

An overview of the **E**nvironment **P**rotection and **B**iodiversity **C**onservation Act



INTRODUCTION



The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the Act) represents the most fundamental reform of Commonwealth environment laws since the first environment statutes were enacted in the early 1970's. In particular, it is the first comprehensive attempt to define the environmental responsibilities of the Commonwealth.

The Act enables the Commonwealth to join with the States (including Territories) in providing a truly national scheme of environmental protection and biodiversity conservation, recognising our responsibility to not only this generation, but also future generations. It does so by providing for Commonwealth leadership on the environment, while also recognising and respecting the responsibility of the States for delivering on-ground natural resource management. It does so also in a way that is 'user friendly', with predictable, transparent and timely assessment processes.

The Act focuses Commonwealth interests on matters of national environmental significance, puts in place a streamlined environmental assessment and approvals process and establishes an integrated regime for biodiversity conservation and the management of important protected areas.

The material in this overview is provided for general information only, and should not be relied upon for the purpose of a particular matter.



BENEFITS

The Act will deliver important benefits for the Australian community including:

- stronger protection for the environment;
- more consistent national environmental standards;
- a more efficient and timely environmental assessment and approval process; and
- a reduction in intergovernmental duplication.

THE OBJECTS OF THE ACT

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

COMMENCEMENT

The Act will commence on 16 July 2000. At that time, it will replace the following Commonwealth statutes:

- *Environment Protection (Impact of Proposals) Act 1974*
- *Endangered Species Protection Act 1992*
- *National Parks and Wildlife Conservation Act 1975*
- *World Heritage Properties Conservation Act 1983*
- *Whale Protection Act 1980.*

STRUCTURE OF THE ACT

Environmental assessment and approval

The Act provides that certain actions – in particular, actions which are likely to have a significant impact on a matter of national environmental significance – are subject to a rigorous assessment and approval process. The Commonwealth may, through bilateral agreements, delegate to the States the responsibility for conducting assessments and, in limited circumstances, the responsibility for deciding whether to grant approval.

Biodiversity conservation

The Act contains an extensive regime for the conservation of biodiversity including provisions dealing with:

- the identification and monitoring of biodiversity, and the preparation of bioregional plans;
- the listing of nationally threatened species and ecological communities, migratory species and marine species;
- the preparation of national recovery plans and wildlife conservation plans for listed species, and additional protection for listed species in Commonwealth areas;
- the identification of key threatening processes and the preparation of threat abatement plans for such processes;
- the establishment of the Australian Whale Sanctuary in Australia's exclusive economic zone;
- access to biological resources on Commonwealth areas;
- invasive species;
- voluntary conservation agreements which may cover environmentally significant private land, including indigenous land; and
- the protection and management of protected areas including Commonwealth reserves (national parks), World Heritage properties, Ramsar wetlands and Biosphere reserves.

Enforcement and administration

The enforcement and administration provisions cover:

- the establishment of Advisory Committees, including the Biological Diversity Advisory Committee, the Indigenous Advisory Committee and the Threatened Species Scientific Committee;
- a requirement for Commonwealth agencies to report annually on their implementation of ecologically sustainable development;
- the preparation of State of the Environment Reports;
- environment audits and conservation orders;
- the liability of corporate executive officers; and
- powers to remedy environmental damage caused by a contravention of the Act.

ASSESSMENT AND APPROVAL

When does an action need approval?

A person must not take an action that has, will have or is likely to have a significant impact on a matter of national environmental significance except:

- in accordance with an approval from the Commonwealth Environment Minister; or
- in accordance with an approval from another Commonwealth decision-maker under a management plan accredited by the Commonwealth Environment Minister for the purposes of a Ministerial declaration (declarations are explained on p.7); or
- in accordance with an approval from a State in accordance with a management plan accredited by the Commonwealth Environment Minister for the purposes of a bilateral agreement (bilateral agreements are explained on p.7).

The unlawful taking of an action that has a significant impact on a matter of national environmental significance may attract a civil penalty of up to \$5.5 million or a criminal penalty of up to 7 years imprisonment.

Matters of National Environmental Significance

The matters of national environmental significance identified in the Act as triggers for the Commonwealth assessment and approval regime are:

- World Heritage properties
- Ramsar wetlands
- Nationally threatened species and ecological communities
- Migratory species
- Commonwealth marine areas
- Nuclear actions (including uranium mining).

