consequences of an action (i.e. impacts that are visited on the physical environment through the medium of the action itself)
- the 'indirect' consequences (i.e. impacts that occur in the physical environment through the medium of some intermediate cause), provided that the action is a 'substantial cause' of the consequence.

In relation to the indirect consequences of an action, if the intermediate cause of such a consequence consists of the taking of another action by another person, then unless that intermediate (or secondary) action is taken at the direction or request of the person taking the primary action, the indirect consequence is not to be treated as an impact of the primary action unless:

- the primary action facilitates, to a major extent, the secondary action
- the secondary action is contemplated by the person taking the primary action, or is a reasonably foreseeable consequence of the primary action
- the indirect consequence is contemplated by the person taking the primary action, or is a reasonably foreseeable consequence of the secondary action.

These provisions were inserted in the EPBC Act in response to the decision of the Full Court of the Federal Court in *Minister for the Environment and Heritage v Queensland Conservation Council Inc.* [2004] FCAFC 190 (the Nathan Dam case). They are intended to clarify, elaborate and qualify the effect of that decision. The case concerned the proposed Nathan Dam project on the Dawson River in Central Queensland. The central question was the scope of the 'relevant impacts' that had to be taken into account by the Minister in deciding whether the dam project was subject to Part 3 of the Act. Of particular concern was the possible indirect impact of the dam on the world heritage values of the Great Barrier Reef World Heritage Area.²² These impacts might occur as a result of the use of water from the dam by farmers for agricultural irrigation, with consequent runoff of agricultural chemicals into the Nathan River and downstream to the Great Barrier Reef.

The Full Court of the Federal Court held that the impacts of an action for the purposes of the EPBC Act include each way in which the action adversely influences or affects the relevant matters of national environmental significance protected by Part 3 of the Act. They include all effects, whether direct or indirect, which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be the consequences of the action on the protected matter. Such consequences include those which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not. In particular, they could include the impacts of activities by third parties that are consequences of the principal action. In this case, the use of water for growing cotton was clearly within the proponent's contemplation and could be regarded as a consequence of the proposed dam project. Therefore the likely impacts of that use of the water could also be regarded as impacts of the construction and operation of the dam.

The impacts of an action include all effects, whether direct or indirect, which are sufficiently close to the action to allow it to be said that they are the consequences of the action on the protected matter.

It is important to note that the above discussion about indirect impacts resulting from intermediate actions is relevant to the application of the referral, assessment and approval process in the EPBC Act. In contrast, when the question is whether a prohibition in Part 3 of the Act has been breached, indirect impacts that occur through the medium of intermediate actions must be disregarded, unless the intermediate actions were taken at the direction or request of the person taking the primary action.²³

When is an impact 'likely'?

The EPBC Act is concerned with the impact that an action 'has, will have or is likely to have' on a matter that is protected by a provision of Part 3. The inclusion of 'likely' impacts arguably expands the coverage of Part 3 of the Act to include situations where an impact is identified with a degree of confidence that is less than certainty or even satisfaction on the balance of probabilities. 'Likely' may mean 'prone', 'with a propensity', or 'liable' in the sense of a real and not remote chance or possibility.²⁴ Such a liberal interpretation of 'likely' is arguably consistent with the EPBC Act's emphasis on the 'precautionary principle', which is an underlying theme of the Act along with other principles of ecologically sustainable development.²⁵ The precautionary principle in this context means that if there are threats of serious or irreversible environmental damage, a lack of full scientific certainty about the impacts of an action should not be used as a reason for postponing measures to prevent environmental degradation.

On the other hand, it has been held that the EPBC Act does not apply in relation to the potential impacts of an action that 'lie in the realm of speculation'²⁶ or are mere 'hypothetical possibilities'.²⁷ For example, in *Mees v Kemp* [2004] FCA 356 the applicant under the *Administrative Decisions (Judicial Review) Act 1977* argued that the construction and operation of a proposed freeway would lead to the construction of a link road, the impacts of which would need to be considered under the EPBC Act as indirect impacts of the proposed freeway. However, Weinberg J held that the link road was a mere hypothetical possibility of a kind that did not have to be taken into account in assessing the impacts of the proposed freeway on matters of national environmental significance. His Honour relied on statements by the authority that would be responsible for any link road project, which strenuously denied any intention to undertake it.²⁸

When is an impact 'significant'?

The test of significance is one of the principal measures employed in the EPBC Act to limit the categories of actions that are subject to the Act. Perhaps inevitably, the concept is, to an extent, inherently uncertain and subjective. The Federal Court has adopted a working definition of 'significant' as 'important, notable or of consequence, having regard to its context and intensity'.²⁹ While this elucidation confirms that formal criteria of significance have little role to play in the absence of context-specific factual situations, it leaves users of the Act without much practical guidance in determining whether the Act applies.

