

Chapter 4

Environment Impact Assessment

Introduction

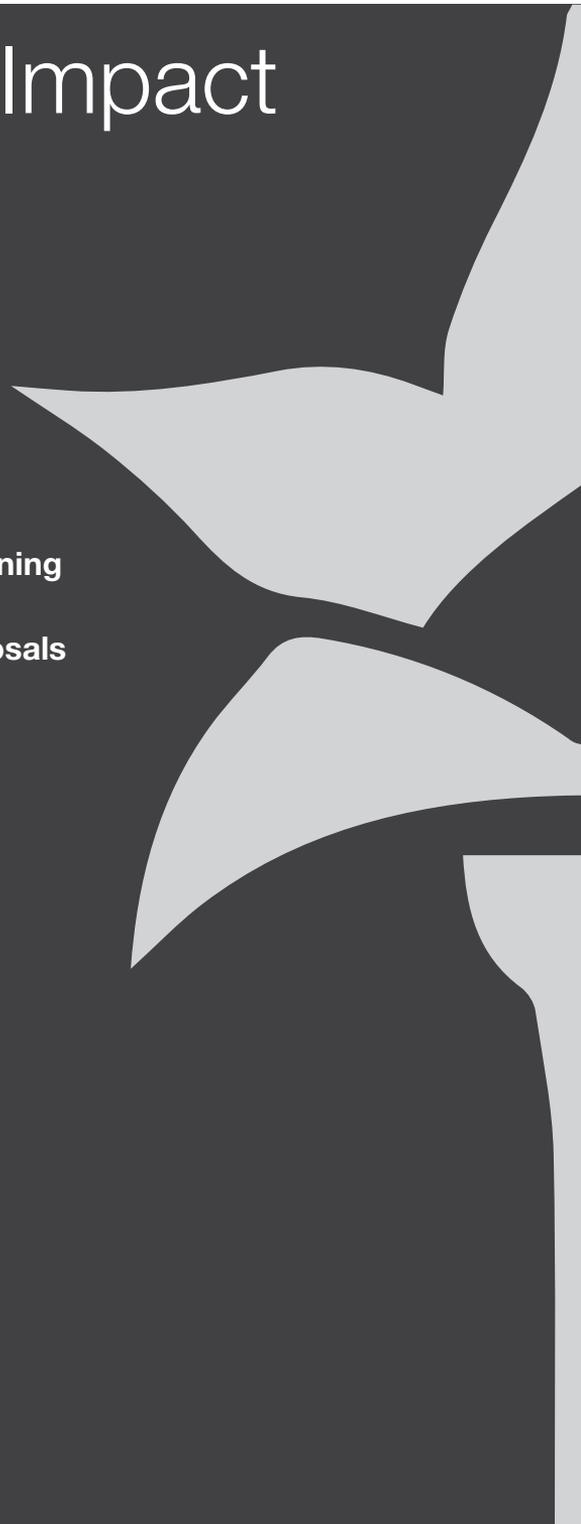
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Environmental Impact Assessment

Introduction

Environmental Impact Assessment (EIA) is a process for ensuring that decision-makers are informed of the environmental impacts of activities. EIA also seeks to enable the public to participate in the decision-making process and improve the quality of those decisions. In the ACT, there are currently two EIA processes that may apply, one under the *Planning and Development Act 2007* (ACT) ('*Planning Act*'), the other under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*').

Under the *EPBC Act* the Commonwealth Minister can enter agreements with the states and territories to transfer Commonwealth responsibility for assessment and/or approval to state and territory governments. To date, agreements have been reached to transfer the responsibility for environmental assessment to the states and territories. At the time of writing, new bilateral agreements covering environmental approvals were in draft form for some jurisdictions (including the ACT). However, no approval agreements have yet been entered into and responsibility for environmental approval still rests with the Commonwealth Minister.

The *EPBC Act* and bilateral agreements are discussed in the second half of this chapter.

ACT legislation

Introduction

Commencing operation in March 2008, the *Planning Act* replaced the *Land (Planning and Environment) Act 1991* (ACT) ('*Land Act*'). Planning is still administered by the ACT Planning and Land Authority (ACTPLA) and the Minister for Planning, referred to in this part of the chapter as the minister. The *Planning Act* regulates the EIA process in the ACT, some aspects of which are set out below:

- The *Planning Act* distinguishes between the environmental assessment required for strategic level planning proposals (for example, amendments to the Territory Plan (TP), grant of leases, and some amendments to plans of management) and the environmental assessment required for individual development proposals. At the strategic level a Planning Report (PR) or Strategic Environmental Assessment (SEA) is prepared whilst an Environmental Impact Statement (EIS) is prepared for some development proposals (Part 5.6 and Part 8.2)

- The *Planning Act* does not require a Preliminary Assessment or Public Environment Report for the environmental assessment of development proposals. An EIS is now the sole method of environmental assessment of a development proposal that is likely to have an impact on the environment (Part 8.2)
- The *Planning Act* does not permit the EIS and development application (DA) processes to run concurrently—a completed EIS is a pre-requisite to a DA being lodged in the impact track (see Chapter 3 in this Handbook for more information on development applications) unless the minister has granted a proponent an exemption from this requirement under section 211H (s 127—Impact track–development applications)
- The *Planning Act* is expected to be consistent with the requirements of the *EPBC Act*, enabling the Commonwealth to refer assessment of a development proposal requiring *EPBC Act* approval to the ACT in accordance with the applicable bilateral agreement (see second half of this chapter)
- The *Planning Act* makes provision for an inquiry panel model—an independent expert inquiry panel model has been adopted in preference to the more formal Royal Commission-style inquiry powers found in the previous *Land Act* (Part 8.3)
- The *Planning Act* contains an eight-part definition of ‘environment’, enabling the EIS process to be used for the assessment of the social impacts of a development proposal (ch 21 Dictionary).

Assessment of strategic level planning

Strategic environmental assessment (SEA)

A SEA is a comprehensive environmental assessment that may be prepared in the early planning stages of a major land use policy initiative (s 99). The SEA is intended to assess the social, economic and environmental impacts of major development plans, changes in planning policy and major plan variations.

ACTPLA must prepare a SEA:

- for a review of the TP (s 103)
- if directed by the minister (s 100)—for example, the minister may direct ACTPLA to prepare a SEA for a draft TP variation (s 62) or for a draft plan of management (s 322).

