

Environment Protection and Biodiversity Conservation Act 1999

The *Environment Protection and Biodiversity Conservation Act 1999* was passed by the House of Representatives on 23 June 1999 and by the Senate on 29 June 1999 and was assented to on 16 July 1999. Its provisions will probably take effect in about twelve months time. The *Act* introduces a new Commonwealth regime to protect national environmental interests.

Reforms

The new *Act* changes the circumstances in which Commonwealth approval for projects impacting upon the environment is required.

Under the existing *Environmental Protection (Impact of Proposals) Act* each Minister must take into account matters affecting the environment to a significant extent when making government decisions. Commonwealth environmental impact assessment is triggered by decisions relating to matters such as granting financial assistance to the States, Foreign Investment Review Board approval and export licence approval.

In contrast, the Minister's approval under the new *Act* is required where a matter of national environmental significance may be significantly impacted by a proposal.

A further difference from the current regime is that the decision as to whether there is a significant impact will be made by the Minister for Environment and Heritage, rather than another minister in the course of making other decisions.

Triggers

The *Act* is triggered by the undertaking of "*actions*" which include the carrying out of projects, developments, undertakings and activities. "*Controlled actions*" require environmental approvals under the *Act*. Actions will qualify as controlled actions in the following circumstances:

1. where the action will have or is likely to have a significant impact on a matter of "*national environmental significance*", being:
 - a. world heritage areas;
 - b. Ramsar wetlands of international importance;
 - c. nationally threatened species and communities as listed;
 - d. migratory species protected under international agreements;
 - e. nuclear actions;
 - f. Commonwealth marine environment (generally outside 3 nautical miles from the coast); and

- g. any additional matter specified by regulations (the subject matter of the regulations is yet to be determined); or
2. where actions are taken on Commonwealth land that have or are likely to have a significant impact on the environment; or
3. where activities of the Commonwealth or a Commonwealth agency will have or are likely to have a significant impact on the environment.

Obligations to refer proposals

Where the proponent "*thinks*" approval is or may be required under the *Act*, an initial application must be made to the Minister to determine whether the proposal is a "*controlled action*". If a proponent "*thinks*" approval is not required, he may still refer the proposal to the Minister for a decision on the point.

Caution is required in dealing with possible obligations under the *Act* because there is no definition of "*significant impact*" (although there is provision for regulations to give guidance on the point). Whether a proponent "*thinks*" an action will have or is likely to have a significant impact on a matter of national environmental significance will depend on:

- whether the action will affect a matter of national environmental significance; and
- whether the impact of the action will be a "*significant impact*".

In relation to proposals regarding the use of Commonwealth land or undertaken by the Commonwealth that may result in a significant environmental impact, these must be referred to the Environment Minister for an assessment as to whether they require approval under the *Act*.

Ministerial determination

If the Minister "*thinks*" that the action is or may be a controlled action, the Minister may request the proposal be formally referred to the Minister. Unless the proponent indicates they think the proposal is a "*controlled action*" the Minister may invite public comment and comment from any other Commonwealth or State or Territory Minister involved. The period for public consultation is only 10 business days. The Minister must then decide whether the proposal needs Commonwealth approval.

Assessment of Impacts

If the action needs approval, the proponent must provide further information to the Minister so that the Minister can determine by which of the following approaches to assess the impacts of the proposal:

- an accredited assessment process (bilateral agreements – see below);
- an assessment on preliminary documentation;
- a public environment report;
- an environmental impact statement; or
- a public inquiry.

How will this act affect you?

The mechanism for preliminary assessment of proposals by the Minister allows a proponent to obtain Ministerial confirmation that a proposal does not require Commonwealth approval based only on preliminary information.

If you are currently undertaking a project which requires Commonwealth or State or Territory approvals and which may be affected by the new *Act*, you should ensure that all approvals for the project are obtained prior to the commencement of the *Act*, otherwise the project may be reassessed under the new *Act*.

States may wish to negotiate bilateral agreements with the Commonwealth, as provided for in the *Act*, to enable State approval processes to take the place of the approvals required under the *Act*. This should result in more streamlined assessment and approval processes. Commonwealth departments may wish to establish protocols to ensure the Commonwealth discharges its rights and obligations under the *Act*.

The *Act* provides that the Commonwealth is to prescribe a number of procedures and matters (including additional matters of national environmental significance) by way of Regulation which may considerably broaden the ambit of the *Act* and the Commonwealth’s powers in respect of the environment.

The *Act* provides for substantial civil penalties and criminal offences for contraventions of its provisions and imposes liability upon the executive officers of corporations for failing to take reasonable steps to prevent any contraventions by the corporation.

Exemptions from the requirement for approval

Actions may be undertaken without an approval under the *Act*:

- a. in accordance with a bilateral agreement (in which an accredited State approval process replaces the approval process under the *Act*);
- b. in accordance with a declaration (including an accredited Commonwealth approval process involving compliance with a management plan);
- c. with the approval of the Environment Minister under Part 9 (as for the dealings with Commonwealth land or undertaken by a Commonwealth agency); and
- d. in accordance with a conservation agreement.

The Minister may make a declaration that certain actions are exempt where they are necessary in the interests of Australia’s defence or security.

Biodiversity/Conservation Measures

The *Act* proposes conservation of biodiversity by a number of means including creating lists of nationally threatened native species, threatened ecological communities and key threatening processes etc. In addition, recovery plans will be prepared by the Environment Ministers for lists of threatened species and lists of threatened communities and abatement plans will be initiated for key threatening processes.

The Environment Minister may also make wildlife conservation plans for protection of animal species.

The *Act* sets out steps for protecting areas including world heritage properties, wetlands of international importance, bio-sphere reserves and Commonwealth reserves. In addition there are steps to be followed for nomination of properties and creating and managing Commonwealth reserves. The Minister for Environment may also enter into conservation agreements with private land holders to enhance conservation and financial assistance may be provided.

The *Act* enables the Commonwealth to establish regulations about access to biological resources on Commonwealth land and waters.

Repealed Acts

The *Act* replaces the following *Acts* which will be repealed after commencement:

- a. *National Parks and Wildlife Conservation Act 1975*;
- b. *The Whale Protection Act 1980*;
- c. *The World Heritage (Properties Conservation) Act 1983*;
- d. *The Endangered Species Protection Act 1992*;
- e. *The Environment Protection (Impact of Proposals) Act 1974*.

- Clayton Utz’s Planning & Environment News Issues Update.