

EPBC Act

Factsheet



Overview

The *Environment Protection and Biodiversity Conservation Act 1999* is Australia's main piece of national environmental legislation. Each state and territory also has its own environmental legislation. In Queensland, for instance, we have the *Environmental Protection Act 1994*. The EPBC Act was enacted in 2000, with objects including:

- To protect the environment, especially matters of national environmental significance (**MNES**);
- To promote conservation of biodiversity;
- To promote a cooperative approach to the protection and management of the environment;
- To recognise the role of Indigenous people and promote the use of Indigenous peoples' knowledge of biodiversity with involvement of, and in cooperation with, the owners of the knowledge; and,
- To promote principles of ecologically sustainable development.

Some of these principles of ecologically sustainable development which are regularly invoked are: the precautionary principle, which requires a precautionary approach where there is scientific uncertainty, and the principle of intergenerational equity.

The MNES protected under the EPBC Act were chosen because they each have a connection to Australia's treaty obligations as they were at the time the law was drafted. This is because the Federal government has to operate within the powers given to it by the Australian Constitution, one of those being the 'external affairs' power.

MNES protected under the EPBC Act include matters of:

- World Heritage
- National Heritage
- Wetlands of international importance (RAMSAR wetlands)
- Listed threatened species and communities
- Listed migratory species
- Protection of the environment from nuclear actions
- Marine environment
- Great Barrier Reef Marine Park
- Protection of water resources from CSG and mining

We acknowledge the Yuggera and Turrbal people on whose land we live, learn and resist. We pay our respects to their elders past, present and emerging as well as First Nations people on the frontlines of climate change across the world. The colonial legal system finds its foundations in property, enforcing notions of ownership in place of guardianship.

How does it work?

The EPBC Act enforces a process of ‘Environmental Impact Assessment’ against particular activities that are **likely to have a “significant impact”** on **“matters of national environmental significance.”**

An activity found to be likely to have a significant impact on any MNES is broadly termed a **“controlled action”** → Each MNES then has its own **“controlling provision”**.

For example, s 12 relates to World Heritage areas. It states that:

“A person must not take an action that has, will have, or is likely to have, a **significant impact** on the world heritage values of a declared World Heritage property.” HOWEVER, this section will not apply where:

- The person has an approval from the relevant Minister
- The person does not need an approval from the relevant Minister
- The Minister has decided under the EPBC Act that the action is not a controlled action (even if it looks like one)

What’s a “significant impact”?

This term was not defined in the EPBC Act at the outset, and has been the subject of a lot of judicial consideration. In a case called *Booth v Bosworth* the courts said that a “significant impact” is “important, notable, or of consequence, having regard to its context or intensity.” This can also include indirect, or ‘downstream’, impacts of an activity.

At the referral stage,

A person/company proposing to take an action (**proponent**) that might be a “controlled action” must refer it to the Minister. Otherwise, the State or Commonwealth can refer it. At this stage, the **Minister makes one of four decisions:**

1. Action is unacceptable and cannot be remedied with conditions
2. Action is a **controlled action**, and **must proceed to the assessment and approval stage**
3. Approval is not required if the action complies with certain conditions aimed at avoiding unacceptable impact
4. Approval is not required, and the action may go ahead

When an action is referred, the Minister must publish the referral information and call for public comments to be provided within a set period of time.

The Minister must then take into consideration these public comments, all adverse impacts the action has, will have or is likely to have on MNES and principles of ecologically sustainable development in the above decision.

At the assessment stage,

The Minister will decide on a particular approach to the assessment. If the project is to be assessed under state laws then this assessment may be used for the Federal decision as well (known as bilateral agreements). This decision as to the type of assessment will generally be informed by the perceived likely impacts of the project.

Each assessment approach involves some form of public consultation.

At the approval stage,

1. The Minister may approve the action
2. The Minister may refuse to approve the action
3. The Minister may attach conditions to the approval of the action if satisfied that the conditions are necessary to protect a matter.

In making the final approval decision, the Minister must consider MNES and positive or negative impacts on economic and social matters. They must also take principles of ecologically sustainable development and any assessment report into account.

The Minister seems to have a lot of discretion. Is there any oversight?

Merits review

We **DO NOT** have merits review rights under the EPBC Act to challenge the Ministers' decisions throughout the process or following their final decision. Merits review enables the court to stand in the place of the decision-maker and re-consider whether the most appropriate decision was made on the available evidence. This provides a valuable and independent oversight mechanism on matters which may be politically charged.

Without merits review, the EPBC Act is seriously lacking in accountability measures, undermining the integrity of the Act's supposed objectives.

Judicial review

We **DO** have the ability to have a Ministers' decision judicially reviewed under the EPBC Act. However, judicial review is a far more limited mechanism than merits review. It enables the court to determine whether the process of the decision was *procedurally* correct. Did the decision-maker comply with the requisite process in reaching their decision? This is particularly challenging where the EPBC Act allows for so much Ministerial discretion. It would take a lot for the Minister to act outside the law.