ACTPLA may also prepare a SEA if satisfied that it is necessary or convenient to do so in relation to a matter relevant to the object of the *Planning Act* (the orderly and sustainable development of the ACT, consistent with the social, environmental and economic aspirations of the people of the ACT and in accordance with sound financial principles) (ss 6, 100).

The SEA process

Chapter 2 of the *Planning and Development Regulation 2008* (ACT) ('*Planning Regulation*') sets out the elements of the SEA process, comprised of five stages (reg 11(1)):

- stage A—setting context and establishing baseline
- stage B—developing alternatives and deciding scope
- stage C—assessing environmental benefits and impacts
- stage D—consultation
- stage E—monitoring, if a decision is made at stage C that monitoring is required.

It should be noted that although this process is presented in a linear form in regulation 11(1) of the *Planning Regulation*, the process is more organic and fluid in nature than this presentation would suggest. The stages do not have to be completed in any particular order, and more than one stage may be conducted at a time (reg 11(2)). For example, consultation is a recurring consideration and activity throughout the process. A consultation plan is prepared as part of Stage D, but this is generally done during Stage A or Stage B so that a consistent approach to consultation is adopted and it is clear who the stakeholders to be consulted are. Consultation may be required:

- during Stage B when the scope of the SEA is being decided
- during Stage C after the environmental benefits and impacts have been assessed against the scoping document
- as a discrete stage if the draft SEA (which may have been revised in response to comments made during Stage C) is to be made available for final public comment prior to the SEA being finalised and used to inform planning policy.

The fluidity of the process means that it can be adapted to assessment of a variety of planning policy initiatives.

What must a SEA address?

A SEA must address the scoping document prepared during Stage B— developing alternatives and deciding scope (reg 13). In preparing the SEA, ACTPLA must, under regulation 14, assess the environmental benefits and impact of the proposal having regard to the following:

- the probability, duration, frequency and reversibility of the effects of the proposal
- the cumulative nature of the effects of the proposal, both positive and negative, and any identified alternatives to the proposal
- whether the effects of the proposal are likely to extend outside the ACT
- the risks to any identified environmental values identified in the scoping document or identified or targeted in relevant plans such as the TP, the ACT Planning Strategy, and threatened species management plans

- the magnitude and spatial extent of the effects of the proposal
- the effects of the proposal on areas or landscapes that have a recognised local, regional or national protection status.

The SEA must also consider how the environmental impacts can be managed through mitigation, offsetting, avoidance or some other method (reg 14(b); see also reg 17).

Planning reports

A Planning Report (PR) is a report prepared to inform a decision under the *Planning Act*, for example to grant a lease or prepare a variation (other than a major variation) to the TP (s 97). ACTPLA must prepare a PR if directed by the minister, for example the minister may direct ACTPLA to prepare a PR for a draft TP variation (s 62) or prior to granting a lease (s 245). ACTPLA may otherwise prepare a PR if satisfied that it is necessary or convenient to do so in relation to a matter relevant to an object of the *Planning Act* (the orderly and sustainable development of the ACT, consistent with the social, environmental and economic aspirations of the people of the ACT and in accordance with sound financial principles) (ss 6, 98).

Whilst section 97 of the *Planning Act* provides that a regulation may prescribe what must be included in a PR, the *Planning Regulation* does not as yet contain any provisions relating to what a PR must address.

Assessment of development proposals

Environmental Impact Statement (EIS)

An Environmental Impact Statement (EIS) is a document that assists the ACT government and the general public to understand the environmental impacts that a development proposal would have if it were to go ahead as planned. It is different to a PR or SEA in that it focuses on an individual development rather than development at the strategic planning level. An EIS is not prepared for strategic level planning proposals such as amendments to the TP or plans of management for public land, or the grant of leases.

When is an EIS required?

An EIS can be initiated through the *Planning Act*, the *Environment Protection Act 1997* (ACT) ('*Environment Protection Act*') or the *Public Health Act 1997* (ACT).

Under the *Planning Act*, an EIS is required if a development proposal is in the impact track (s 127), unless the minister grants an exemption under section 211H on the basis that the impacts of the proposal have been assessed by another study (see below for more information). Generally, development proposals which are in the impact track require an EIS. These include proposals that are:

- listed as impact assessable in the relevant TP development table for the zone (s 123(a))
- listed in Schedule 4 of the *Planning Act* (s 123(b))
- not provided for elsewhere, that is, not an exempt or prohibited development and the development table does not state which assessment track applies (s 132).

Under the *Planning Act*, an EIS must also be prepared if:

- under section 124, the minister has required it (s 123(c))
- under section 125, the Health minister has declared an application to be s 125-related, thus requiring the preparation of an EIS (s 123(d)) (see also s 134 of the *Public Health Act 1997* (ACT))
- under a bilateral agreement with the Commonwealth, the relevant Commonwealth minister has advised the ACT minister that the development is subject to the *EPBC Act*, but does not require assessment under that Act if it is assessed under the *Planning Act* (s 123(e)).

Section 94(2) of the *Environment Protection Act* also provides that an EIS can be required for activities (not subject to a development application) that require an environmental authorisation under that Act.

The EIS process

Under the *Planning Act*, development is classified as being exempt, assessable or prohibited. Assessable development is further split into ‘tracks’ based upon the complexity, nature and scale of development—that is, the code track, the merit track and the impact track. Impact track developments, being at the higher end of the track system, undergo the most intensive assessment compared with the other tracks. Impact track developments are assessed against not only the specific rules and criteria in the TP, but also against an EIS. As noted above, a development will be impact track assessable if it is identified as such in a development table of the TP, is a development of a kind mentioned in Schedule 4 of the *Planning Act*, or is not provided for elsewhere, that is, it is not an exempt or prohibited development, and the development table does not state which assessment track applies (see Chapter 3 in this Handbook for further discussion of development assessment and approval).

After a development proposal is designated as a proposal for which an impact track development application must be made, the proposal is subject to a staged assessment and approval process. The first stage is comprised of an EIS process and the second stage is comprised of the application and approval process.

The EIS process is described in chapter 8 of the *Planning Act* and is represented diagrammatically on the next page.

What is a scoping document?

