

Environmental regulation in Australia

- 2.1 Under Australia's federal system of government, responsibility for environmental regulation is carried by the Commonwealth Government and state/territory governments concurrently.
- 2.2 The Commonwealth's responsibilities are principally established as a result of the foreign affairs power under the Constitution and the Commonwealth Government implementing Australia's responsibilities under international agreements on environmental protection. The residual powers of the states under the Constitution allow for the concurrent regulation of environmental matters that lay outside of the Commonwealth's responsibilities.
- 2.3 Whilst this system is often labelled a 'dual regulatory approach' there are, in practice, three tiers of environmental regulation as state and territory governments frequently devolve many environmental decisions and regulatory functions to local governments.
- 2.4 This complex system of environmental regulation is the principal concern of this chapter. It will first examine environmental regulation at the Commonwealth level, and subsequently provide a brief and general overview of the regulatory responsibilities of the states and territories as well as local governments.

The role of the Commonwealth Government

- 2.5 The role of the Commonwealth in environmental regulation is to protect 'matters of national environmental significance' (MNES). The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) is the Commonwealth's primary legal tool to protect the environment and conserve biodiversity across Australia. It is discussed

below, followed by an overview of other Commonwealth environmental regulations.

Environmental Protection and Biodiversity Conservation Act

- 2.6 The EPBC Act provides important mechanisms for achieving ecologically sustainable development through the protection of the environment, focussing on Commonwealth interests in the nine MNES listed in the Act.¹
- 2.7 The EPBC Act provides that certain actions, including projects, developments, undertakings or activities, which are likely to have a significant impact on an MNES (known as 'controlled actions'), are subject to an assessment and approval process by the federal Environment Minister.²
- 2.8 The Commonwealth Government cannot intervene in a development proposal if there is no significant impact on one of the MNES specified in the EPBC Act. For example, the Commonwealth does not have power to regulate a development proposal that will have an impact on matters such as air quality or noise. These and other environmental matters are the responsibility of the relevant state government to consider during any state assessment and approval process (discussed later in this chapter).
- 2.9 A person proposing to take an action that they think is, or may be, covered by the EPBC Act must refer the proposal to the federal Environment Minister. If a proponent of a controlled action (such as a project developer) proceeds with the action without seeking assessment and approval from the Environment Minister, they may attract a civil or criminal penalty under the EPBC Act. The Environment Minister may decide that an approval is not needed for a particular action however it is an offence to carry out a controlled action without seeking ministerial assessment and approval.

1 The nine matters of national environmental significance protected under the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBC Act) are: world heritage properties; national heritage places; wetlands of international importance (listed under the Ramsar Convention); listed threatened species and ecological communities; migratory species protected under international agreements; Commonwealth marine areas; the Great Barrier Reef Marine Park; nuclear actions (including uranium mines); and water resources, in relation to coal seam gas development and large coal mining development (EPBC Act, Chapter 2, pt 3).

2 EPBC Act, s. 523.

How is Australia's biodiversity protected under the EPBC Act?

2.10 The EPBC Act protects biodiversity in several ways:

- requiring environmental impact assessment of developments which have a significant impact on a 'matter of national environmental significance';³
- requiring environmental impact assessment of developments which have a significant effect on the environment in Commonwealth land or waters;⁴
- listing threatened species and ecological communities, identifying their critical habitat, and making recovery plans for them;⁵
- listing migratory and marine species;⁶
- regulating trade in wildlife;⁷
- listing key threatening processes and making threat abatement plans for them;⁸
- providing for the making of conservation orders;⁹
- providing for the making of wildlife conservation plans;¹⁰ and
- providing for the declaration of conservation or biodiversity reserves which are managed for biodiversity and other purposes.¹¹

2.11 The EPBC Act's requirement for an environmental impact assessment of developments which have a significant effect on an MNES was the principal concern raised throughout the inquiry and will be the chief focus of this chapter's discussion of that Act.

Actions significantly impacting matters of national environmental significance

2.12 As discussed above, actions that are likely to have a significant impact on an MNES are subject to an assessment process and an approval process by the Environment Minister or their delegate.

