



23 February 2024

Legal briefing

Commonwealth Environment and Heritage Law

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The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is the key Commonwealth law about 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 EPBC Act has the potential to affect all Commonwealth agencies that engage in activities involving the use of land or sea. It is administered by the Department of Climate Change, Energy, the Environment and Water.

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.

Overview of the EPBC Act

The EPBC Act contains a number of distinct but frequently overlapping regimes. In summary, the principal functions of the EPBC Act are:

- regulation of actions (by any person) 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, from nuclear actions⁵
 - the marine environment⁶
 - the Great Barrier Reef Marine Park⁷
 - a water resource (but only in relation to actions involving unconventional gas development or large coal mining development)⁸
- regulation of Commonwealth actions that have, will have or are likely to have a significant impact on the 'environment',⁹ including:
 - actions taken anywhere by the Commonwealth and Commonwealth agencies¹⁰
 - actions taken by anyone on Commonwealth land¹¹ 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 jurisdiction¹²
- provision for bilateral agreements with states and territories for cooperative assessment and approval of actions impacting on matters of national environmental significance¹³
- protection and conservation of listed threatened species and ecological communities, listed migratory species, listed marine species, and cetaceans (i.e. whales and dolphins)¹⁴
- management and protection of areas of special 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)¹⁵

- control of international trade in endangered species.¹⁶

The focus of this briefing is the regulation of environmentally significant actions of the Commonwealth under Pt 3, Div 2, Subdiv B of the EPBC Act. Most of the concepts that arise in this analysis bear a corresponding relevance to other kinds of actions that are controlled under Pt 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 for the protection of the environment and conservation of biodiversity on Commonwealth land.

Regulation of Commonwealth actions with a significant impact on the environment

The form of regulation employed by Pt 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.¹⁷ 'Commonwealth agency' is defined in s 528 of the EPBC Act and includes:¹⁸

- a Minister
- a body corporate established for a public purpose by a law of the Commonwealth
- a body corporate established by a Minister
- subsidiaries of such bodies corporate
- 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.¹⁹ In addition, 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.²⁰ 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.²¹

Is a proposed Commonwealth activity subject to s 28 of the EPBC Act?

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.

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’.

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’.²² Thus, an action can be identified at varying levels of generality.

In *Tasmanian Aboriginal Centre Inc v Secretary of Department of Primary Industries, Parks, Water and Environment (No. 2)*,²³ Mortimer J (as her Honour then was) described the 4 definitions of ‘action’ in s 523 as embodying the concept of a number of smaller activities or steps or stages of conduct which should be considered together as forming a greater whole. Her Honour gave an example of the construction and operation of a coal fired power plant, which involves a number of individual activities before it becomes operational. These activities together may constitute a single ‘action’. This passage was cited with approval by the Full Court in *Triabunna Investments Pty Ltd v Minister for Environment and Energy*.²⁴

The most appropriate degree of specificity in the identification of an action depends on balancing the following (potentially competing) considerations:

- 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.²⁵
- However, 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.

Exclusions

The definition of ‘action’ contains 2 important exclusions:

- Section 524 excludes the grant of a governmental authorisation.
- Section 524A excludes the provision of grant funding.

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*,²⁶ 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 for 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.

In *Esposito v Commonwealth*,²⁷ the Full Court of the Federal Court held that an exercise of state legislative power that does not relate to any development in particular, and that merely empowers a council to grant its approval to future developments, thereby engaging provisions of the relevant state Act, cannot be described as a project, development, undertaking or activity or series of activities (i.e. action) within the meaning of s 523 of the EPBC Act.

In *Secretary of Department of Primary Industries, Parks, Water and Environment (No. 2) v Tasmanian Aboriginal Centre Inc.*,²⁸ the decision to open 3 tracks to recreational vehicles in a place of National Heritage value and the deliberative steps that led up

to this decision were excluded from the operation of the EPBC Act as a 'grant of a governmental authorisation'. Activities that implemented this decision, including offering recreational driver passes for sale to the public, ensuring GPS devices were fitted to vehicles and undertaking maintenance of the tracks, could be regulated as an 'action' or 'actions' under the EPBC Act.

Following these decisions, any administrative decision by a government that removes a statutory barrier to the taking of an action is itself not an 'action'. 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 actions by government bodies (including actions taken under statute) may fall outside the exemption because they do not have a 'governmental character'. In *Forestry Tasmania v Brown*,²⁹ the Full Court of the Federal Court held that a governmental authorisation is 'something only a government can do'. However, the Court left open the question whether the grant of a right to enter upon Crown land to conduct forestry activities was of a governmental nature.