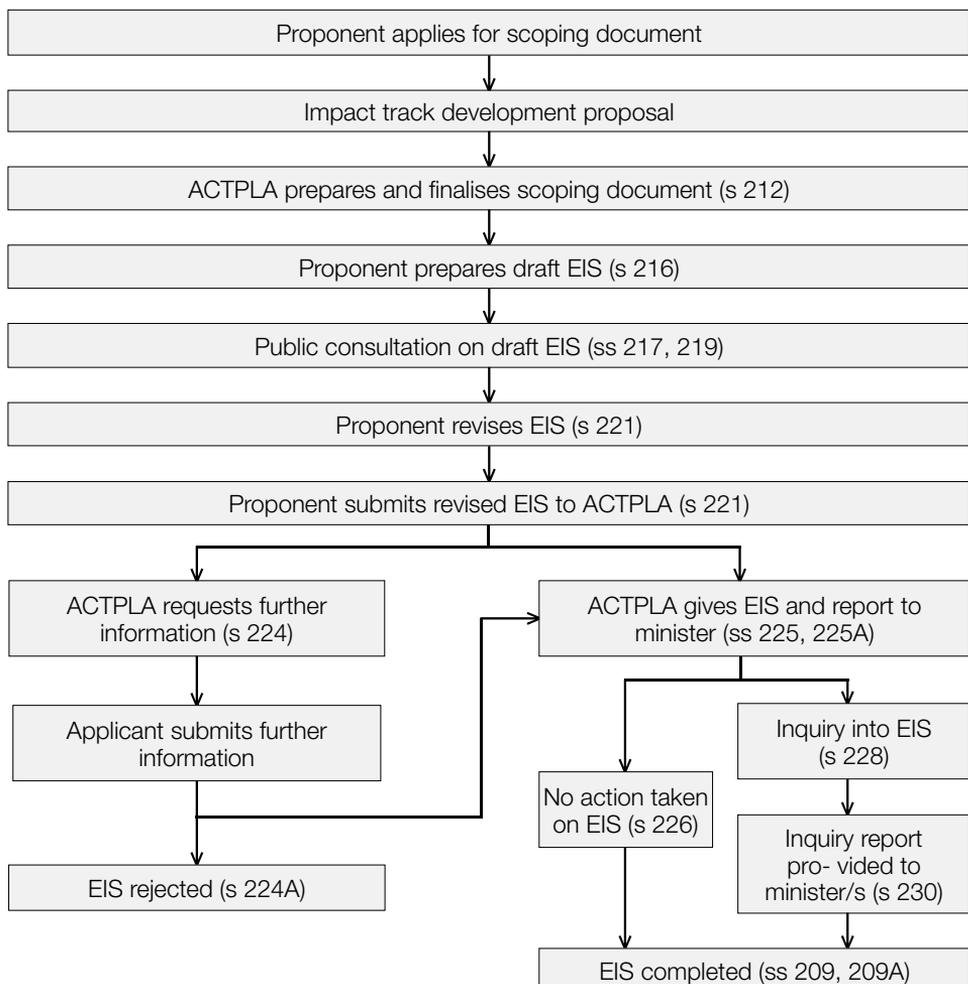
A scoping document is a written notice prepared by ACTPLA that sets out the matters that must be addressed by the proponent in preparing the draft EIS (s 212).

The scoping process entails:

- identification of the environmental impacts a development proposal will or may have and presentation of these matters in an initial scoping document
- consultation with prescribed entities regarding the matters to be addressed that have been identified in the initial scoping document (for the entities that must be consulted and the entities that may be consulted, see reg 51)
- ACTPLA consideration of the information received as a result of this restricted consultation and finalisation of the scoping document
- provision of the finalised scoping document to the proponent (s 214).

The scoping document must include the minimum content for scoping documents prescribed by the *Planning Regulation* (reg 54). ACTPLA may also include in the scoping document a requirement that the proponent engage a consultant to help prepare the EIS (s 213(2)).

Procedure for the preparation and submission of an EIS



The scoping document must be provided to the proponent no later than 30 working days after the application is made unless the Chief Planning Executive (the CEO of ACTPLA) has allowed a further period for provision of the scoping document (s 214). A scoping document is valid for 18 months after the day the document is given to the proponent (s 215).

Who prepares an EIS?

An EIS is generally prepared by the proponent, that is, the person proposing the development or the person or territory authority designated by the minister as the proponent under section 207. As noted above, ACTPLA may require that the proponent engage a consultant to help prepare an EIS for the proposal (s 213(2)).

The proponent is not required by ACTPLA to engage a particular consultant. The proponent is able to engage a consultant of the proponent's choice provided that the consultant is a person that ACTPLA is satisfied holds professional qualifications relevant to preparing an EIS, has experience in preparing an EIS, and the capacity to prepare an EIS (reg 55).

What must the EIS address?

Both the draft EIS and revised EIS (see below) must address each matter that is raised in the scoping document for the development proposal. The *Planning Regulation* provides a detailed list of the items that must be included in an EIS (reg 50). After the revised EIS is submitted to ACTPLA, it is assessed to determine whether it has sufficiently addressed each matter raised in the scoping document (s 222). If a matter has not been sufficiently addressed, ACTPLA may provide the proponent with a further opportunity to address any outstanding matters (s 224). Failure to sufficiently address the matters raised in a scoping document may lead to ACTPLA refusing to accept the revised EIS (s 224A).

How can the public participate in the EIS process?

The public has the opportunity to participate in the EIS process when the draft EIS is publicly notified (s 217). After the draft EIS is submitted to ACTPLA, it places a notice on its website and in the *Canberra Times*. The information publicly notified includes the availability of the draft EIS for public inspection for a minimum period of 20 working days (s 218) plus details of how and when representations can be made on the draft EIS (s 217). Under a bilateral agreement, the public must be given at least 28 days to provide comments on the EIS.

Members of the public are entitled to make written submissions which must be received by ACTPLA by the closing date indicated for the EIS (s 219). ACTPLA provides no specific guidelines on how to prepare a submission; however, there is a specific suggestion on the [ACTPLA website](#) that the grounds for any objections should be clearly stated. Submissions can be provided to ACTPLA in person, by post, email or fax (see Contacts list at the back of this book).

Representations may be withdrawn at any time before ACTPLA has accepted the revised EIS (s 219). Under section 220 of the *Planning Act*, submissions are available on the ACTPLA website until the EIS is completed or the representation is withdrawn. The submissions also must be given to the proponent of the development proposal. In preparing the revised EIS the proponent must address any representations made during the public consultation period (s 221).