The Department of the Environment and Water Resources has published guidelines to assist in the identification of situations where a provision of Part 3 of the Act may apply.³⁰ These guidelines emphasise the importance of considering the sensitivity, value, and quality of the particular environmental context in which an action is proposed to be taken,³¹ and provide lists of issues to be taken into account in considering the significance of various categories of environmental impacts (e.g. impacts on landscapes and soils, impacts on water, impacts on plants, impacts on animals, and impacts on heritage). In this respect, the guidelines direct attention to the scale, intensity, and duration or frequency of the proposed action and its likely impacts. They also recognise the possibility of impact avoidance, mitigation and management to reduce the likely impacts

The Department of the Environment and Water Resources has published guidelines to assist in the identification of situations where a provision of Part 3 of the Act may apply.

of an action to a level below the threshold of significance. The assessment of such matters will usually require input from expert evaluators and, as a result, the judicial concept of 'significance' could evolve over time to incorporate the views of the scientific community.

The importance of context does not mean that the significance of an impact of an action on a protected matter is to be determined by comparison with the impacts that may result from other actions.³² However, it is reasonable to assume that the word 'significant' is intended to distinguish impacts that are important enough to justify regulation at the Commonwealth level from impacts that are considered to be less important and adequately dealt with at the state and local government levels.³³ In other words, the term has some work to do. For example, not all Commonwealth actions that have an impact on the environment are meant to be regulated under s 28 of the EPBC Act. But the need to consider the context in which an action interacts with a particular protected matter means that the line between 'significant' impacts and other impacts is a shifting one. For example, if the particular protected matter is extremely sensitive to disturbance, it is arguable that almost any adverse impact on that matter is 'significant'. Thus in *Brown v Forestry Tasmania (No.4)* [2006] FCA 1729, Marshall J held that the condition of various threatened species in Tasmania was so precarious that forestry operations which had any adverse impact on a member of the species would be significant.³⁴

Consideration of the context in which an action has impacts on a matter protected by Part 3 of the EPBC Act needs to avoid any attribution to that action of the cumulative impacts of a broader class of actions, to which the particular action belongs. The common characteristics of a class of actions could relate to the activities they involve or the nature of their impacts. In *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736, the applicant under the *Administrative Decisions (Judicial Review) Act 1977* argued that the likely impacts of the burning of coal to be produced from two proposed coal mines could be identified through a consideration of the cumulative impacts on protected matters of all coal burning. Thus a suggestion was made to the effect that the question is whether the proposed coal mines would make a significant contribution to the accumulation of greenhouse gases in the atmosphere as a result of the burning of coal (an underlying assumption being that this accumulation would lead to significant impacts on protected matters as a result of climate change). Dowsett J rejected this line of argument, affirming that it is not sufficient merely to consider the size of the contribution that the action would make to the accumulation of greenhouse gases in the atmosphere as a result of the burning of coal. The EPBC Act requires identification of the impacts of the particular proposed action on particular protected matters.³⁵

The EPBC Act requires identification of the impacts of the particular proposed action on particular protected matters.

Does an exemption apply?

The main exemptions from the prohibition in s 28(1) arise through the referral, assessment and approval process in the Act. The prohibition stops applying to a Commonwealth action if the Minister for the Environment and Water Resources decides at the start of that process that the action is not a 'controlled action' (i.e. it is not an action that is likely to have a significant impact on the environment),³⁶ or if, at the completion of the process, the Minister decides to approve the taking of the action.³⁷

The Minister also has power to grant an exemption from the prohibition in s 28(1) if he or she is satisfied that this is necessary on grounds related to defence, security or national emergency.³⁸ Alternatively, the Minister has

a general power (likely to be used very sparingly) to grant an exemption on national interest grounds.³⁹ In the case of a Commonwealth agency, an exemption may also be granted if the agency is required to comply with the relevant state or territory environmental protection laws.⁴⁰

The prohibition in s 28(1) also does not apply in relation to various actions which are considered to be subject to adequate scrutiny and regulation through the effect of alternative regimes (which in some cases operate in combination with an assessment process under Part 8 of the EPBC Act).⁴¹ The exempted actions include actions covered by a conservation agreement between the Minister and a Commonwealth agency (entered into under Part 14 of the Act) that includes a declaration that the actions do not require approval under Part 9 because they are not likely to have a significant impact on the environment.⁴²