The Act also provides that:

- a person must not take an action on Commonwealth land that has, will have or is likely to have a significant impact on the environment;
- a person must not take an action outside Commonwealth land that has, will have or is likely to have a significant impact on the environment on Commonwealth land;
- the Commonwealth (including a Commonwealth agency or corporation) must not take an action which has, will have or is likely to have a significant impact on the environment anywhere in the world.

An action in one of these categories may be taken in accordance with an approval from the Commonwealth Environment Minister, or in accordance with an approval from another Commonwealth decision-maker under a management plan accredited by the Commonwealth Environment Minister.

The unlawful taking of an action in these categories may attract a civil penalty of up to \$1.1 million, or a criminal penalty of up to 2 years imprisonment.

What is an ‘action’?

An action includes a project, development, undertaking or an activity or series of activities. A decision by a government body to grant an authorisation (for example, a permit or licence) or to provide funding is not an action.

Existing actions

An action does not require approval if it is a lawful continuation of a use of land, sea or seabed that was occurring before the commencement of the Act. (An enlargement, expansion or intensification of a use is not a continuation of a use.)

A person will therefore not require approval under the Act to continue taking an action that was commenced before 16 July 2000.

Actions approved prior to 16 July 2000

An action does not require assessment or approval under the Act if:

- it has been approved by the Commonwealth or a State before 16 July 2000; and
- no further approvals are required in order for the action to be lawfully taken.

A person will therefore not require approval to take an action that was fully approved before 16 July 2000, even if it had not commenced by that date.

Other actions not subject to the Act

Actions taken in accordance with the Great Barrier Reef Marine Park Act 1975, or instruments under the Act, and forestry operations in a Regional Forest Agreement area do not need approval.

Actions covered by the Environment Protection (Impact of Proposals) Act 1974 (EPIP)

Transitional provisions provide that, in general, a proposed action that has been, or is being, assessed under the EPIP Act does not require approval under the Act.

Figure 1 (page 10) is a simplified scheme of when an action requires approval under the Act.

WHAT IS THE PROCESS FOR OBTAINING AN APPROVAL?

Figure 2 (page 11) is a flow chart which represents an outline of the assessment and approvals process established by the Act.

Referral

Before the Act commences, administrative guidelines will be issued to assist in determining whether an action requires approval – in particular, to provide guidance on whether an action has, will have or is likely to have a significant impact on a matter of national environmental significance.

The person proposing to take the action must refer proposed actions, that may require approval from the Commonwealth Environment Minister, to the Minister. The Minister will decide whether approval is required.

If a person is unsure whether approval is required, he or she may refer a proposed action to the Commonwealth Environment Minister. The Minister must make a binding decision on whether the Act is triggered within 20 business days. If the Minister provides advice that an action does not require approval, a person will not contravene the Act if the action is taken in accordance with that advice.

The Act therefore guarantees that a proponent will receive timely advice on whether a proposed action triggers the Act. It also ensures certainty for proponents by providing that a proponent does not contravene the Act if he or she follows the advice of the Commonwealth Environment Minister.

A proposed action may also be referred by a Commonwealth or State agency, and the Commonwealth Environment Minister may ask a person to refer a proposed action.

Assessment

An action that requires the Commonwealth Environment Minister's approval must be assessed.

If a bilateral agreement is in place that accredits a State assessment process, a State will assess the action under the terms of that agreement. Similarly, if a Ministerial declaration is in place that accredits the assessment process of another Commonwealth agency, the action will be assessed by that Commonwealth agency (Bilateral agreements and Ministerial declarations are described on p.7).

Assessment options for the Commonwealth Environment Minister

The options for the Commonwealth Environment Minister are:

- assessment on preliminary documentation;
- public environment report (PER);
- environmental impact statement (EIS);
- public inquiry; or
- an accredited process (ie, accreditation on a project-by-project basis).

If a relevant bilateral agreement or Ministerial declaration is not in place, the Commonwealth Environment Minister will decide on an assessment approach. A decision must be made within 20 business days of the Commonwealth Environment Minister receiving information about the potential impacts of the proposed action.

Assessment on preliminary documentation, or by PER or EIS, involves the preparation and publication of draft assessment documentation, a period for public comment, and finalisation of assessment documentation taking public comments into account. All of these steps are taken by the person proposing to take the action, following regulations and guidelines prepared by the Commonwealth Environment Minister.