Inquiry into EIS

The *Planning Act* allows the minister to establish an inquiry under section 228. While in some cases the Minister for Health may decide that an inquiry should be established to assess public health impacts of a proposal (s 228(3)), it remains the responsibility of the Minister for Planning to establish an inquiry. The minister appoints the person or persons to constitute a panel to conduct the inquiry, determines the terms of reference for the inquiry, notifies the proponent of the inquiry and notifies the terms of reference under the *Legislation Act 2001* (ACT) (ss 228-229 of the *Planning Act*).

The minister must appoint persons with the necessary expertise to the inquiry panel and is not permitted to appoint the following persons: the CEO or a member of staff of ACTPLA; a member of staff of the Land Development Agency; or a person prescribed by regulation (s 229(4)).

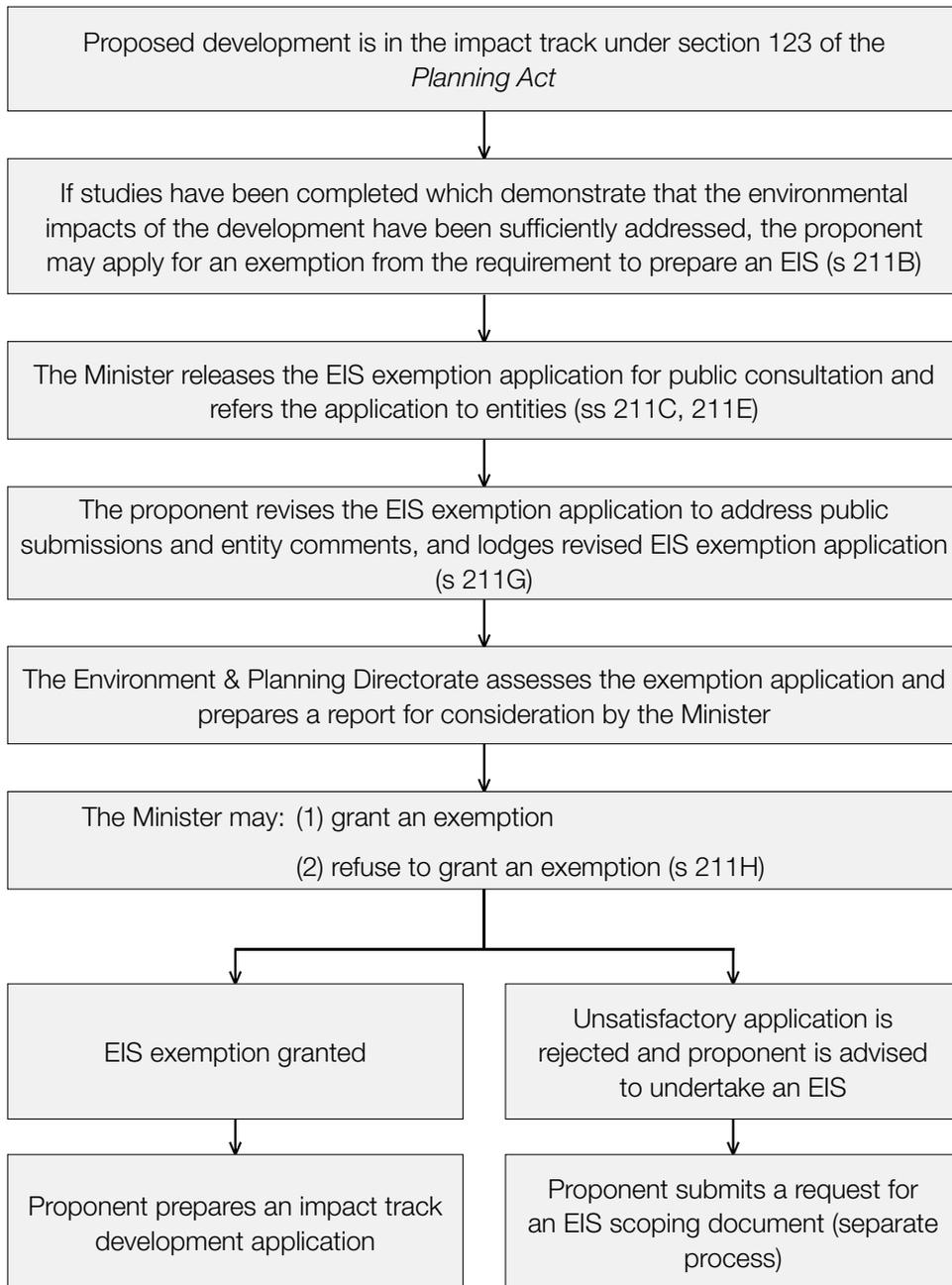
A panel of inquiry must conduct its business having regard to the procedural requirements for inquiries found in part 4.2 of the *Planning Regulation*. These include a requirement that an inquiry must ordinarily be held in public (reg 76) and provisions for 'interested persons' to make submissions (reg 77(4)-(5)). A panel must not be directed by the minister as to the findings or conclusions that the panel should reach (s 231).

Exemptions

Under section 211B of the *Planning Act*, an applicant may seek an exemption from the requirement to prepare an EIS. An exemption may be granted if the minister is satisfied that the expected environmental impact of the development proposal has already been sufficiently addressed by a previous studies (s 211H(2)). The minister must consider information provided in accordance with regulation 50A of the *Planning Regulation* and the matters specified in section 211H(3).

The application must be accompanied by supporting information including a description of the proposal, a preliminary risk assessment, details regarding the previous studies, and details of public consultation which has been undertaken. If the minister decides to grant an exemption, it will be published on the Directorate's website.

Procedure for obtaining an EIS exemption



When is the EIS process complete?

Under section 209, if the minister has given ACTPLA notice that he or she has decided to take no action in relation to an EIS, or at least 15 working days have elapsed since receiving the EIS from ACTPLA, and the minister has not decided in that time to establish a panel to inquire about the EIS, then the EIS is regarded as being completed and the minister cannot thereafter establish an inquiry. If the minister has made a decision to establish an inquiry no later than 15 working days after receiving the EIS from ACTPLA, then the EIS is not completed until the inquiry panel has submitted a report or has failed to produce a report by the stipulated date for reporting.