The referral, assessment and approval process

If the Commonwealth or a Commonwealth agency proposes to take an action which it thinks may be or is a controlled action, it is required to refer the proposal to take the action to the Minister for the Environment and Water Resources for a decision on the question.⁴³ (Commonwealth agencies also have power to make a referral of a proposed action by a third party.⁴⁴) A referred proposal may include alternative locations, time frames, and ways of taking the proposed action.⁴⁵ The regulations prescribe the information that must be included in a referral.⁴⁶ The Department of the Environment and Water Resources has prepared a referral template to assist in the provision of that information.⁴⁷

When a referral is received, the Minister must conduct a consultation process involving the public and any relevant Commonwealth, state or territory ministers.⁴⁸ The Minister also has power to seek further information about the action from the proponent, if the Minister considers that he or she does not have enough information about the action to make an informed decision about whether the action is a controlled action, or if it is a controlled action, which approach should be used to assess the action.⁴⁹ A decision on whether the action is a controlled action must be made within 20 business days after the referral, unless that time is extended by the making of a request for further information.⁵⁰ In making that decision, the Minister is not allowed to consider any possible beneficial impacts of the proposed action on a protected matter.⁵¹

If the Minister decides that the proposed action is not a controlled action, the action may then be taken without contravening the prohibitions in Part 3 of the Act. Such a decision may be contingent on the Minister's belief that the action will be taken in a particular manner, in which case the exemption only applies if the action is taken in that manner.⁵²

If the Minister decides that the action is a controlled action, he or she must then choose the approach to be used for assessment of the environmental impacts of the action. The potentially available assessment approaches in relation to Commonwealth actions⁵³ are:

- an accredited assessment process under a law of the Commonwealth, a state or a self-governing territory⁵⁴
- assessment based on the information provided in the referral for the proposed action⁵⁵ (This option may be available if the Minister is satisfied that the likely impacts of the proposed action are predictable, relatively small-scale or reversible, well-understood, limited to few matters protected under Part 3, and uncontroversial.⁵⁶)

If the Minister decides that the proposed action is not a controlled action, the action may then be taken without contravening the prohibitions in Part 3 of the Act.

- assessment based on preliminary documentation (i.e. the referral information, possibly with specified additional information) together with a public consultation process⁵⁷
- assessment by public environment report⁵⁸ or environmental impact statement⁵⁹ (These approaches involve the preparation of guidelines for a comprehensive assessment by the proponent of the impacts of the action, along with significant public consultation.)
- assessment by a public inquiry conducted by an independent commission.⁶⁰

A central consideration in deciding on the approach to be used for assessment of an action is the need to ensure that the Minister will receive enough information about the impacts of the action to make an informed decision about whether to approve the action, and what conditions to attach to any approval. This depends on the nature and complexity of the action and its impacts, as well as the extent of existing knowledge about those impacts. The appropriate degree of public involvement in the process, and the desirability of maximising the efficiency and timeliness of the process, are also important matters to be considered.

The process culminates in the provision of a report to the Minister by the proponent (except in the case of assessment on referral information) along with advice from the Department of the Environment and Water Resources. The Minister must then decide whether to approve the action, after further consultation with other relevant Commonwealth ministers, the proponent, and potentially the public.⁶¹ In making the decision, the matters the Minister must have regard to include economic and social matters and the principles of ecologically sustainable development (including the precautionary principle).⁶²

An approval may be subject to conditions designed to protect, or repair or mitigate damage to, the relevant matter protected by the EPBC Act. The conditions do not need to relate directly to the anticipated impacts of the proposed action.⁶³ Among other things, the conditions may require the approval holder to:⁶⁴

- make a financial contribution to another person for the purpose of supporting activities to protect, repair or mitigate damage to a protected matter⁶⁵
- prepare and implement a plan, which must be approved by the Minister, for managing the impacts of the action on the protected matter
- carry out environmental monitoring or an environmental audit
- comply with conditions specified in an instrument made under another law.

All approvals are also subject to a condition requiring the approval holder to ensure that any person who carries out the action on their behalf is informed of the conditions of the approval and complies with those conditions.⁶⁶

Part 10 of the Act contains an alternative approach to the assessment and approval process outlined above. Part 10 provides for the approval of a class of actions which have undergone a 'strategic assessment' process and are then deemed to have been approved under Part 9.⁶⁷

In some cases, a conservation agreement under Part 14 of the Act provides a more effective mechanism of securing the objectives of possible conditions of an approval. The Minister for the Environment and Water Resources may enter into a conservation agreement with a person who proposes to take an action,

An approval may be subject to conditions designed to protect, or repair or mitigate damage to, the relevant matter protected by the EPBC Act.

for the protection and conservation of matters protected under Part 3 of the Act. The main advantage of a conservation agreement in this context is that it is binding on any successors in title to the interest of the proponent in the land to which the agreement relates.⁶⁸ This makes conservation agreements particularly appealing in relation to an action that is, or contemplates, a disposition of land.