There are penalties for providing information in assessment documentation that is false or misleading.

Once the person proposing to take the action has completed these steps, the Secretary of Environment Australia will prepare an assessment report for the Commonwealth Environment Minister. This report must be prepared within 20 business days.

If the Commonwealth Environment Minister chooses an accredited process, then the assessment will be carried out by a State or by a Commonwealth agency other than Environment Australia. The accredited process will need to be consistent with best practice criteria.

Approval decision

After the assessment process is complete, the Commonwealth Environment Minister has 30 business days to decide whether to grant approval.

When deciding whether to approve the taking of an action and what conditions to impose, the Commonwealth Environment Minister must consider:

- social and economic matters; and
- relevant environmental impacts.

The Minister must take into account:

- the principles of ecologically sustainable development;
- the assessment report on the impacts of the action;
- any other information about the impacts of the action; and
- relevant comments from other Ministers (such as information on social and economic factors).

The principles of ecologically sustainable development include the principle that decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.

The Commonwealth Environment Minister must not decide whether to grant approval until he or she has received a notice from the relevant State confirming that the environmental impacts on matters other than the matters of national environmental significance have also been assessed.

The Commonwealth Environment Minister may also consider the proponent's environmental history.

A proponent may transfer an approval to another person with the Minister's consent.

Decisions on which advice must be sought from the Commonwealth Environment Minister

The Commonwealth Environment Minister's advice (as opposed to approval) must be sought before certain Commonwealth decisions are made. These are:

- entering into a contract, agreement or arrangement for a foreign aid project which is likely to have a significant impact on the environment;
- adopting or implementing a plan for aviation airspace management which is likely to have a significant impact on the environment;

- adopting or implementing a major development plan (as defined in the Airports Act 1996); and
- any other decision which is prescribed in regulations (which will include, for example, environmentally significant decisions by the Great Barrier Reef Marine Park Authority).

HOW DO BILATERAL AGREEMENTS AND MINISTERIAL DECLARATIONS WORK?

Bilateral Agreements

A key function of bilateral agreements is to provide for the accreditation of State processes and systems by the Commonwealth.

'Accreditation', in this context, means the reliance by the Commonwealth on State assessment processes and, in appropriate cases, State approval decisions. In effect, bilateral agreements allow the Commonwealth to delegate to the States the responsibility for conducting environmental assessments under the Act and, in more limited circumstances, the responsibility for granting environmental approvals under the Act.

It is important to note that the Act sets out various constraints on the scope of any accreditation that can be effected through bilateral agreements, and imposes certain minimum standards that must be observed. To be accredited, a State process will need to meet 'best practice' criteria.

Bilateral agreements may:

- accredit State assessment processes only (an 'assessment bilateral'); or
- in limited circumstances, accredit State assessment and approval processes carried out in accordance with agreed management plans (an 'approval bilateral').

Bilateral agreements may also deal with various other matters such as management plans for World Heritage properties, co-operation on monitoring and enforcement and so on.

If an action is covered by an assessment bilateral, then that action is assessed under the accredited State process. The action still requires approval from the Commonwealth Environment Minister under the Act.

If an action is covered by an approval bilateral, then that action is assessed and approved by the State in accordance with an agreed management plan. Approval is not required from the Commonwealth Environment Minister under the Act.

Ministerial declarations

A Ministerial declaration may:

- accredit an assessment process by a Commonwealth agency other than Environment Australia; or
- in limited circumstances, accredit an assessment and an approval process by a Commonwealth agency, other than Environment Australia, carried out in accordance with an agreed management plan.

The effect of a Ministerial declaration is similar to a bilateral agreement.

Making bilateral agreements

The Commonwealth Environment Minister must publish a notice as soon as practicable after starting the process of developing a draft bilateral agreement.

Once the Commonwealth and a State develop a draft bilateral agreement, it must be published and at least 28 days allowed for public comment. The Commonwealth Environment Minister must take any comments received into account before finalising the bilateral agreement.

Bilateral agreements have a maximum life of five years, and must be reviewed before they expire.