Section 209A (regarding the section 125-related EIS prepared for a DA in relation to which the Public Health Act Minister has made a declaration) works on the same premise as section 209, albeit complicated by the addition of the Health Minister to the process.

Sections 209 and 209A are indicative of the time-frame-driven nature of the *Planning Act* and the commitment of ACTPLA to meeting timeframes and deadlines. These sections highlight for the planning minister and the health minister the importance of making timely decisions with respect to establishing inquiries. These sections also create serious consequences where an inquiry panel fails to produce a report in a timely manner. Failure on the part of either the ministers or the panel to act in a timely manner will result in a finalised EIS being presented without critical review as part of an impact track development application. Failure of this nature is significant in that the adequacy of the EIS cannot be commented upon by the public during the time for representations on the relevant impact track development application (s 156(6)). It should be noted that the EIS process may be regarded as completed under section 209 or section 209A irrespective of whether the minister has presented the EIS to the Legislative Assembly under s 227 (ss 209(2), 209A(2)).

What is the outcome of the EIS process?

Once the EIS is completed the proponent may submit an impact track development application for the development proposal under section 127. As with the EIS process, referral entities may comment on the impact track development application (ss 147A-149) and the public has the opportunity to comment on the development application during the public consultation period, which is generally 15 working days (ss 130, 157; reg 28). Impact track development applications must be decided within 30 working days after lodgement of the application if no representations are made, or within 45 working days if representations are made (s 131) (see Chapter 3 in this handbook for more information on the development application process).

Commonwealth EPBC Act

Introduction

Activities or development undertaken in the ACT may trigger the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'). This is not unique to the ACT. The *EPBC Act* is a Commonwealth Act and can equally be triggered in other states and territories.

By triggering the *EPBC Act*, a development may need to be assessed and approved under the *EPBC Act*, in addition to the requirements under ACT legislation.

All references in the Commonwealth section of this chapter to the minister are to the Commonwealth Minister for the Environment; references to the department are to the Commonwealth Department of the Environment; and all section numbers are to the *EPBC Act* unless stated otherwise.

The [department's website](#) includes extensive and detailed information about the operation of the *EPBC Act* (see Contacts list at the back of this book).

Actions requiring assessment and approval

The *EPBC Act* prohibits any person from taking an action that will have or is likely to have a 'significant impact' on a matter protected under a provision of Part 3 of the Act without the approval of the minister (s 67A).

An 'action' is broadly defined in the *EPBC Act* to include a project, development, undertaking and an activity or series of activities or an alteration of one of these things (s 523). However, the definition of 'action' expressly excludes:

- a decision by a government body, including government agencies and local councils, to grant a 'governmental authorisation' for another person to take an action
- a decision by a government body to provide funding by way of a grant.

The matters protected under Part 3 can be divided into the following two categories:

- matters of national environmental significance
- matters relating to actions by the Commonwealth, Commonwealth agencies and actions on Commonwealth land.

There are a number of exemptions from the requirements of the *EPBC Act*, which are discussed below.

What is a significant impact?

The *EPBC Act* provides no guidance on the meaning of ‘significant impact’. Administrative guidelines have been prepared by the department to assist proponents to determine when a proposed action may have a significant impact on a matter of national environmental significance and consequently whether it should be referred to the minister for assessment and approval. Copies of the guidelines are available at the [EPBC Act](#) page of the department website (see Contacts list at the back of this book). While helpful, these guidelines are not legally binding.

The Federal Court considered the meaning of ‘significant impact’ in the case of *Booth v Bosworth* (2001) 114 FCR 39. This case concerned a lychee farmer using electric grids to kill Spectacled Flying-foxes from the adjacent Wet Tropics World Heritage Area. The court suggested that a significant impact under the *EPBC Act* is one that is ‘important, notable or of consequence’ having regard to its context and intensity. In this case, the court found that the killing of large numbers of the flying-foxes on the farm was likely to have a significant impact on the world heritage values of the adjacent Wet Tropics World Heritage Area.

In determining the impacts of an action it is necessary to consider the potential direct and indirect (including cumulative) impacts of the action. In 2004, the Federal Court in the *Minister for Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* (2004) 139 FCR 24 (*‘Nathan Dam Case’*) considered the scope of impacts that must be taken into account when deciding whether a proposed action is a ‘controlled action’ which requires approval under the *EPBC Act*. In particular, the Court looked at whether indirect impacts produced by third parties should be considered when assessing the impacts of a proposed action.

The *Nathan Dam Case* concerned a proposal to construct a dam on the Dawson River in Queensland. The case was primarily concerned with whether the impacts on the Great Barrier Reef from agriculture (and associated chemical application and run-off), which would be facilitated by the construction and operation of the dam, should be considered an impact of the dam itself. The court found that the potential impacts of the irrigation of cotton were impacts of the dam.

The court held that the term ‘impact’ is not confined to the direct physical effects of an action on a matter of national environmental significance. Rather, the term can include the indirect consequences of an action and may include the results of acts done by persons other than the proponent. Section 527E of the *EPBC Act* provides that the impact of a secondary action carried out by an independent person (that is, not at the direction or request of the primary person) is only an impact of a primary action if:

- the primary action facilitates, to a major extent, the secondary action; and
- the secondary action is within the contemplation of the person taking the primary action, or is a reasonably foreseeable consequence of the primary action; and

- the impact is within the contemplation of the person taking the primary action, or is a reasonably foreseeable consequence of the secondary action.

Matters of national environmental significance

There are currently nine matters of national environmental significance listed under Part 3 of the *EPBC Act*:

- world heritage values of declared World Heritage properties (ss 12-15A)
- national heritage values of a national heritage place (ss 15B-15C)
- ecological character of declared Ramsar wetlands (ss 16-17B)
- listed threatened species and ecological communities (other than vulnerable ecological communities) (ss 18-19)
- listed migratory species (ss 20-20B)
- nuclear actions (ss 21-22A)
- the environment in Commonwealth marine areas and Commonwealth managed fisheries (ss 23-24A)
- the Great Barrier Reef Marine Park (ss 24B-24C)
- water resources impacted by coal seam gas development and large coal mining development (ss 24D-24E).

Certain additional matters may be added after consultation with the states and territories (through prescribing additional matters by regulation).