2.13 The term 'significant impact' is not defined in the EPBC Act or its regulations. The Department of the Environment (DoE) has issued two 'Significant Impact Guidelines' which aim to assist stakeholders by setting

3 EPBC Act, Chapter 2.

4 EPBC Act, Chapter 2, pt 3, div 2.

5 EPBC Act, Chapter 5, pt 13, div 1.

6 EPBC Act, Chapter 5, pt 13, divs 2-4.

7 EPBC Act, Chapter 5, pt 13A.

8 EPBC Act, Chapter 5, pt 13, div 5.

9 EPBC Act, Chapter 5, pt 13, div 5.

10 EPBC Act, Chapter 5, pt 13, div 5.

11 EPBC Act, Chapter 5, pt 15, div 3.

out criteria for judging whether the impact is likely to be significant. For example, *Matters of National Environmental Significance (EPBC Act Policy Statement 1.1)* provides that:

Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.¹²

- 2.14 Also known as ‘triggers’, there are currently nine MNES protected under the Act:
- world heritage properties (ss. 12–15A);¹³
 - national heritage places (ss. 15B–15C);¹⁴
 - wetlands of international importance (as listed under the Ramsar Convention¹⁵) (ss. 16–17B);¹⁶
 - listed threatened species and ecological communities (ss. 18–19);¹⁷
 - migratory species (ss. 20–20B);¹⁸
 - nuclear actions (including uranium mines) (ss. 21–22A);
 - Commonwealth marine areas (ss. 23–24A);¹⁹
 - the Great Barrier Reef Marine Park (ss. 24B–24C);²⁰ and
 - a water resource, in relation to coal seam gas development or large coal mining development (ss. 24D–24E).²¹

12 DoE, ‘Matters of National Environmental Significance: Significance Impact guidelines 1.1’, p. 2 <http://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf> viewed 3 December 2014.

13 A list of Australia’s world heritage properties and a map showing their location are available at: <www.environment.gov.au/epbc/protect/heritage.html> viewed 3 December 2014.

14 A list of Australia’s national heritage places and a map showing their location are available at: <www.environment.gov.au/epbc/protect/heritage.html> viewed 3 December 2014.

15 *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, done at Ramsar, Iran, on 2 February 1971.

16 A list of Australia’s Ramsar Wetlands and a map showing their locations are available at: <www.environment.gov.au/epbc/protect/wetlands.html> viewed 3 December 2014.

17 Lists of threatened species and ecological communities is available at: <www.environment.gov.au/epbc/protect/species-communities.html> viewed 3 December 2014.

18 A list of migratory species is available at: <www.environment.gov.au/epbc/protect/migratoy.html> viewed 3 December 2014.

19 Information about the Commonwealth marine environment is available at: <www.environment.gov.au/epbc/protect/marine.html> viewed 3 December 2014.

20 Information about the Great Barrier Reef Marine Park is available at: <www.gbrmpa.gov.au> viewed 3 December 2014.

- 2.15 The minister may add further matters to this list without the agreement of the states. However, the minister must consult with the states and territories prior to making such additions.²²

The referral, assessment and approval processes

Referral process

- 2.16 The first step in the Commonwealth's assessment and approval process is a proponent referring the proposed action to the minister via the DoE. A referral must identify the proponent of the proposed action as well as a brief description of the action, including the location, the nature and extent of any potential impacts, and any proposed mitigation measures.²³
- 2.17 The purpose of the referral is for the minister to determine whether the proposed action is a 'controlled action' under the Act, that is, an action that is likely to significantly impact an MNES.²⁴ In deciding whether an action is a controlled action, the minister must invite comment from other Commonwealth ministers with administrative responsibilities relating to the proposal. The minister must also publish the referral on the internet and invite public comment. Under the EPBC Act, the minister is generally required to make a binding decision within 20 business days of receiving a referral.²⁵
- 2.18 If the minister deems a proposed action is a 'controlled action', the proposal will then be subject to the formal assessment and approval process established under the EPBC Act and cannot proceed unless approval is granted (see below).
- 2.19 If the minister decides the proposal is not a controlled action, as it is unlikely to have a significant impact on an MNES, then the action does not require approval under the EPBC Act.
- 2.20 The minister may also decide that an action is not likely to have a significant impact on an MNES, and does not require approval under the EPBC Act, because it will be undertaken by the proponent in 'a particular manner'.²⁶ However, the proponent must undertake the action in a way

21 Information about a water resource, in relation to coal seam gas development and large coal mining development, is available at: <www.environment.gov.au/epbc/about/water-trigger.html> viewed 3 December 2014.