Prerequisites for assessment bilaterals

The most important requirements of the Act in relation to assessment bilaterals include:

- the Commonwealth Environment Minister may accredit an assessment process under a bilateral agreement only if he or she is satisfied that the assessment of an action in accordance with that process will address all impacts on matters of national environmental significance;
- an assessment bilateral must provide for the Commonwealth Environment Minister to receive an assessment report with enough

information about the impacts on matters of national environmental significance to let the Minister make an informed approval decision;

- the Commonwealth Environment Minister may enter into a bilateral agreement only if he or she is satisfied that it meets the requirements (if any) prescribed by the regulations. In this respect, the Commonwealth has given a commitment that it will introduce regulations that specify 'best practice' criteria for environmental impact assessment processes. These criteria will operate as the 'benchmark' against which State processes will be considered for accreditation;
- an assessment bilateral must include an undertaking by the State that it will ensure that environmental impacts other than those affecting matters of national environmental significance will be assessed to the greatest extent practicable.

The Act specifies a range of other criteria that must be met by assessment bilaterals, including that they must meet the objects of the Act and must not be inconsistent with relevant international Conventions.

Similar criteria apply in relation to corresponding Ministerial declarations.

Prerequisites for approval bilaterals

The Commonwealth may, through an approval bilateral, accredit State approval decisions only in limited circumstances:

- a State 'approval decision' can be accredited only if the approval is given by the State, and the action is taken, in accordance with an accredited management plan;
- the management plan must be approved by the Commonwealth Environment Minister under a bilateral agreement;
- accreditation of the management plan for the purposes of the Act is disallowable by either House of Commonwealth Parliament;
- the management plan must be in force under a State law;
- the Commonwealth Environment Minister may accredit a plan only if satisfied that:
 - (a) an adequate environmental assessment will occur;

- (b) relevant actions permitted by the plan will have no unacceptable or unsustainable impacts; and
- (c) the management plan is not inconsistent with relevant international treaties and satisfies other criteria laid out in regulations.

A range of other criteria must also be met before an approval bilateral can be entered into.

Similar criteria apply in relation to corresponding Ministerial declarations.

Cancelling and suspending bilateral agreements and declarations

The Commonwealth Environment Minister may cancel or suspend a bilateral agreement if he or she is satisfied that:

- a State has not complied with the agreement (or will not in the future comply with the agreement); or
- a State has not given effect to the agreement in a manner which accords with the objects of the Act and Australia's responsibilities under relevant international agreements (or will not in the future give effect to the agreement in this manner).



A suspension or cancellation may operate in relation to:

- the whole agreement or specified provisions in the agreement; and
- all actions or a specified class of actions.

A savings provision is included for actions that are approved under a bilateral agreement that is later suspended or cancelled.

The Commonwealth Environment Minister must give notice and consult with the relevant State before suspending or cancelling the agreement (except in the case of an emergency suspension).

The agreement must be suspended or cancelled at the request of the State under circumstances that may be set out in the agreement.

The Commonwealth Environment Minister may also cancel or suspend a declaration.