What is the 'impact' of an action?

The assessment of the impact of an action must focus on the subject matter (matter of national environmental significance) that is protected by the EPBC Act.³⁰

The definition of 'impact' of an action in s 527E of the EPBC Act lists 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 of an action (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.

Indirect consequences of an action

If the intermediate cause of the 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:³¹

- 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.

Section 527E was 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.*³² (the Nathan Dam case) to clarify, elaborate and qualify the effect of that decision.

The Nathan Dam case

The Nathan Dam 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 the Environment Minister³³ had to take into account in deciding whether the dam project was subject to Pt 3 of the EPBC 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.³⁴ These impacts could occur as a result of the use of water from the dam by farmers for agricultural irrigation, with consequent run-off 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 Pt 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. These 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 Carmichael case

In 2015, the Australian Conservation Foundation (ACF) brought legal proceedings challenging the EPBC Act approval of the Carmichael (better known as Adani) coal mine. The ACF's primary argument was that the Minister failed to correctly or fully consider the likely impact on the Great Barrier Reef of greenhouse gas emissions from the overseas burning of coal exported from the mine (the climate change impacts). The ACF argued that these indirect consequences fell within s 527E of the EPBC Act.

The challenge was dismissed at first instance, and on appeal in *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy*.³⁵ Importantly, however, the challenge was dismissed on the ground that the Minister had, in fact, implicitly accepted that the climate change impacts were indirect consequences within the meaning of s 527E and had assessed these impacts in approving the mine. In this case, the Minister had based his decision in part on the view that the *United Nations Framework Convention on Climate Change*³⁶ and the *Kyoto Protocol* would manage and mitigate the overseas emissions. The Court considered that the ACF's challenge went to the merits of the decision as opposed to the legality of the decision and noted that, while 'there may be good grounds for disagreeing with the Minister's decision', the Court could not undertake merits review (at [61]).

It is important to note that the 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 Pt 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.³⁷

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 Pt 3. The inclusion of 'likely' impacts arguably expands the coverage of Pt 3: 'likely' may mean 'prone', 'with a propensity', or 'liable' in the sense of a real and not remote chance or possibility.³⁸ A liberal interpretation of 'likely' is arguably consistent with the role in the EPBC Act of the 'precautionary principle', which is an underlying theme of the Act along with other principles of ecologically sustainable development.³⁹

The precautionary principle

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.⁴⁰

The Full Court has recently provided guidance on the precautionary principle.⁴¹ The Court found that the precautionary principle only applies directly to the resolution of a question concerning postponing a measure to prevent degradation.⁴² It is a rule or principle of decision-making rather than a mandatory consideration. What is required by the precautionary principle is that the assessment of the likely impacts of the proposed action on matters of national environmental significance, and the weighing of those impacts against the social and economic benefits of the proposed action, be done consistently with the value embodied in the precautionary principle. Accordingly, the decision-maker must be aware of, and reason consistently with, the precautionary principle.

It has been held that the EPBC Act does not apply to the potential impacts of an action that 'lie in the realm of speculation' or are mere 'hypothetical possibilities'.

It has been held that the EPBC Act does not apply to the potential impacts of an action that 'lie in the realm of speculation'⁴³ or are mere 'hypothetical possibilities'.⁴⁴ For example, in *Mees v Kemp*⁴⁵ the applicant 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.⁴⁶

When is an impact ‘significant’?

One of the principal measures employed in the EPBC Act to limit the categories of actions that are subject to the EPBC Act is the *test of significance*. To an extent, the concept is 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’.⁴⁷ While this clarification confirms that formal criteria of significance have little role to play in the absence of context-specific factual situations, it leaves users of the EPBC Act without much practical guidance in determining whether the Act applies.

Guidelines

The department has published guidelines to assist in the identification of situations where a provision of Pt 3 of the EPBC Act may apply.⁴⁸ 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 taken⁴⁹
- 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 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.⁵⁰ 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.⁵¹

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)*,⁵² Marshall J held that the condition of various threatened species in Tasmania was so precarious that forestry operations that had any adverse impact on a member of the species would be significant.⁵³ On appeal, while not overturning his Honour’s finding on this point, the Full Court of the Federal Court found that the question whether the forestry operations had a significant impact on the threatened species was not determinative of the relevant legal issues that arose in that case.⁵⁴ In light of this finding, there is a serious question as to whether a future court would follow the approach of Marshall J.