22 EPBC Act, s. 25.

23 EPBC Act, s. 72; Environment Protection and Biodiversity Conservation Regulations 2000.

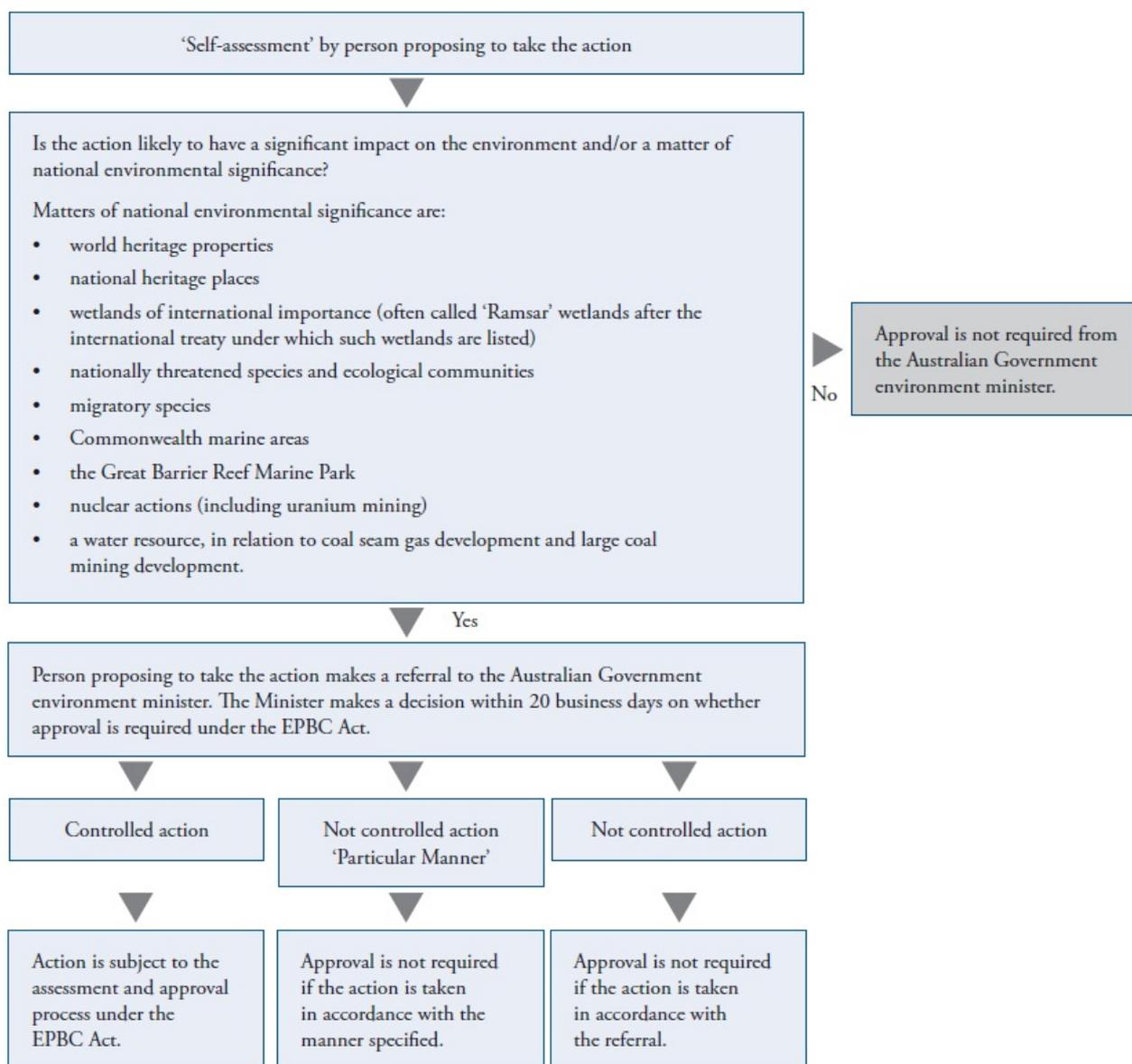
24 EPBC Act, s. 68.

25 EPBC Act, s. 75(5).

26 EPBC Act, s. 77A.

that is consistent with the manner specified in this decision, or they may be subject to penalties under the Act.²⁷

Figure 2.1 EPBC Act referral process



Source Department of the Environment, *Matters of National Environmental Significance: Significant Impact Guidelines 1.1*, p. 27.