Figure 1: Deciding whether an action requires approval under the Act

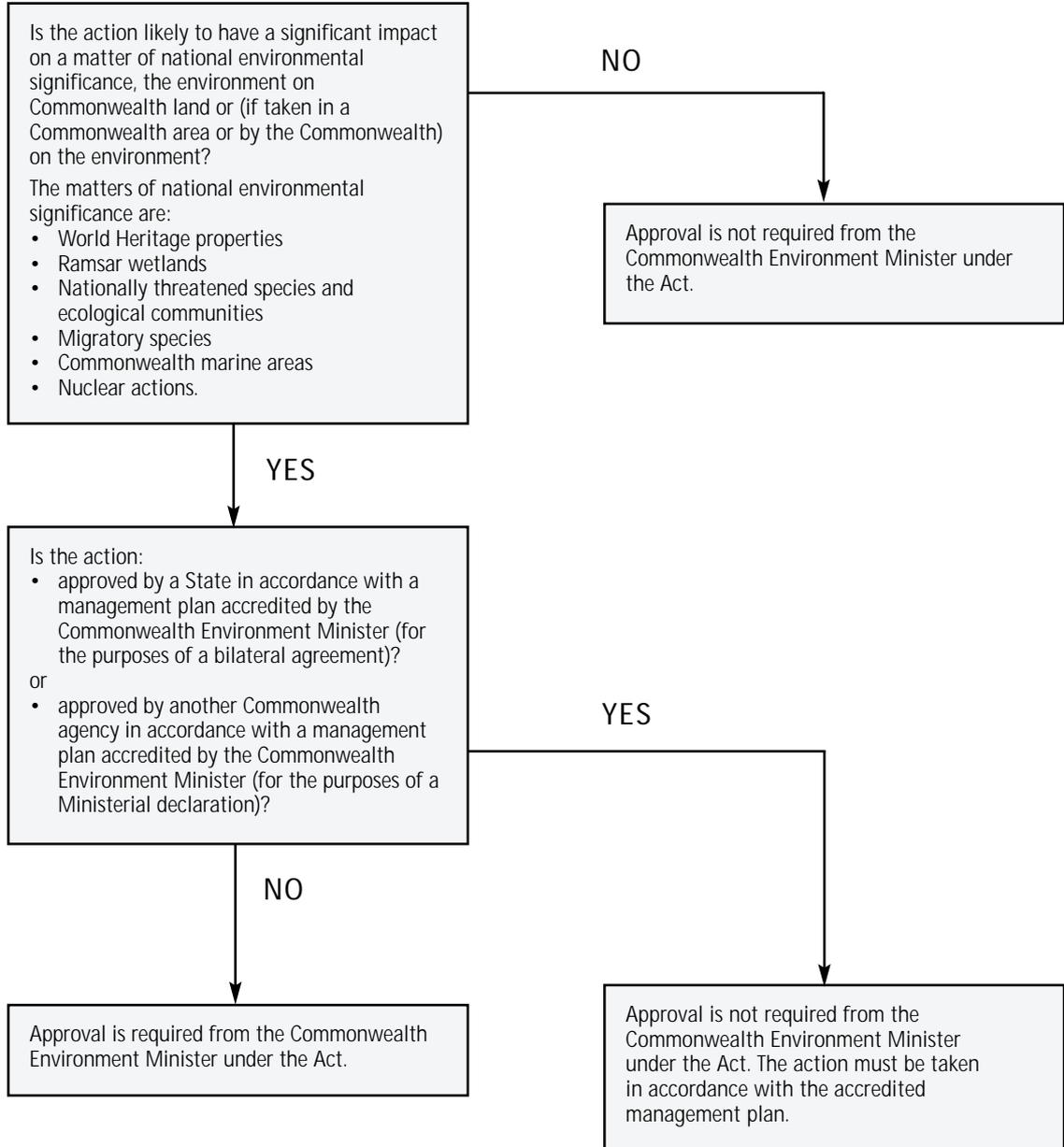
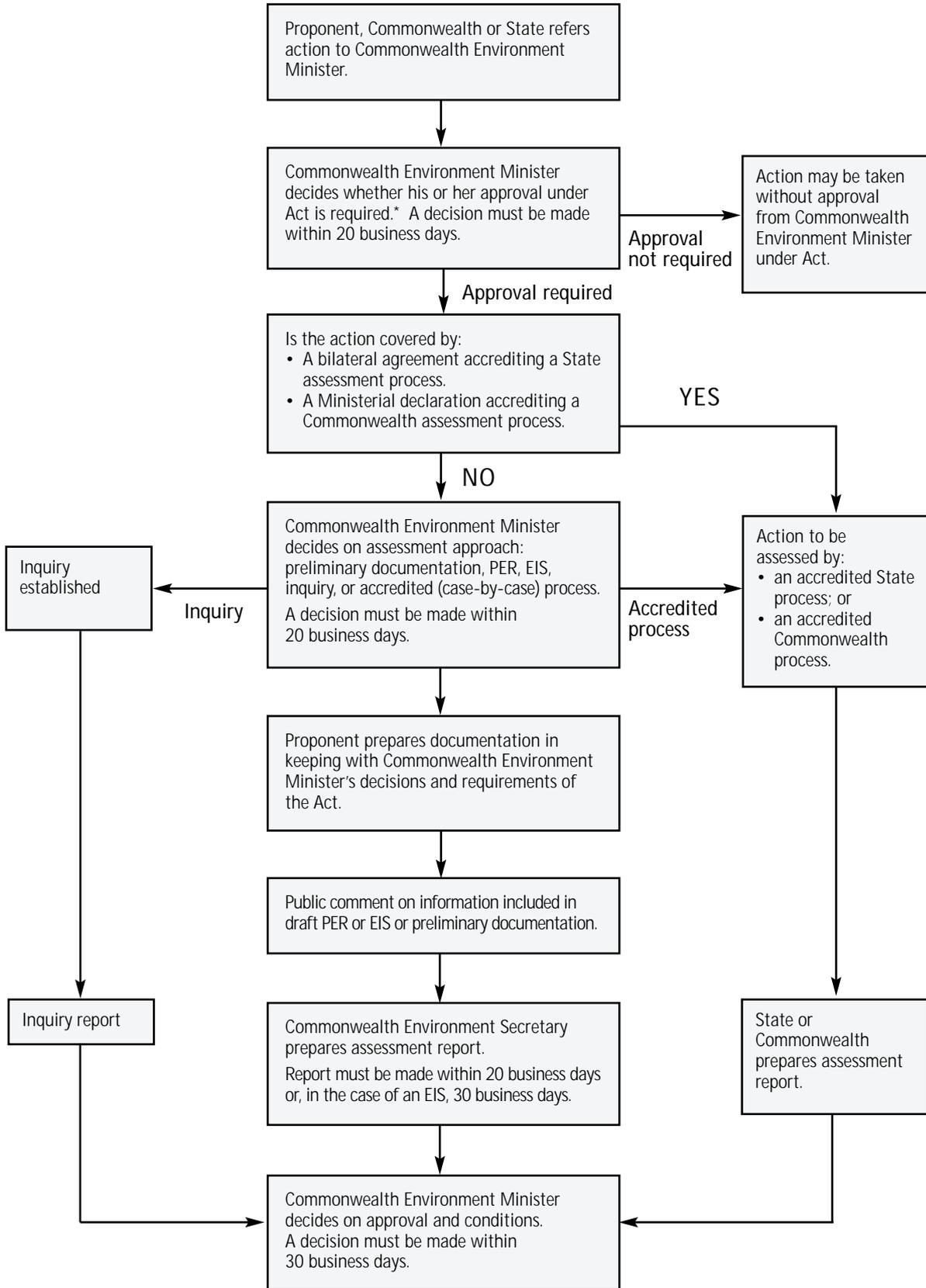