Other Commonwealth obligations concerning Commonwealth land

The Commonwealth's obligations under the EPBC Act as an owner and manager of land extend beyond the regime outlined above in relation to an action by the Commonwealth or a Commonwealth agency that may have a significant impact on the environment. The following sections of this briefing discuss issues that arise in relation to actions by third parties which may be carried out on or near Commonwealth land. Other specific obligations in relation to the protection of heritage and threatened species on Commonwealth land are also examined.

Commonwealth land is land that is owned or held under lease by the Commonwealth or a Commonwealth agency.⁶⁹

Actions by third parties affecting Commonwealth land

Part 3 of the EPBC Act includes prohibitions on the following actions by persons other than the Commonwealth or a Commonwealth agency:

- an action taken on Commonwealth land that has, will have or is likely to have a significant impact on the environment⁷⁰
- an action taken outside Commonwealth land that has, will have or is likely to have a significant impact on the environment on Commonwealth land.⁷¹

A person who proposes to take such an action would be principally liable for it and would be expected to take responsibility for the referral, assessment and approval process. However, a Commonwealth agency also has power to instigate that process by referring the proposed action to the Minister for the Environment and Water Resources.⁷²

Furthermore, as an owner, lessee or occupier of land, a Commonwealth agency could potentially be liable to a civil penalty if another person takes an action on the land that contravenes a prohibition in Part 3 (or a condition of an approval under Part 9) and the Commonwealth agency:⁷³

- knew, or was reckless or negligent as to whether, the contravention would occur; and
- was in a position to influence the conduct of the person; and
- failed to take all reasonable steps to prevent the contravention.⁷⁴

Protection of heritage on Commonwealth land

The EPBC Act contains provisions to protect three categories of places of heritage significance: World Heritage properties, National Heritage places and Commonwealth Heritage places. An area of Commonwealth land could potentially fall within one or more of these categories, depending on the significance of the heritage values associated with the land.⁷⁵ The 'heritage value' of a place includes the place's natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.⁷⁶

A Commonwealth agency could potentially be liable to a civil penalty if another person takes an action on the land that contravenes a prohibition in Part 3.

World Heritage properties and National Heritage places are matters of national environmental significance which are protected under Part 3 of the Act.⁷⁷ Commonwealth Heritage places, as such, are generally not protected under Part 3,⁷⁸ but the Act imposes a number of specific obligations on the Commonwealth in relation to the heritage values of these areas as well.⁷⁹

Where a World Heritage property or National Heritage place occurs on Commonwealth land, the Minister for the Environment and Water Resources must make a plan for managing the property or place, which must be complied with by the Commonwealth and Commonwealth agencies.⁸⁰ With respect to a Commonwealth Heritage place, the obligation to make the plan applies to the Commonwealth agency that owns or controls the place; the plan is subject to endorsement by the Minister and must be complied with by the Commonwealth and Commonwealth agencies.⁸¹

Commonwealth agencies are required to assist in the identification of National Heritage values and Commonwealth Heritage values of places that they own or control.⁸² They must also prepare heritage strategies to identify and protect the Commonwealth Heritage values of those places.⁸³

A Commonwealth agency must not take an action that has, will have or is likely to have an adverse impact on the National Heritage values of a National Heritage place or the Commonwealth Heritage values of a Commonwealth Heritage place unless there is no feasible and prudent alternative to taking the action, and all measures that can reasonably be taken to mitigate the impact of the action are taken.⁸⁴ This requirement is not dependent on the adverse impact of the action being 'significant'.

A Commonwealth agency must also ensure that any contract for the sale or lease of an area of Commonwealth land that includes a National Heritage place or a Commonwealth Heritage place contains a covenant to protect the heritage values of the place, unless the agency is satisfied that this is unnecessary, unreasonable or impracticable.⁸⁵ If such a covenant is not included in a contract, or if it could be insufficient to ensure the ongoing protection of the relevant heritage values of the place, the Minister for the Environment and Water Resources may either:⁸⁶

- seek to enter into a conservation agreement with the prospective buyer or lessee for the ongoing protection of those values, under Part 14 of the EPBC Act, or
- advise the Commonwealth agency about measures to ensure the ongoing protection of those values (which the agency must take reasonable steps to implement).