When considering the context in which an action has impacts on a matter protected by Pt 3 of the EPBC Act, existing case law suggests it is necessary to avoid attributing to an action 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. However, information about cumulative impacts may be relevant to determining, for instance, the seriousness or intensity of the relevant impact of a particular action on a protected matter. In particular, cumulative impacts on protected matters may be indirectly relevant if they inform the nature of the impacts of the proposed action on the protected matter and whether or not those impacts are ‘significant’ for the purposes of the EPBC Act. This is consistent with the view taken by Gilmour J in *Western Australian Land Authority (Landcorp) v Minister for Sustainability, Environment, Water, Population and Communities*.⁵⁵

In that matter his Honour concluded that the clearing of Black Cockatoo habitat as part of other actions, both approved and proposed, was relevant to the Minister's determination of whether the proposed action would have a significant impact on Carnaby's Black Cockatoo, as those matters are part of the context in which the direct impacts of the clearing of Black Cockatoo habitat as a result of the proposed action should be considered (at [56]).⁵⁶ Whether the impact of an action on a protected matter is, will be or is likely to be significant would be a matter of fact and would depend on scientific evidence.

In *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage*,⁵⁷ the applicant argued that the likely impacts of the burning of coal to be produced from 2 proposed coal mines could be identified through a consideration of the cumulative impacts on protected matters of all coal burning. 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).

Justice Dowsett 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.⁵⁸ That said, the impacts of other actions may be relevant in determining the significance of impacts of a specific action (e.g. if there are actions impacting on a threatened species, the impact of one action may be of greater significance in placing the species under pressure).

As noted above, in the Carmichael case, the Minister's assessment of the likely impact on the Great Barrier Reef World Heritage Area arising from the greenhouse gas emissions that the proposed mine would give rise to was unsuccessfully challenged by the ACF. In that case, the Minister applied similar reasoning to Dowsett J, concluding that it was difficult to identify a relationship between the proposed mine and the impacts on relevant matters of national environmental significance that may occur as the result of any increase in global temperatures. This difficulty arose from the number of variables that would determine whether the

approval of the mine would in fact lead to increased emissions, such as whether coal from the Carmichael mine would replace other coal or different energy sources, the efficiency of the power plants in which it was used and the measures taken by other countries to reduce their greenhouse gas emissions.⁵⁹

Does an exemption apply?

The main exemptions from the prohibition in s 28(1) arise through the referral, assessment and approval process in the EPBC Act. The prohibition stops applying to a Commonwealth action if:

- the Environment Minister:
 - 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)⁶⁰
 - at the completion of the process, decides to *approve* the taking of the action⁶¹
 - grants an exemption from the prohibition if satisfied that this is necessary on grounds related to *defence, security or national emergency*⁶²
 - grants an exemption on national interest grounds under the general exemption power⁶³ (likely to be used very sparingly)
- in the case of a Commonwealth agency, an exemption is granted because the agency is required to comply with the relevant state or territory environmental protection laws⁶⁴
- it is an action 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 Pt 8 of the EPBC Act).⁶⁵

The exempted actions include actions covered by a conservation agreement between the Environment Minister and a Commonwealth agency (entered into under Pt 14 of the EPBC Act) that includes a declaration that the actions do not require approval under Pt 9 because they are not likely to have a significant impact on the environment.⁶⁶

The referral, assessment and approval process

Referral

The Commonwealth (or Commonwealth agency) is required to refer the proposal to take an action that it thinks is or may be a controlled action to the Environment Minister for a decision on the question.⁶⁷ A referred proposal may include

alternative locations, time frames and ways of taking the proposed action.⁶⁸ The *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations) prescribe the information that must be included in a referral.⁶⁹ The referral is submitted using an online form.⁷⁰

When a referral is received, the Minister must conduct a consultation process involving the public and any relevant Commonwealth, state or territory ministers.⁷¹ To make an informed decision on whether it is a controlled action (or, if it is a controlled action, which approach should be used to assess the action), the Minister may seek further information from the proponent about the action.⁷² The decision on whether the action is a controlled action must be made within 20 business days after the referral, unless that time is extended.⁷³ In making the decision, the Minister is not allowed to consider any possible beneficial impacts of the proposed action on a protected matter.⁷⁴