The matters of national environmental significance which are most likely to be of relevance to actions taken in the ACT are listed threatened species and listed threatened ecological communities. For example, the listed threatened ecological communities include the 'Natural temperate grassland of the Southern Tablelands of NSW and the Australian Capital Territory'. This endangered ecological community is threatened by land clearing and residential development in the ACT. The [Department's website](#) contains an interactive search map to assist in identifying matters of national environmental significance located in a certain area (see Contacts list at the back of this book).



Actions concerning the Commonwealth, Commonwealth agencies and Commonwealth land

Under Part 3, Division 2 of the *EPBC Act*, approval is required for the following:

- actions taken on Commonwealth land that have, will have or are likely to have a significant impact on the environment (anywhere) (s 26(1))
- actions outside Commonwealth land that have, will have or are likely to have a significant impact on the environment on Commonwealth land (s 26(2))
- actions carried out by the Commonwealth or a Commonwealth agency that have, will have or are likely to have a significant impact on the environment (anywhere) (s 28).

'Commonwealth land' is defined broadly to include land owned or leased by the Commonwealth or a Commonwealth agency, land in an external territory (except Norfolk Island) and the Jervis Bay Territory (ss 27, 525). Although all land in the ACT is owned by the Commonwealth, land in the ACT (other than certain land actually used by the Commonwealth) is not 'Commonwealth land' unless there is some other basis of the Commonwealth's interest (e.g., a lease of the land to a Commonwealth agency). 'Commonwealth agency' is defined broadly to include a minister, body corporate established for a public purpose by a law of the Commonwealth, a company in which the Commonwealth owns more than half the voting stock, and a person holding an office under Commonwealth law. Certain exceptions apply, including a person holding an office under the *Australian Capital Territory (Self Government) Act 1988* and certain Indigenous organisations (see definitions in s 528).

Exemptions from approval requirement

If an action has a significant impact on one of the matters of national environmental significance (discussed above) or, in the case of actions involving the Commonwealth or Commonwealth land, then approval from the minister will generally be required (pt 3, div 1). However, in some cases, an action will not need approval by the minister despite triggering the *EPBC Act* as described above. These key exceptions are covered in Part 4 of the *EPBC Act* and include actions that:

- have been declared by a bilateral agreement or a ministerial declaration to not require approval because it is approved under an accredited ACT or Commonwealth law or management arrangement (bilateral agreements are discussed below) (divs 1-2)
- are covered by ministerial declarations and bioregional plans (div 3)
- are covered by a conservation agreement (div 3A)
- are in an area covered by regional forest agreements or in a region subject to a process of negotiation for a regional forest agreement (div 4)
- are within the Great Barrier Reef Marine Park and taken in accordance with the zoning plan (div 5)
- were already approved, or being lawfully undertaken, when the *EPBC Act* commenced in 2000 (div 6).

Other exemptions from the assessment and approval process under the *EPBC Act* are discussed below.

Referral process

A proponent of an activity that may have a significant impact on a matter protected under Part 3 of the *EPBC Act* is required to refer details of the activity to the minister (s 68). If a proponent fails to make such a referral, the minister may 'call-in' the action (s 70). Commonwealth, state and territory agencies may also refer actions proposed by another person to the minister (s 69(1)).

Individuals and community groups cannot formally refer actions by other people or organisations to the minister. However, if you want a proposal referred, you can write to the state or territory agencies which do have the power to formally refer the matter and you may also contact the department to report the matter.

Upon receiving a formal referral, generally the minister must determine whether the activity must be approved, that is, whether the activity is likely to have a significant impact on a matter protected under Part 3 of the *EPBC Act* and is not otherwise exempt (s 75). If a proposed action does require approval it is called a 'controlled action'.

A notice of all referrals is placed on the department's website (s 74(3)) (see Contacts list at the back of this book). Members of the public will be given 10 business days to submit comments on whether they believe the action is likely to have a significant

impact on a matter protected under Part 3 of the *EPBC Act* (that is, whether it should be a 'controlled action').

The minister may decide that a referred action is not a controlled action if satisfied that the action is not likely to have a significant impact on a protected matter. If the decision is made on the basis that the action will be taken in a particular manner, the notice of the minister's decision must specify that manner and the action may not be taken in a way that is inconsistent with the manner specified in the notice (s 77A).

If the minister determines that an action is a controlled action, the relevant provisions of Part 3 must be identified as the 'controlling provisions' for the action. For example, if a proposal requires approval because it is likely to have a significant impact on a listed threatened ecological community, the controlling provisions are sections 18 and 18A (Actions with significant impact on listed threatened species or endangered community prohibited without approval; Offences relating to threatened species, etc). The minister has 20 business days to determine whether an action is a controlled action and, if it is, which provisions will be the controlling provisions for the action (s 75(5)). If further information is requested, the period for making the decision does not run until the information is provided (s 75(6)).

A decision that an action is or is not a controlled action may be reconsidered in limited circumstances. Generally, this will only be possible if substantial new information or a substantial change in circumstances relevant to the impacts of the proposed action emerges (s 78).

If the minister considers that the impacts of a referred action on a protected matter are clearly unacceptable, rather than making a controlled action decision, the minister may instead decide that the normal assessment process should not apply (s 74B). This in effect provides a mechanism for early rejection of an action which clearly would not be granted an approval if the process was followed. The minister may be required to reconsider such a decision (s 74D).

Environmental impact assessment process

If the minister determines that an action is a 'controlled action' and does require approval, an assessment must be carried out on the 'relevant impacts' of that action (s 82). The relevant impacts are potential impacts on each matter protected under Part 3 of the *EPBC Act* that the minister determined is likely to be affected by the proposal. For example, if an action is likely to have a significant impact on a listed threatened species, the assessment must address the potential impacts of the activity on the threatened species.

The assessment process in the *EPBC Act* only applies to actions that are not covered by an assessment bilateral agreement. As discussed below, the assessment bilateral agreement between the Commonwealth and the ACT covers many of the actions that may be proposed to be taken in the ACT which would otherwise require assessment under the *EPBC Act*. For these actions, assessment under the *EPBC Act* is not required, but the Commonwealth minister still retains an approval role (also discussed below).

For actions that are not covered by the bilateral agreement, after the minister has determined what the controlling provisions are for an action, the minister must decide which of the six possible methods of assessment, provided for in Part 8, should be applied. The methods of assessment are:

- an accredited assessment process (s 87(4), discussed below)
- an assessment on referral information (div 3A)
- an assessment on preliminary documentation (div 4)
- a public environment report (PER) (div 5)
- an environmental impact statement (EIS) (div 6)
- a public inquiry (div 7).