Protection of threatened species on Commonwealth land

Listed threatened and migratory species and ecological communities are given special protection under Part 13 of the EPBC Act. Many actions on Commonwealth land which interfere with a member of a listed species or ecological community are offences if taken without a permit or approval, regardless of whether they have a significant impact on the affected species or community.⁸⁷

The EPBC Act provides for the making of plans to protect and promote the recovery of listed species and communities.⁸⁸ These plans must be complied with by the Commonwealth and Commonwealth agencies.⁸⁹

There are also provisions in the EPBC Act protecting critical habitat of listed threatened species and ecological communities.⁹⁰ These include a requirement

Commonwealth agencies are required to assist in the identification of National Heritage values and Commonwealth Heritage values of places that they own or control.

to ensure that any sale or lease of Commonwealth land includes a covenant, the effect of which is to protect the critical habitat.⁹¹ The Commonwealth agency that executes the sale or lease contract must take reasonable steps to ensure as far as practicable that the covenant binds successors in title of the buyer or lessee.⁹²

Key issues

These are the most important questions to be addressed by Commonwealth agencies in considering the possible application of the EPBC Act to their activities related to the use or management of areas of land or sea:

- Are those activities no more than the grant of governmental authorisations which remove a legislative barrier to another person taking an action? If so, the activities are not 'actions' subject to the EPBC Act (unless they are listed in s 160 of the Act).
- If the activities are 'actions', what impacts will they have or be likely to have on the environment? This needs to include indirect impacts, such as consequences of actions by third parties that are themselves a contemplated or reasonably foreseeable consequence of the agency's actions.
- Are the impacts of the actions on the environment likely to be significant? This involves consideration of the environmental context of the actions – for example, is the environment particularly sensitive to disturbance, of special value, or already in a degraded condition? It also involves consideration of the scale, intensity and duration and frequency of the actions and any measures they entail for impact avoidance or mitigation.
- If the actions are likely to have significant impacts on the environment, they should be referred to the Minister for the Environment and Water Resources for assessment and approval under Chapter 4 of the EPBC Act (unless they are exempted from the Act under Part 4).
- Does the agency own or lease land on which other people take actions which have, will have or are likely to have a significant impact on the environment? If so, the agency should ensure that those actions are referred to the Minister for the Environment and Water Resources for assessment and approval.
- Does the agency comply with its obligations in relation to the identification and protection of the heritage values of land that it owns or controls? This may include inserting appropriate provisions in contracts for the sale or lease of land.
- If the agency takes actions which have an adverse impact (whether significant or not) on the heritage values of a National Heritage place or a Commonwealth Heritage place, does it consider whether there are feasible and prudent alternatives to those actions and take reasonable measures to mitigate the impact?
- Does the agency ensure that listed threatened and migratory species and ecological communities on Commonwealth land are protected, including by complying with relevant recovery plans, threat abatement plans and wildlife conservation plans and protecting critical habitat?

Greg Prutej has been an outposted client counsel to the Department of the Environment and Water Resources since 2002. In that role he has provided the department with significant advice over an extended period in relation to the interpretation and administration of the EPBC Act, and provided specialist advice concerning all of the major court cases involving judicial review of decisions under the Act or enforcement of the Act. Greg has also been heavily involved in advising on the development of the recent amendments to the Act.

Notes

- 1 These are properties declared under the *Convention for the Protection of the World Cultural and Natural Heritage* done at Paris on 23 November 1972 (*Australian Treaty Series* 1975 No.47) (the World Heritage Convention) (see Subdivision A of Division 1 of Part 3 of the EPBC Act; also see Division 1 of Part 15 of the EPBC Act).
- 2 These are places included in the National Heritage list under Division 1A of Part 15 of the EPBC Act. As a matter of national environmental significance, National Heritage places are protected only in respect of actions by constitutional corporations and the Commonwealth and Commonwealth agencies, actions for the purpose of cross-jurisdictional trade and commerce; actions in territories and Commonwealth areas; actions in areas protected by Article 8 of the *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (*Australian Treaty Series* 1993 No.32) (the Biodiversity Convention); and all actions that have a significant impact on National Heritage values that are indigenous heritage values of a place (see Subdivision AA of Division 1 of Part 3 of the EPBC Act).
- 3 Also known as Ramsar wetlands, these are wetlands declared under the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* done at Ramsar, Iran on 2 February 1971 (*Australian Treaty Series* 1975 No.48) (the Ramsar Convention) (see Subdivision B of Division 1 of Part 3 of the EPBC Act; also see Division 2 of Part 15 of the EPBC Act).
- 4 These are species and communities listed under Divisions 1 and 2 of Part 13 of the EPBC Act (see Subdivisions C and D of Division 1 of Part 3 of the EPBC Act).
- 5 'Nuclear action' is defined in s 22 of the Act (see Subdivision E of Division 1 of Part 3 of the EPBC Act).
- 6 The protected area is all waters inside the exclusive economic zone or above the continental shelf, except coastal waters vested in the states and Northern Territory under the offshore constitutional settlement (see Subdivision F of Division 1 of Part 3 of the EPBC Act).
- 7 See Subdivision B of Division 2 of Part 3 of the EPBC Act.
- 8 Commonwealth land is defined in section 27 of the Act and generally includes an area of land that is owned or held under lease by the Commonwealth or a Commonwealth agency.
- 9 See Subdivisions A and AA of Division 2 of Part 3 of the EPBC Act.
- 10 See Part 13 of the EPBC Act.
- 11 See Parts 15 and 15A of the EPBC Act.
- 12 See Part 13A of the EPBC Act.
- 13 'Environment' is defined in s 528 of the EPBC Act as including:
 - (a) ecosystems and their constituent parts, including people and communities; and
 - (b) natural and physical resources; and
 - (c) the qualities and characteristics of locations, places and areas; and
 - (d) heritage values of places; and
 - (e) the social, economic and cultural aspects of a thing mentioned in paragraphs (a)–(d).
- 14 There are some exceptions, as set out in paragraphs (h)–(j) of the definition.
- 15 The civil penalty is 1000 penalty units for a Commonwealth agency that is an individual, and 10,000 penalty units for a Commonwealth agency that is a body corporate. In relation to other actions to which Part 3 applies (e.g. actions that have a significant impact on a matter of national environmental significance under Division 1 of Part 3), cognate civil penalty and criminal provisions apply.
- 16 For example, in *Minister for the Environment and Heritage v Greentree (No.3)* [2004] FCA 1317 the Federal Court ordered the respondent to plant trees in order to repair damage caused by a contravention.