2.21 Regardless of whether ministerial approval is required under the EPBC Act, separate environmental assessment and approval may be required under state/territory (and in some cases, local government)

27 DoE, 'Practice Guide: Application of 'Particular Manner' Decision Making Under the EPBC Act' <www.environment.gov.au/epbc/publications/manner.html> viewed 18 November 2014.

legislation. State/territory and the limited local government matters are discussed later in this chapter.

2.22 Figure 2.1 provides a simplified illustration of the referral process. A more detailed diagram of this process is included in Appendix D of this report.

Assessment and approval process

2.23 Once a referred action is deemed a 'controlled action' – one that is likely to significantly impact an MNES – an environmental assessment of the action must be conducted.

2.24 The EPBC Act requires the minister to choose, within 20 business days,²⁸ how the impacts of the proposed action will be assessed from the following options:²⁹

- an accredited assessment process such as a bilateral agreement or ministerial declaration;
- an assessment on referral information;³⁰
- an assessment on preliminary documentation;³¹
- a public environment report;³²
- an environmental impact statement;³³ or
- a public inquiry.³⁴

2.25 The EPBC Act sets out the manner and form of each assessment process. Within 10 business days of deciding on an assessment approach, the minister must inform all stakeholders including the state/territory ministers. Regardless of the approach chosen, a report will be prepared at the conclusion of the assessment process.

2.26 After considering an environmental assessment report, the minister must decide whether to approve the action and what conditions (if any) to impose on the project.³⁵ The minister must make the decision within the relevant period specified in the Act (see Table 2.1), or may specify a longer time frame in writing.³⁶

2.27 The EPBC Act also specifies that time does not run while the minister awaits advice from an independent expert scientific committee or while

28 EPBC Act, s. 88.

29 EPBC Act, s. 87.

30 EPBC Act, pt 8, div 3A.

31 EPBC Act, pt 8, div 4.

32 EPBC Act, pt 8, div 5.

33 EPBC, pt 8, div 6.

34 EPBC Act, pt 8, div 7.

35 EPBC Act, s. 130(1).

36 EPBC Act, s. 130(1A).

further information is sought from the proponent.³⁷ This is sometimes referred to as the ‘stop the clock’ provision.

Table 2.1 Time periods for ministerial approval decisions

Assessment process	Applicable time frame
An assessment report produced under a bilateral agreement or ministerial declaration	30 business days beginning on the first business day after the Minister receives the report.
An assessment report on referral information	20 business days beginning on the first business day after the Minister receives the finalised recommendation report.
An assessment report on preliminary information	40 business days beginning on the first business day after the Minister receives the documents or statement as required under the Act.
A public environment report OR an environmental impact statement	40 business days beginning on the first business day after the Minister receives the finalised report or statement.
A public inquiry	40 business days beginning on the first business day after the Minister receives the report.

Source EPBC Act, s. 130.

2.28 When deciding whether to approve an action and what conditions to impose, the minister must consider social and economic matters and relevant environmental impacts.³⁸ The minister must also take into account:

- principles of ecologically sustainable development;
- outcomes of the assessment of the impacts of the action;
- referral documentation;
- community and stakeholder comment;
- any relevant information available on the impacts of the action; and
- relevant comments from other Commonwealth ministers and their state and territory counterparts (such as information on social and economic factors).³⁹

2.29 The minister may take into account the environmental history of the individual or organisation proposing to take the action.⁴⁰ The EPBC Act prescribes a range of additional considerations for decisions about world heritage, national heritage, Ramsar wetlands, threatened species and