If the Minister decides that the proposed action is *not* a controlled action, the action may then be taken without contravening the prohibitions in Pt 3 of the EPBC Act. If this decision is contingent on the Minister's belief that the action will be taken in a particular manner, the exemption only applies if the action is taken in that manner.⁷⁵

In *Triabunna Investments Pty Ltd v Minister for Environment and Energy*,⁷⁶ the Full Federal Court considered the scope of the requirement under s 77A to set out the particular manner in which an action is to be taken in a notice determining that an action is not a controlled action. The Full Court held that all of the measures materially contributing to the conclusion that the action was not a controlled action needed to be listed in the notice, irrespective of whether the measures were part of the action as originally proposed or whether they were additional and supplementary measures developed through the referral process (see at [219]–[220] per Mortimer J).⁷⁷

Assessment

If the Minister decides that the action is a controlled action, they must choose the approach to be used. Under Pt 8 of the EPBC Act for assessment of the environmental impacts of the action, the potentially available assessment approaches in relation to Commonwealth actions⁷⁸ are:

- an accredited assessment process under a law of the Commonwealth, a state or a self-governing territory⁷⁹

- assessment based on the information provided in the referral for the proposed action⁸⁰ (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 Pt 3, and uncontroversial (Div 5.1A of the EPBC Regulations))
- assessment based on preliminary documentation (i.e. the referral information, possibly with specified additional information) together with a public consultation process⁸¹
- assessment by public environment report⁸² or environmental impact statement⁸³ (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.⁸⁴

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.

Approval

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. The Minister must then decide whether to approve the action, after further consultation with other relevant Commonwealth ministers, the proponent, and potentially the public.⁸⁵ The Minister must have regard to matters including economic and social matters and the principles of ecologically sustainable development (including the precautionary principle).⁸⁶

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 need not relate directly to the anticipated impacts of the proposed action⁸⁷ and may require the approval holder to do various things such as:⁸⁸

- undertake specific activities to protect a matter or repair or mitigate damage to a protected matter
- make a financial contribution to another person for the purpose of supporting activities to protect, repair or mitigate damage to a protected matter⁸⁹

- pay a security to comply with the EPBC Act and Regulations and any conditions of an approval
- 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 a specified industry standard code of practice
- comply with conditions specified in an instrument made under another law (e.g. a state approval).

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.⁹⁰

As an alternative approach to the assessment and approval process, Pt 10 provides for the approval of a class of actions that have undergone a 'strategic assessment' process and are then deemed to have been approved under Pt 9 (e.g. the Melbourne Urban Growth Boundary; Offshore Petroleum activities in Commonwealth Waters; and the South Australian Fire Management Policy).

Conservation agreement

In some cases, a conservation agreement under Pt 14 of the EPBC Act provides a more effective mechanism of securing the objectives of possible conditions of an approval. The Minister may enter into a conservation agreement with a person who proposes to take an action, for the protection and conservation of matters protected under Pt 3 of the EPBC Act.

A conservation agreement may include a declaration that certain actions do not need approval if the Minister is satisfied that those actions are not likely to have a significant impact on protected matters.⁹¹ However, 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.⁹² This makes conservation agreements particularly appealing for an action that is, or contemplates, a disposition of land.

Other Commonwealth obligations concerning Commonwealth land

Commonwealth land is land that is owned or held under lease by the Commonwealth or a Commonwealth agency.⁹³ 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 that 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.

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 Commonwealth agency):

- an action taken on Commonwealth land that has, will have or is likely to have a significant impact on the environment⁹⁴
- an action taken outside Commonwealth land that has, will have or is likely to have a significant impact on the environment on Commonwealth land.⁹⁵

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.⁹⁶

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 Pt 3 (or a condition of an approval under Pt 9) and the Commonwealth agency:⁹⁷

- knew, or was reckless or negligent as to whether, the contravention would occur
- was in a position to influence the conduct of the person
- failed to take all reasonable steps to prevent the contravention.⁹⁸

Protection of heritage on Commonwealth land

The EPBC Act contains provisions to protect 3 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.⁹⁹ 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.¹⁰⁰

World Heritage properties and National Heritage places are matters of national environmental significance that are protected under Pt 3 of the EPBC Act.¹⁰¹ Commonwealth Heritage places, as such, are generally not protected under Pt 3,¹⁰² but the Act imposes a number of specific obligations on the Commonwealth in relation to the heritage values of these areas as well.¹⁰³