- 17 See s 475(6) and (7) of the EPBC Act. The effect of identical provisions conferring standing for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* was considered in *Paterson v Minister for the Environment and Heritage* [2004] FMCA 924.
- 18 See s 523 of the EPBC Act.
- 19 The Minister may reject a referral of an action under Part 7 if he or she is satisfied that the action is a component of a larger action (s 74A).
- 20 See also *Minister for the Environment and Heritage v Greentree (No.2)* [2004] FCA 741 in relation to the meaning of 'specifically authorised' in s 43A.
- 21 See *Save the Ridge Inc. v The Commonwealth* [2005] FCAFC 203 at [17] per Black CJ and Moore J; cf. at [63]–[64] per Emmett J suggesting that only direct impacts are relevant in this respect.
- 22 The taking of an action that has a significant impact on the world heritage values of a World Heritage property is prohibited under ss 12 and 15A of the EPBC Act, subject to the exemptions mentioned in this briefing.
- 23 See ss 25AA and 28AB of the EPBC Act.
- 24 See *Booth v Bosworth* (2001) 114 FCR 39 at [97]–[98].
- 25 See ss 3(1)(b) and 3A(b) of the EPBC Act.
- 26 See *Queensland Conservation Council Inc. v Minister for the Environment and Heritage* [2003] FCA 1463. On appeal, the Full Court took no exception to this finding, provided it is understood that this is predicated on the 'impacts' of an action, with the connotation ascribed to that concept as discussed above.
- 27 *Mees v Kemp* [2004] FCA 356.
- 28 See *Mees v Kemp* [2004] FCA 356 at [107]. Also see *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [72].
- 29 See *Booth v Bosworth* (2001) 114 FCR 39 at [99]–[100]; *Minister for the Environment and Heritage v Greentree (No. 2)* [2004] FCA 741 at [192]–[193].
- 30 The guidelines for actions by the Commonwealth and Commonwealth agencies are available on the Internet at <<http://www.environment.gov.au/epbc/publications/pubs/commonwealth-guidelines.pdf>>. Guidelines on the application of Division 1 of Part 3 (actions impacting on matters of national environmental significance) are available at <<http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf>>. There are also guidelines for certain specific matters of national environmental significance and specific industry operations. These are all available at <<http://www.environment.gov.au/epbc/publications/index.html>>. The publication of guidelines to assist users of the Act was endorsed by the Federal Court in *Humane Society International Inc. v Minister for the Environment and Heritage* [2003] FCA 64 and is now authorised by s 520A of the EPBC Act.
- 31 This approach conforms to the methodology employed by Sackville J in *Minister for the Environment and Heritage v Greentree (No.2)* [2004] FCA 741 at [198]–[199] and upheld on appeal to the Full Court of the Federal Court in *Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128 at [48].
- 32 *Brown v Forestry Tasmania (No.4)* [2006] FCA 1729 at [94].
- 33 See *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [65]–[66].
- 34 *Brown v Forestry Tasmania (No.4)* [2006] FCA 1729 at [97], [101]. At the time of publication, this aspect of the decision was subject to appeal to the Full Court of the Federal Court; the appeal had not yet been heard.
- 35 See *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [55]; see also paragraph 51 of the Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1999. Arguably contrary to this position is *Brown v Forestry Tasmania (No.4)* [2006] FCA 1729 at [95], [102] (subject to appeal to the Full Court of the Federal Court; the appeal had not yet been heard at the time of publication).
- 36 See s 28(2)(d) and Part 7 of the EPBC Act. An action may also be not a 'controlled action' on the basis that one of the exemptions outside the referral, assessment and approval process applies.
- 37 See s 28(2)(a) and Part 9 of the EPBC Act.
- 38 See ss 28(2)(c) and (3) of the EPBC Act.
- 39 See s 158 of the EPBC Act.
- 40 See ss 28(2)(c), (4) and (5) of the EPBC Act.