In choosing the assessment approach, the minister will have regard to the information provided by the proponent on the potential impacts of the proposed activity and any other relevant information available, including any comments received from the relevant state or territory government (s 87). There is no opportunity for additional public comment on, or participation in, the decision of the minister as to the type of assessment to be undertaken.

Assessments done on referral information are undertaken solely on the information that an applicant has provided when referring their action to the minister. This referral information must include a description of the proposed action, the nature and extent of its likely impact on the environment and any matters of national significance, plus a description of the flora and fauna and other natural features in the project area (s 72(2); reg 4.03; sch 2 of the *Environment Protection and Biodiversity Conservation Regulations 2000* ('*EPBC Regulations*')).

Where assessment is done on preliminary documentation, it is undertaken on information provided in the referral form and any other relevant information identified by the minister.

Where assessments are carried out by way of PER, EIS or public inquiry, the minister will issue guidelines or terms of reference that identify what specific matters the assessment must address (ss 96A(1), 101A(1), 107(1)(b)).

Such assessments may address impacts other than relevant impacts, however they will only do so where the relevant state or territory has asked the minister to ensure that the assessment under the *EPBC Act* covers other impacts.

The proponent will generally (with the exception of public inquiries) be responsible for carrying out the assessment and preparing relevant assessment documentation. The key steps in the assessment processes and the person responsible for these steps are set out below:

- determination of assessment approach—minister (s 87)
- preparation of guidelines (for PER or EIS)—minister (ss 96A(1), 101A(1))

- preparation of draft assessment documentation (for preliminary documentation, PER or EIS)—proponent (ss 98(1) (a), 103(1) (a))
- publication of draft assessment documentation for public comment (for preliminary documentation, PER or EIS)—proponent (ss 98(1) (c), 103(1) (c))
- preparation of final assessment documentation, taking public comment into account— proponent (ss 99, 104)
- preparation of recommendation report—secretary of the department (ss 100, 105).

If the assessment is by way of public inquiry, the minister will appoint commissioners to carry out the inquiry and will set their terms of reference (s 107). The commissioners have flexible powers in conducting the inquiry, including the powers to call witnesses, obtain documents and inspect places (pt 8, div 7). The inquiry must be held in public unless the commissioners believe it is in the public interest to hold all or part of it in private (s 110). The commissioners must report to the minister and publish their report, unless the inquiry, or part of it, was held in private (ss 121-122).

Details on the numbers and types of assessments undertaken are available from the department's annual reports (see Contacts list at the back of this book). There have been no assessments by way of public inquiry since the *EPBC Act* commenced.

Bilateral agreements and accredited assessment processes

The *EPBC Act* allows the minister to enter into agreements with the states and territories under which the responsibility for assessing actions, or assessing and approving actions, can be transferred to the state or territory concerned (s 45). These agreements are called bilateral agreements. Actions that fall within the terms of a bilateral agreement will be exempt from the relevant requirements under the *EPBC Act*, and will be assessed, and possibly also approved, only under the relevant state or territory processes (ss 29, 46).

At the time of writing, all of the states and self-governing territories had entered bilateral agreements with the Commonwealth, covering assessment procedures only. Bilateral agreements covering environmental approvals are currently in draft form with the ACT, NSW, Queensland, Tasmania, South Australia and Western Australia. To date, no bilateral agreements covering approvals have been entered into; therefore all matters must still be referred to the Commonwealth minister for environmental approval.

Assessment bilateral agreement

A bilateral agreement, which allows for the transfer of assessment responsibilities only, between the Commonwealth and the ACT is currently in force. Under the bilateral agreement, actions assessed by an EIS under the *Planning Act* need

not be assessed under Part 8 of the *EPBC Act*. The agreement specifies various requirements in relation to the conduct of the EIS process. After the EIS has been completed, the ACT must prepare an assessment report and provide a copy to the Commonwealth minister. The assessment report must take into account the EIS and any comments received during public consultation and include a description of the action, an assessment of the nature and extent of the likely impacts and recommend conditions that may be imposed. The Commonwealth minister will comment on whether it provides sufficient information for an informed decision to be made on whether or not to approve the action. The ACT may then provide any further information required, and will prepare a final assessment report. When preparing the assessment report, the ACT must take into account the Commonwealth *EPBC Act* Environmental Offsets Policy, recovery plans for threatened species and ecological communities and any approved conservation advices and threat abatement plans. The ACT and the Commonwealth ministers must endeavour to agree on a common set of approval conditions.

The Commonwealth minister must then decide whether to approve the action (s 133). In making this decision, the minister must take into consideration matters relevant to any matter protected by a Part 3 provision that the minister has decided is a controlling provision for the action; and economic and social matters. Other factors to be taken into account include the principles of ecologically sustainable development; the assessment report, if any; the public environment report, if any; comments by other relevant ministers (s 131) or the public (s 131A); and advice from the Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development, if relevant (ss 131AB, 136(2)). The minister may also consider a proponent's history in relation to environmental matters (s 136(4)).

The minister has a broad discretion to impose conditions on an approval to protect the relevant matter of national environmental significance or Commonwealth environment or to mitigate or repair any damage that might be caused by the action. Conditions attached to an approval may include provision of a bond or other security, independent environmental auditing, preparing or implementing management plans, carrying out specified environmental monitoring or testing or complying with a code of practice (s 134). Some types of conditions can only be imposed with the agreement of the proponent.

The 2013-14 annual report of the department gives statistics for environmental impact assessment activities during the year and since the *EPBC Act's* commencement in July 2000.

Since the commencement of the *EPBC Act*, a total of 5,137 referrals have been made and 5,139 decisions (including reconsiderations) made on these referrals. Of these, 2,452 were not controlled actions so required no approval. Another 985 required no approval provided they were undertaken in a particular manner, that is, in the manner specified by the proponent in the referral documentation or specified by the minister. Only 1307 of the referrals required assessment and approval. 722 actions have been approved and ten actions have been refused approval.