Where a World Heritage property or National Heritage place occurs on Commonwealth land, the Minister must make a plan for managing the property or place. The Commonwealth and Commonwealth agencies must comply with this plan.¹⁰⁴ 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 may be endorsed by the Minister, and the Commonwealth and Commonwealth agencies must comply with it.¹⁰⁵

Commonwealth agencies are required to assist in the identification of National Heritage values and Commonwealth Heritage values of places that they own or control.¹⁰⁶ They must also prepare heritage strategies to identify and protect the Commonwealth Heritage values of those places.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹ If this type of 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 may either:¹¹⁰

- seek to enter into a conservation agreement with the prospective buyer or lessee for the ongoing protection of those values, under Pt 14 of the EPBC Act
- 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 Pt 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.¹¹¹

The EPBC Act provides for the making of plans to protect and promote the recovery of listed species and communities.¹¹² In general, the Commonwealth must implement these plans and Commonwealth agencies must comply with them.¹¹³

There are also provisions in the EPBC Act protecting critical habitat of listed threatened species and ecological communities.¹¹⁴ These include a requirement to ensure that any sale or lease of Commonwealth land includes a covenant, the effect of which is to protect the critical habitat.¹¹⁵ 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.¹¹⁶

Key issues

These are the most important questions that Commonwealth agencies must address 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. However, certain authorisation processes managed by other Commonwealth agencies, as listed in s 160 of the Act, will be subject to an alternative pathway for managing environmental impacts of projects based on the advice from the Environment Minister.
 - 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 assessment and approval under Ch 4 of the EPBC Act (unless they are exempted from that Act under Pt 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 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?

Endnotes

- 1 These are properties declared under the *Convention for the Protection of the World Cultural and Natural Heritage* [1975] ATS 47 (World Heritage Convention) (see Pt 3, Div 1, Subdiv A of the EPBC Act; also see Pt 15, Div 1 of the EPBC Act).
- 2 These are places included in the National Heritage List under Pt 15, Div 1A of the EPBC Act. As matters 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 Art 8 of the *Convention on Biological Diversity* [1993] ATS 32 (Biodiversity Convention); and all actions that have a significant impact on National Heritage values that are Indigenous heritage values of a place (see Pt 3, Div 1, Subdiv AA 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* [1975] ATS 48 (Ramsar Convention) (see Pt 3, Div 1, Subdiv B of the EPBC Act; also see Pt 15, Div 2 of the EPBC Act).
- 4 These are species and communities listed under Pt 13, Divs 1 and 2, of the EPBC Act (see Pt 3, Div 1, Subdivs C and D of the EPBC Act).
- 5 ‘Nuclear action’ is defined in s 22 of the Act (see Pt 3, Div 1, Subdiv E 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 Pt 3, Div 1, Subdiv F of the EPBC Act).
- 7 See ss 24B and 24C of the EPBC Act.
- 8 See ss 24D and 24E of the EPBC Act. ‘Unconventional gas development’ and the related term ‘unconventional gas production’ are defined in s 528 of the EPBC Act.
- 9 ‘Environment’ is defined in s 528 of the EPBC Act.