- 41 Part 4 of the EPBC Act describes categories of actions to which s 28(1) does not apply (see s 28(2)(b)) because of any of the following: the action will be subject to a bilaterally accredited state or territory approval process (Division 1 of Part 4; currently there is only one such bilaterally accredited process; it is inapplicable to Commonwealth actions); the action is covered by an accredited management arrangement or authorisation process (Division 2 of Part 4; currently applied in relation to certain Commonwealth-managed fisheries, in respect of which a special strategic assessment process under Part 10 of the Act is applied); the action is taken in accordance with a bioregional plan (Division 3 of Part 4 which was inserted in the Act in 2007; currently there are no actions to which this exemption applies); the action is taken in accordance with a conservation agreement that contains a declaration that the action does not require approval (Division 3A of Part 4 which was inserted in 2007; currently there are no actions to which this exemption applies); the action is a forestry operation that is taken in accordance with a regional forest agreement or in a region for which a regional forest agreement is being developed (Division 4 of Part 4); actions in the Great Barrier Reef Marine Park (Division 5 of Part 4); and actions which were authorised and/or commenced before the commencement of the EPBC Act (Division 6 of Part 4). Section 160(2) lists certain categories of actions that are authorised through other Commonwealth regimes; the prohibition in s 28(1) also does not apply to such actions (see s 28(2)(e)), although an assessment under Part 8 is still required and the person authorising the action must have regard to advice from the Minister for the Environment and Water Resources (see Division 4 of Part 11).
- 42 See ss 37M and 306A of the EPBC Act.
- 43 Section 68 of the EPBC Act. Commonwealth agencies also have power to make a referral of a proposed action by a third party (s 71).
- 44 Section 71 of the EPBC Act.
- 45 Section 72(3) of the EPBC Act.
- 46 Sections 72(1) and (2) of the EPBC Act and Part 4 of the *Environment Protection and Biodiversity Conservation Regulations 2000*.
- 47 The referral form is available on the Internet at <www.environment.gov.au/epbc/assessmentsapprovals/referrals/pubs/referralform.doc>.
- 48 Section 74 of the EPBC Act. These requirements and the remainder of the process do not apply if the Minister determines that the impacts of the proposed action on a protected matter are clearly unacceptable (Division 1A of Part 3). Section 170A(b) requires notice of the referral (and various subsequent steps in the process) to be published on the Internet.
- 49 Section 76 of the EPBC Act.
- 50 Section 75 of the EPBC Act.
- 51 Section 75(2) of the EPBC Act.
- 52 Sections 28(2)(d) and 77A of the EPBC Act. A civil penalty is prescribed for taking the action in a way that is inconsistent with the specified particular manner.
- 53 Assessment under a bilaterally accredited state or territory assessment process is also possible, but this is currently precluded in relation to Commonwealth actions (see ss 49 and 83 of the EPBC Act).
- 54 See s 87(4) of the EPBC Act. A similar option is the making of a declaration that the EPBC Act's assessment provisions do not apply to a class of actions because the action will be adequately assessed by the Commonwealth or a Commonwealth agency (see s 84).
- 55 See s 87(4A) and Division 3A of Part 8 of the EPBC Act.
- 56 See Division 5.1A of the *Environment Protection and Biodiversity Conservation Regulations 2000*.
- 57 See s 87(5) and Division 4 of Part 8 of the EPBC Act.
- 58 See Division 5 of Part 8 of the EPBC Act.
- 59 See Division 6 of Part 8 of the EPBC Act.
- 60 See Division 7 of Part 8 of the EPBC Act.
- 61 See ss 130–132 of the EPBC Act.
- 62 See ss 136 and 391 of the EPBC Act.
- 63 See s 134(1) and (2) of the EPBC Act. However, if the conditions require activities to be carried out that are not reasonably related to the proposed action, the consent of the proponent is required (see s 134(3A)(a)).
- 64 See s 134(3) of the EPBC Act.