In 2013-14, the type of assessment required for the 113 referrals made in that year was as follows:

Commonwealth assessments	State/territory assessments
environmental impact statement—2	bilateral assessment—15
public environment report—3	accredited process—15
referral information—9	
preliminary documentation—69	

In the ACT in 2013-14, a total of four referrals under the *EPBC Act* were made. One of these was a controlled action that progressed through to an assessment process and three were not considered to be controlled actions. The EIS assessment reports considered by the Commonwealth minister included:

- Mugga Lane Resource Management Centre Expansion
- Craven's Creek Water Quality Control Pond; and
- Lawson South 132 kV Power Line Relocation.

There are a number of restrictions on the minister's power to approve activities that relate to matters of national environmental significance. Conservationists and other interested persons should consider this when seeking to oppose an activity.

Approval bilateral agreement

An approval bilateral agreement between the Commonwealth and the ACT has been drafted, but not entered. The draft agreement provides for accreditation of ACT processes for approval of proposed actions that have been assessed via the impact track under the *Planning Act* and that would otherwise require approval under the *EPBC Act*. Copies of the draft agreement can be viewed on the [department website](#) (see Contacts list at the back of this book).

Penalties

The *EPBC Act* has parallel civil and criminal penalty provisions for some activities. For example, undertaking an activity that has, or is likely to have, a significant impact on a matter protected under Part 3 of the *EPBC Act* without approval may attract a criminal or civil penalty (ss 15A, 15C, 17B, 18A, 20A, 22A, 24A, 24C, 24E). In these cases, the Commonwealth has the option of determining the most appropriate course of action be it pursuing a criminal prosecution or seeking a civil penalty or injunction. In deciding this, the department may take into account matters such as the previous record of the person, the seriousness of the breach and whether

legal action is being pursued under other legislation. A copy of the department's compliance and enforcement policy is available from their website (see Contacts list at the back of this book).

Undertaking an activity that has, or is likely to have, a significant impact on a matter protected under Part 3 of the EPBC Act without approval is a criminal offence. Severe penalties can be imposed for failing to obtain approval, including a civil penalty or fine of up to 50,000 penalty units (currently \$8.5 million) for a corporation and a fine of 5,000 penalty units (currently \$850,000) for an individual and/or a criminal penalty of seven years imprisonment and/or a fine of 420 penalty units (currently \$71,400). The offender may also be required to undertake or pay for the mitigation or repair of the environmental damage caused by the action (pt 17, divs 14A-14B; pt 18).

It is a criminal offence to breach a condition attached to an approval with maximum civil penalties of 1,000 penalty units (currently \$170,000) for an individual or 10,000 penalty units (currently \$1.7 million) for a corporation (s 142) or a criminal penalty of up to two years imprisonment and/or a fine of up to 120 penalty units (currently \$20,400) (s 142A). Failure to comply with the terms of an approval can also result in the suspension or revocation of an approval (ss 144-145).

Exemptions

There are a number of instances where actions can be exempt from both assessment and approval under the *EPBC Act*. Further, certain actions can be exempt from the assessment process, while still requiring approval under the *EPBC Act*. For example, the minister can grant an exemption from specific provisions of the *EPBC Act*, including the entirety of the assessment and approval process, if the minister is satisfied that it is in the national interest that those provisions do not apply to the action (s 158). Notice of such exemptions, and the reasons for granting them, must be published on the department website (s 158(7)(a); *EPBC Regulations*, pt 16).

Other exemptions from the approval requirements are discussed above, for example, exemptions for actions that are declared under a bilateral agreement not to require approval by the Commonwealth minister.

Opportunities for public participation

The opportunities for public involvement in the referral and assessment processes have been mentioned above. The following section gives more detail.

If a proposal is referred to the minister, notification must be published on the department website and comments must be submitted within 10 business days (s 74(3)). Matters to be addressed in any submission must cover whether the proposed action is likely to have a significant impact on any matter protected under Part 3 of the *EPBC Act*, that is, whether it is a 'controlled action'.

If the action is to be assessed by a PER or EIS, then the minister must prepare guidelines for that process (ss 96A, 101A). At the discretion of the minister, there may be an opportunity for public comment at this stage (ss 97(5), 102(5)). The question to be addressed will be whether the guidelines are appropriate.

If the assessment is by referral information, preliminary documentation, PER or EIS, there is an opportunity for public comment. An invitation to provide comment is published in a national, state or territory newspaper, depending on the location of the action and, if practical, in a regional newspaper in the region affected. A notice is also published on the department website. The notification will include the time limit for comments, but it must be not less than 10 days for an assessment on referral information or preliminary documentation (ss 93(3), 95(2)) and not less than 20 days for a PER or EIS assessment (ss 98(3), 103(3)).

As well as addressing the accuracy and thoroughness of the documentation, comments may address:

- potential impacts on matters of national environmental significance or other relevant matters protected under Part 3 of the *EPBC Act* (see above)
- social and economic issues
- history of the proponent in relation to environmental issues—any allegations made against the proponent must be supported by reliable evidence (see Chapter 12 in this Handbook for a discussion of defamation)
- conditions which should be attached to any approval.

Where assessment is by way of public inquiry this may be because public involvement is seen to be necessary. However, whether objectors and third parties are given the opportunity to make written or oral submissions is at the discretion of the commissioners appointed to run the inquiry (pt 8, div 7).

If the assessment is carried out under another Commonwealth, state or territory accredited process or an assessment bilateral agreement, there will also generally be opportunities for public comment.

Legal review

In certain circumstances, a third party, or the minister, can seek an injunction in the Federal Court to prevent a contravention of any of the provisions of the *EPBC Act* (s 475). The case of *Booth v Bosworth* (referred to above) involved a third party seeking an injunction to prevent a lychee farmer operating an electric grid to protect his crop as the grid was causing the death of thousands of Spectacled Flying-foxes, which the applicant argued was having a significant impact on a World Heritage listed property (see Chapter 12 in this Handbook for more information on taking action under the *EPBC Act*).

Decisions made under the *EPBC Act* are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in the Federal Circuit Court or the Federal Court. The *EPBC Act* makes special provision extending the category of persons who can apply for judicial review (s 487). However, there is no right to apply for merits review of a ministerial decision in the Commonwealth Administrative Appeals Tribunal.

Conclusion

Activities that impact on the environment in the ACT may require assessment under either the ACT legislation or the Commonwealth *EPBC Act* or both. Both are complex processes and this chapter has provided only a simple overview, but it highlights that there are at least some opportunities for public participation and comment in both processes.