- 10 See Pt 3, Div 2, Subdiv B of the EPBC Act.
- 11 ‘Commonwealth land’ is defined in s 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.
- 12 See Pt 3, Div 2, Subdivs A and AA of the EPBC Act.
- 13 See Pt 5 of the EPBC Act.
- 14 See Pt 13 of the EPBC Act.
- 15 See Pts 15 and 15A of the EPBC Act.
- 16 See Pt 13A of the EPBC Act.
- 17 ‘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).
- 18 There are some exceptions, as set out in paragraphs (h)–(j) of the definition.
- 19 The civil penalty is 1,000 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 Pt 3 applies (e.g. actions that have a significant impact on a matter of national environmental significance under Div 1 of Pt 3), cognate civil penalty and criminal provisions apply.
- 20 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 to repair damage caused by a contravention.
- 21 See s 475(6) and (7), and also s 487, of the EPBC Act. The effect of s 487 of the EPBC Act 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. For case studies that illustrate how the courts have dealt with the issue of standing, see Chris McGrath, ‘Flying foxes, dams and whales: Using federal environmental laws in the public interest’ (2008) 25 *Environmental and Planning Law Journal* 324, 341.
- 22 See s 523 of the EPBC Act.
- 23 [2016] FCA 168 at [179].
- 24 [2019] FCAFC 60.
- 25 The Minister may reject a referral of an action under Pt 7 if he or she is satisfied that the action is a component of a larger action (s 74A).
- 26 [2005] FCAFC 203.
- 27 (2015) 235 FCR 1.
- 28 [2016] FCAFC 129.
- 29 (2007) 167 FCR 34 at [102].
- 30 *Tasmanian Aboriginal Centre Inc v Secretary of Department of Primary Industries, Parks, Water and Environment* (No. 2) [2016] FCA 168 at [206].
- 31 Section 527E(2) of the EPBC Act.
- 32 (2004) 139 FCR 24.
- 33 In this briefing, ‘Environment Minister’ means the Minister administering the EPBC Act.
- 34 The taking of an action that has a significant impact on the World Heritage values of a World Heritage property is prohibited under s 12 and s 15A, subject to the exemptions mentioned in this briefing.
- 35 (2017) 251 FCR 359.
- 36 [1994] ATS 2.
- 37 See ss 25AA and 28AB of the EPBC Act.
- 38 See *Booth v Bosworth* (2001) 114 FCR 39 at [97]–[98]; *Polaris Coomera Pty Ltd v Minister for the Environment* [2021] FCA 254.
- 39 See ss 3(1)(b) and 3A(b) of the EPBC Act.
- 40 See s 391(2) of the EPBC Act.
- 41 *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139 (Gelorup).
- 42 At [91]. The Full Court (Jackson and Kennett JJ; Feutrill J agreeing) also found that the precautionary principle had no direct application to a decision under s 133 of the EPBC Act (at [86] cf. *Bob Brown Foundation Inc v Minister for the Environment* (No 2) [2022] FCA 873 in relation to s 75 of the EPBC Act (see also *Gelorup* at [83] and [168])).
- 43 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.

- 44 *Mees v Kemp* [2004] FCA 366.
- 45 [2004] FCA 366.
- 46 See *Mees v Kemp* [2004] FCA 366 at [107]. Also see *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [72].
- 47 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].
- 48 The guidelines for actions by the Commonwealth and Commonwealth agencies are available at <<https://www.dceew.gov.au/environment/epbc/publications>>. The publication of guidelines to assist users of the EPBC Act was endorsed by the Federal Court in *Humane Society International Inc. v Minister for the Environment and Heritage* [2003] FCA 64. See also s 520A of the EPBC Act.
- 49 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].
- 50 *Brown v Forestry Tasmania (No. 4)* [2006] FCA 1729 at [94].
- 51 See *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [65]–[66].
- 52 [2006] FCA 1729.
- 53 *Brown v Forestry Tasmania (No. 4)* [2006] FCA 1729 at [97], [101].
- 54 *Forestry Tasmania v Brown* (2007) 167 FCR 34 at [103].
- 55 [2012] FCA 226.
- 56 See also *Brown v Forestry Tasmania (No. 4)* [2006] FCA 1729 at [94]–[102].
- 57 [2006] FCA 736.
- 58 See *Wildlife Preservation Society of Queensland v Minister for the Environment and Heritage* [2006] FCA 736 at [55]; see also para 51 of the Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1999.
- 59 *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* (2017) 251 FCR 359 at [60]. See also *Environment Council of Central Queensland Inc. v Minister for the Environment and Water (No. 2)* [2023] FCA 1208.
- 60 See s 28(2)(d) and Pt 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.
- 61 See s 28(2)(a) and Pt 9 of the EPBC Act.
- 62 See s 28(2)(c) and (3) of the EPBC Act.
- 63 See s 158 of the EPBC Act.
- 64 See s 28(2)(c), (4) and (5) of the EPBC Act.
- 65 Part 4 of the EPBC Act describes categories of actions to which s 28(1) does not apply (see s 28(2)(b)).
- 66 See ss 37M and 306A of the EPBC Act.
- 67 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).
- 68 Section 72(3) of the EPBC Act.
- 69 Sections 72(1) and (2) of the EPBC Act and Pt 4 of the EPBC Regulations.
- 70 See Australian Government Department of Climate Change, Energy, the Environment and Water, ‘Referral applications and proposals’, 18 October 2023 <<http://www.environment.gov.au/protection/environment-assessments/assessment-and-approval-process/refer-proposed-action>>.
- 71 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 (Pt 3, Div 1A). Section 170A(b) requires notice of the referral (and various subsequent steps in the process) to be published on the internet.
- 72 Section 76 of the EPBC Act.
- 73 Section 75(5) of the EPBC Act.
- 74 Section 75(2) of the EPBC Act.
- 75 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.
- 76 [2019] FCAFC 60.
- 77 The scope of the requirement in s 77A(1) is important because s 77A(2) provides for a simpler enforcement mechanism where a person takes an action in a way that is inconsistent with a manner specified in a s 77 notice. Where a manner is not specified in a s 77 notice, enforcement action would need to be taken under Ch 2, Pt 3 on the basis that the action taken was not the same as the action subject to the s 77 notice.
- 78 Assessment under a bilaterally accredited state or territory assessment process is also possible, but the default position is that this is precluded in relation to Commonwealth actions (see ss 49 and 83 of the EPBC Act).