To seek judicial review, you must have “standing” which means you must be a “person who is aggrieved” by a decision. The EPBC Act has provided for extended standing which allows environmental interest groups to apply for review of decisions, although this has been the source of political debate.

JUDICIAL REVIEW OF ADANI'S EPBC ACT APPROVALS

Litigation led by the Mackay Conservation Group against Adani's EPBC Act approvals in 2015 is an example of the limits of judicial review. MCG argued that the decision to approve the mine was *procedurally incorrect* because the Minister had failed to consider everything they were required to consider by law (including conservation advices for two listed threatened species, the Yakka Skink and the Ornamental Snake).

The approval was successfully set aside by the Federal Court. However, the Minister was able to reconsider the application for the mine and grant a second approval, simply stating that they “took into consideration” the conservation advices. There is no requirement to assess how meaningfully the Minister may have considered these advices. Read more [here](#).

What are some of its problems?

Adaptive management

Adaptive management practices are increasingly being used in environmental approvals as a means of applying the precautionary principle. An adaptive management approach generally means that a proponent is required to monitor the impacts of an activity on an ongoing basis and adapt accordingly. Unfortunately, the practical result is that proponents are relying on adaptive management conditions in place of a thorough assessment of the impacts before taking action. Without an accurate level of baseline information, monitoring efforts are providing limited actual feedback and mitigating measures are not being implemented at the outset. There is also very little oversight of ongoing monitoring of impacts and steps being taken to mitigate harm.

Offsets

Environmental offsets allow developments to proceed regardless of having a significant impact on the environment and biodiversity, as long as the proponent undertakes a positive action in another location. For example, a proponent may clear vegetation impacting a threatened species but plant habitat somewhere else. The goal is often described as “no net loss” of biodiversity.

The potential for misuse of this practice by developers is significant. A common criticism of offsets is that they **exchange certain losses for uncertain gains**. An offsets plan also regularly offends the best science and the practicality of implementation. Activities are being approved on the basis of offset plans without providing any evidence that the impact can actually be offset. There tends to be an assumption that any impact can be offset with no test as to whether an activity is essential enough to warrant the impact proposed.

ADANI V THE BLACK THROATED FINCH

One good example of a questionable offsets plan is in the Adani Carmichael Coal Mine’s plan to relocate the endangered black throated finch from its footprint. The plan has been [criticised](#) for its misunderstanding of the species, which requires particular grasses to feed on which are not available on the proposed offsetting site.

[Further criticism](#) has been levied at the fact that the proposed new home for the finch is on the site of another proposed coal mine which could displace the species further if built.

No mention of climate change

When making a controlled action decision, the Minister, under the EPBC Act is not required to consider greenhouse gas emissions or contributions to climate change. Legal experts have toiled for years to try and show that there is a causal link between, for example, the burning of coal, climate change, and the effects it can have on MNES. Over time, in an incremental fashion, public interest cases have consolidated the practice of considering greenhouse gas emissions in environmental impact assessments where they can be related to an MNES. However, this is a very round-a-bout and uncertain pathway to assessing an environmental concern which will have catastrophic impacts for our communities.

Some experts state that due to the fact that Australia’s treaty obligations on climate change have developed significantly over the past 20 years since the implementation of the Act, the EPBC Act could easily be amended to govern impacts on climate change while staying well within the government’s Constitutional constraints.

Ministerial discretion

As outlined above, the Minister has a great deal of discretion in making decisions about environmentally damaging activities under the EPBC Act. Coupled with that, there are only very limited avenues available to review the Minister's decisions, and these reviews rarely have a lasting impact on an outcome. The process is fraught with a lack of independent oversight. Many environmentalists and legal experts have long called for a merits review process to be implemented under the EPBC Act.

And many, many more....

Many different experts, lawyers and community leaders have valid criticisms of the EPBC Act and its ability to protect our environment. The EPBC Act begins with admirable objectives but repeatedly fails itself. One of the most vital ways in which these objectives can be met is through supporting Indigenous sovereignty and self-determination; yet references and attempts to empower Indigenous people throughout the Act are tokenistic at best.

In 2009, the first 10 year review of the EPBC Act was conducted by Dr Allan Hawke. The review summarises community and expert concerns of the Act as at 2009, many of which are still relevant today. See [here](#) to read the review and get across the details of more criticisms of the EPBC Act.

Further resources

- Environmental law case studies: <http://envlaw.com.au>
- [The Hawke Review](#)
- Government fact sheets: <https://www.environment.gov.au/epbc/about>
- EDO blog article: [EPBCA Review: A Once in a Decade Opportunity](#)
- The Conversation, [Why Aren't Australia's Environmental Laws Preventing Widespread Land clearing?](#)
- Environmental Justice Australia, [Why we need an overhaul of our federal environmental laws](#)