- 65 Such a condition may only be imposed with the consent of the approval holder (see s 134(3A)(b) of the EPBC Act).
- 66 See s 134(1A) of the EPBC Act.
- 67 See Divisions 2 and 3 of Part 10 of the EPBC Act.
- 68 See s 307 of the EPBC Act.
- 69 Commonwealth land also includes land in an external territory (except Norfolk Island) or the Jervis Bay Territory, but does not include territory land in the Australian Capital Territory (see s 27 of the EPBC Act and the definitions of 'Commonwealth area' in s 525 and 'Commonwealth marine area' in s 24).
- 70 See ss 26(1) and 27A(1) and (2) of the EPBC Act.
- 71 See ss 26(2) and 27A(3) and (4) of the EPBC Act.
- 72 See s 71 of the EPBC Act.
- 73 See s 496B of the EPBC Act.
- 74 Matters relevant to whether reasonable steps have been taken are set out in s 496D of the EPBC Act.
- 75 See the definitions of 'National Heritage values' in s 324D of the EPBC Act and 'Commonwealth Heritage values' in s 341D.
- 76 See the definition of 'heritage value' in s 528. 'World heritage value' is defined in ss 12(3) and (4) by reference to the World Heritage Convention.
- 77 A property may be included in the World Heritage List pursuant to the World Heritage Convention (see s 14 of the EPBC Act). Provisions relating to the listing and management of such properties are in Division 1 of Part 15 of the Act. A property may be included in the National Heritage List in accordance with Division 1A of Part 15 of the Act, which also contains provisions relating to the management of such places.
- 78 However, because the heritage values of a place are part of the environment (see definition of 'environment' in s 528), the provisions of Part 3 relating to Commonwealth actions (s 28) and to Commonwealth land (s 26) protect the Commonwealth Heritage values of a Commonwealth Heritage place on Commonwealth land in Australia. Commonwealth Heritage places outside Australia are protected under Subdivision AA of Division 2 of Part 3. A place may be listed as a Commonwealth Heritage place only if it is in a Commonwealth area, or is outside Australia and is owned or leased by the Commonwealth or a Commonwealth agency (s 341C).
- 79 A property may be included in the Commonwealth Heritage List in accordance with Division 1A of Part 15 of the Act, which also contains provisions relating to the management of such places.
- 80 See Subdivision D of Division 1 and Subdivision C of Division 1A of Part 15 of the EPBC Act.
- 81 See Subdivision C of Division 3A of Part 15 of the EPBC Act.
- 82 See ss 324Z and 341Z of the EPBC Act.
- 83 See ss 341ZA and 341ZB of the EPBC Act.
- 84 See s 341ZC of the EPBC Act and *Friends of Merri Creek Inc. v Meakins* [2003] FCA 671.
- 85 See ss 324ZA(2) and 341ZE(2) of the EPBC Act.
- 86 See ss 324AZ(3)–(6) and 341ZE(3)–(6) of the EPBC Act.
- 87 See Subdivision B of Division 1 and Subdivision B of Division 2 of Part 13 of the EPBC Act.
- 88 See Subdivisions A and B of Division 5 of Part 13 of the EPBC Act.
- 89 See ss 268, 269 and 286 of the EPBC Act.
- 90 See Subdivision BA of Division 1 of Part 13 of the EPBC Act.
- 91 See s 207C(2) of the EPBC Act.
- 92 See s 207C(3) of the EPBC Act.

AGS contacts

AGS has a network of lawyers experienced in providing advice to agencies on environmental law. For further information please contact our network leader in this area, Greg Prutej, on tel 02 6274 1826, email greg.prutej@ags.gov.au, or any of the lawyers listed below.

Canberra	Susan Reye Andrew Miles	02 6253 7110 02 6253 7100*
Sydney	Sonja Marsic Simon Konecny	02 9581 7594 02 9581 7585*
Melbourne	Libby Haigh Jo Ziino	03 9242 1499 03 9242 1312*
Brisbane	Michelle Lindley Nathan Simmons	07 3360 5753 07 3360 5681*
Perth	Lee-Sai Choo	08 9268 1137
Adelaide/Darwin	Sarah Court	08 8205 4231
Hobart	Peter Bowen	03 6210 2104

* For enquiries relating to property, leasing or infrastructure projects.

Offices

Canberra

50 Blackall Street Barton ACT 2600

Sydney

Level 42, 19 Martin Place Sydney NSW 2000

Melbourne

Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane

Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth

Level 19, 2 The Esplanade Perth WA 6000

Adelaide

Level 18, 25 Grenfell Street Adelaide SA 5000

Hobart

Level 8, 188 Collins Street Hobart TAS 7000

Darwin

Level 3, 9–11 Cavenagh Street Darwin NT 0800

Web site

For a full review of AGS services, visit <www.ags.gov.au>.

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form.

For enquiries regarding supply of issues, change of address details:
T 02 6253 7052 **F** 02 6253 7313
E ags@ags.gov.au

ISSN 1448-4803
Approved Postage PP 233744/00042