- 79 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).
- 80 See s 87(4A) and Pt 8, Div 3A of the EPBC Act.
- 81 See s 87(5) and Pt 8, Div 4 of the EPBC Act.
- 82 See Pt 8, Div 5 of the EPBC Act.
- 83 See Pt 8, Div 6 of the EPBC Act.
- 84 See Pt 8, Div 7 of the EPBC Act.
- 85 See ss 130–132 of the EPBC Act.
- 86 See ss 136 and 391 of the EPBC Act.
- 87 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)).
- 88 See s 134(3) of the EPBC Act.
- 89 Such a condition may only be imposed with the consent of the approval holder (see s 134(3A)(b) of the EPBC Act).
- 90 See s 134(1A) of the EPBC Act.
- 91 See s 306A of the EPBC Act.
- 92 See s 307 of the EPBC Act.
- 93 'Commonwealth land' also includes land in an external territory (except Norfolk Island) or the Jervis Bay Territory but does not include freehold land in Christmas Island Territory (s 525(2A)) or 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).
- 94 See ss 26(1) and 27A(1) and (2) of the EPBC Act.
- 95 See ss 26(2) and 27A(3) and (4) of the EPBC Act.
- 96 See s 71 of the EPBC Act.
- 97 See s 496B of the EPBC Act.
- 98 Matters relevant to whether reasonable steps have been taken are set out in s 496D of the EPBC Act.
- 99 See the definitions of 'National Heritage values' in s 324D of the EPBC Act and 'Commonwealth Heritage values' in s 341D. See also *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129.
- 100 See the definition of 'heritage value' in s 528. 'World heritage value' is defined in s 12(3) and (4) by reference to the World Heritage Convention.
- 101 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 Pt 15, Div 1 of the Act. A place may be included in the National Heritage List in accordance with Pt 15, Div 1A of the Act, which also contains provisions relating to the management of such places.
- 102 However, because the heritage values of a place are part of the environment (see the definition of 'environment' in s 528), the provisions of Pt 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 Pt 3, Div 2, Subdiv AA. 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(2)).
- 103 A place may be included in the Commonwealth Heritage List in accordance with Pt 15, Div 3A of the EPBC Act, which also contains provisions relating to the management of such places.
- 104 See Pt 15, Div 1, Subdiv D; and Pt 15, Div 1A, Subdiv C of the EPBC Act.
- 105 See Pt 15, Div 3A, Subdiv C of the EPBC Act.
- 106 See ss 324Z and 341Z of the EPBC Act.
- 107 See ss 341ZA and 341ZB of the EPBC Act.
- 108 See s 341ZC of the EPBC Act and *Friends of Merri Creek Inc. v Meakins* [2003] FCA 671, which considers the meaning of the phrase 'no feasible and prudent alternative' within the (now repealed) *Australian Heritage Commission Act 1975* (Cth).
- 109 See ss 324ZA(2) and 341ZE(2) of the EPBC Act.
- 110 See ss 324AZ(3)–(6) and 341ZE(3)–(6) of the EPBC Act.
- 111 See Pt 13, Div 1, Subdiv B; and Pt 13, Div 2, Subdiv B of the EPBC Act.
- 112 See Pt 13, Div 5, Subdivs A and B of the EPBC Act.
- 113 See ss 268, 269 and 286 of the EPBC Act.
- 114 See Pt 13, Div 1, Subdiv BA of the EPBC Act.
- 115 See s 207C(2) of the EPBC Act.
- 116 See s 207C(3) of the EPBC Act.



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ISSN 1443-9549 (Print)
ISSN 2204-6550 (Online)