Figure 2: An outline of the assessment and approvals process



* See Figure 1 on how to decide whether approval is required.

CONSERVATION OF BIODIVERSITY

The Act strengthens Australia's capacity to conserve its biodiversity through a substantially improved and integrated framework. In addition to the environment protection measures related to threatened and migratory species, Ramsar wetlands, World Heritage properties, and the Commonwealth marine area, the Act provides additional protection to species and communities in Commonwealth areas, and provides for world's best practice management of Commonwealth reserves and other protected areas.

SPECIES AND COMMUNITIES

Listing

The Act provides for the listing of:

- nationally threatened native species and ecological communities;
- internationally protected migratory species; and
- marine species.

Processes which pose a particular threat to Australia's native species, such as predation by foxes and feral cats, may also be listed as key threatening processes.

The Commonwealth Environment Minister must also maintain a register in which he or she can list critical habitat for threatened species and ecological communities.

Plans

The Commonwealth Environment Minister must ensure that a recovery plan is made for each threatened species (except for conservation dependent and extinct species) and ecological community. A wildlife conservation plan may be prepared for other listed species.

A threat abatement plan must be made for a key threatening process if the Commonwealth Environment Minister considers that a plan will be a feasible, effective and efficient way to abate the process.

The Commonwealth must consult States before making plans for species, communities or processes. State plans may be adopted if they meet the standards set out in the Act.

The Commonwealth, in co-operation with the States, must seek to implement recovery plans and threat abatement plans.

Commonwealth agencies must insert a covenant to protect listed critical habitat when selling Commonwealth land.

Offences

It is an offence to take, kill, injure, move, trade or keep a member of a listed species or ecological community, or a cetacean in a Commonwealth area (terrestrial or marine).

It is an offence to knowingly damage critical habitat in a Commonwealth area.

A person will not commit an offence if he or she takes an act in accordance with a permit or an approval. Certain other exceptions apply – for example, in the case of an unavoidable accident.

Australian Whale Sanctuary

The Act establishes the Australian Whale sanctuary. The sanctuary covers Australia's entire exclusive economic zone and State coastal waters if they are prescribed by regulation.

The sanctuary provides strict protection for all whales, dolphins and porpoises, and greatly contributes to the aim of establishing a global whale sanctuary.

Access to biological resources

Regulations may be made to control access to biological resources in Commonwealth areas.

Invasive species

Regulations may be made in order to establish a list of non-native species that may threaten biodiversity in Australia, or would be likely to do so if they were brought into Australia. The regulations may regulate trade in such listed species and provide for making plans to reduce, eliminate or prevent the impacts of such species in biodiversity in Australia.

CONSERVATION AGREEMENTS

Conservation agreements are voluntary agreements between the Commonwealth and landholders for the protection and conservation of biodiversity. Such agreements are an important tool in the Government's efforts to promote off-reserve conservation of biodiversity. A conservation agreement can be entered into only if it will result in a net benefit to biodiversity.

The Commonwealth may provide financial or other assistance to a person under a conservation agreement. For example, an agreement could provide for the Commonwealth to pay for fencing off remnant vegetation, on the basis that the landholder agrees to take steps to protect the biodiversity values.

A conservation agreement binds all successors to any interests covered by the agreement, ensuring that it will continue to protect biodiversity in perpetuity.

PROTECTED AREAS

Managing World Heritage properties, Ramsar wetlands, Biosphere reserves

Before nominating an area for inclusion as a World Heritage property, Ramsar wetland, or Biosphere reserve, the Commonwealth must consult relevant States, and private landholders.

The Commonwealth must use its best endeavours to prepare and implement management plans for a World Heritage property, Ramsar wetland, or a Biosphere reserve in co-operation with States. Commonwealth agencies must take all reasonable steps to comply with these management plans.

Special provisions apply if the property, wetland or reserve is wholly within a Commonwealth area.

Commonwealth reserves

A Commonwealth reserve can be proclaimed over areas of the land or sea owned or leased by the Commonwealth or in a Commonwealth marine area. Kakadu and Booderee National Parks are examples of existing Commonwealth reserves.

The Act provides for a Commonwealth reserve, when established, to be assigned to an IUCN category for protected areas.

The Director of National Parks must prepare management plans for Commonwealth reserves. In jointly managed reserves, plans are prepared by the Director and the Board of Management. The plan must be consistent with Australian IUCN reserve management principles, which will be made under the Act.

Management plans must be subject to public consultation, and may be disallowed by either Commonwealth House of Parliament.

If a Commonwealth reserve is wholly or partly on indigenous people's land, and the traditional owners or land council agree, the Commonwealth Environment Minister must establish a Board of Management with a majority of members nominated by traditional owners. The Board will prepare management plans for the reserve in conjunction with the Director of National Parks.

Restrictions on activities in Commonwealth reserves

The Act imposes a range of controls and restrictions on activities in Commonwealth reserves. These controls and restrictions do not affect certain traditional activities by indigenous people. In addition, special provisions apply if prior usage rights exist over land or seabed in a reserve.

Conservation Zones

The Act also provides for the establishment of 'conservation zones'. Conservation zones provide 'interim' protection to biodiversity and heritage in Commonwealth areas that are being assessed for inclusion in a Commonwealth reserve.

ADVISORY COMMITTEES

The Act establishes:

- the Threatened Species Scientific Committee, which will advise the Commonwealth Environment Minister on listing and making plans for species, communities and threatening processes;
- the Biological Diversity Advisory Committee, which will advise the Commonwealth Environment Minister on matters relating to the conservation and ecologically sustainable use of biodiversity; and

- the Indigenous Advisory Committee, which will advise the Commonwealth Environment Minister on the operation of the Act, taking into account the significance of indigenous peoples' knowledge of land management, and the conservation and sustainable use of biodiversity.

ESD REPORTING AND REVIEW

All Commonwealth bodies must report annually on their implementation of ecologically sustainable development.

The Commonwealth must prepare a State of the Environment Report every five years.

The list of matters of national environmental significance must be reviewed every five years.

ENFORCEMENT

There is a range of enforcement mechanisms included in the Act, which were not available under the Acts to be repealed. For example:

- the Commonwealth Environment Minister may direct that an environmental audit be carried out if he or she has reasonable grounds to believe that a person has contravened or is likely to contravene an environmental approval or permit issued under the Act;
- in certain circumstances, civil or criminal penalties can apply to executive officers of a corporation that contravenes the requirements for environmental approvals under the Act, including the provision of false or misleading information to obtain approval;
- a person who contravenes the Act may be obliged to pay for the remediation of any resulting environmental damage.

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www.environment.gov.au/epbc

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