37 EPBC Act, ss. 130(4) and (5).

38 EPBC Act, s. 136(1).

39 EPBC Act, s. 136(2).

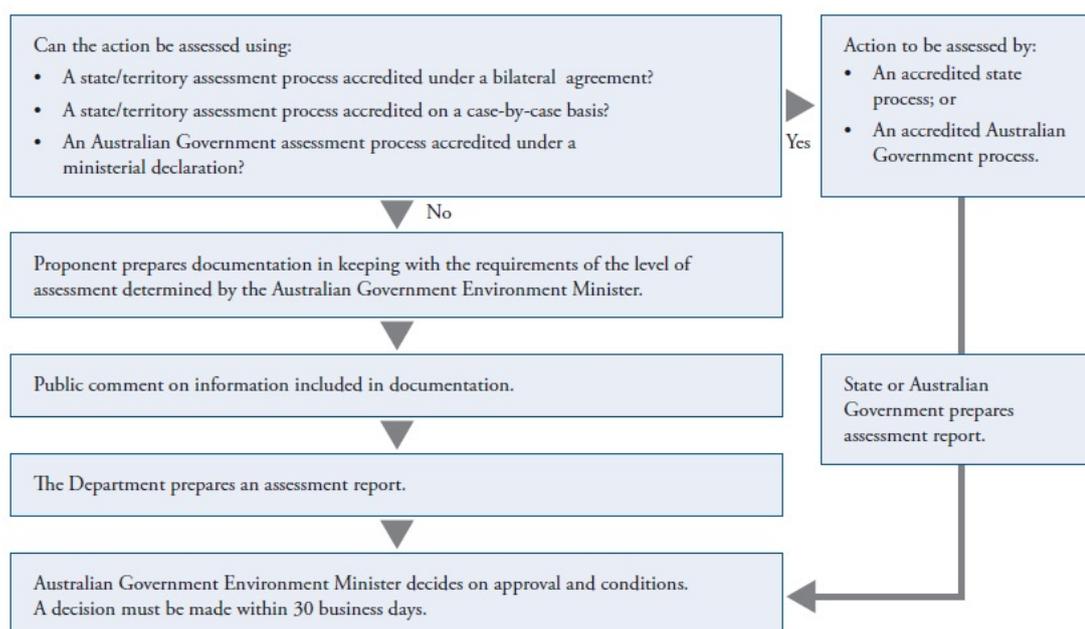
40 EPBC Act, s. 136(3).

endangered communities, and migratory species.⁴¹ The minister also has limited powers to approve certain nuclear installations.⁴²

Conditions

- 2.30 The minister may attach a range of conditions upon approving a controlled action. The purpose of those conditions is generally to protect, or to mitigate or repair damage to an MNES, whether the damage is caused by the action or not.⁴³
- 2.31 A proponent of an approved action must not contravene any condition attached to the approval. If contravened, the proponent may incur a civil penalty.
- 2.32 Figure 2.2 below provides a simplified illustration of the assessment and approval process. A more detailed diagram of this process is included in Appendix E of this report.

Figure 2.2 EPBC Act assessment and approval process



Source Department of the Environment, *Matters of National Environmental Significance: Significance Impact guidelines 1.1*, p. 29.

41 EPBC Act, ss. 137–41.

42 EPBC Act, s. 142.

43 EPBC Act, s. 134.

Assessment under bilateral agreements

- 2.33 If a bilateral agreement has been concluded between the Commonwealth and the state or territory in which the action is to be undertaken, the action may be assessed by that state or territory using the processes accredited under the bilateral agreement. This is discussed further in Chapter 4.

Other Commonwealth legislation regulating development projects

- 2.34 Throughout the current inquiry various other Commonwealth Acts were discussed by stakeholders, including those relating to offshore petroleum activities, Aboriginal and Torres Strait Islander heritage and native title.
- 2.35 A list of additional Commonwealth legislation is provided in Appendix D.
- 2.36 During the inquiry, the DoE stated that some of these Acts are being ‘considered for amendment or review’.⁴⁴ The Department indicated the following – relevant to this inquiry – are under consideration:
- repeal of the *Historic Shipwrecks Act 1976* and drafting of an Underwater Cultural Heritage Bill;
 - the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*;
 - the scoping of a ‘post-implementation review’ of the ‘water trigger’ of the EPBC Act (namely sections 24D–24E); and
 - the listing requirements for heritage matters, species and ecological communities as established in the EPBC Act.⁴⁵

The role of the states and territories and local governments

- 2.37 As stated at the beginning of this chapter, the Commonwealth Government has a specific and limited role relating to environmental regulation. The states and territories are responsible for all other environmental regulation.
- 2.38 Although the extent of the responsibility for environmental regulation carried by the states and territories is the same, the characterisation of those responsibilities varies between the jurisdictions.
- 2.39 Consequently, each state and territory differs in its approach to environmentally sustainable development, which in turn affects the application, assessment and approval processes for project developers in these jurisdictions.
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44 DoE, *Submission 19.1*, p. 15.

45 DoE, *Submission 19.1*, pp. 15–16.

2.40 This section of the report will not address the specifics of the regulatory systems in each state and territory. Rather, it will provide a general overview.

Overview

2.41 In 1992 the Council of Australian Governments set out the roles and responsibilities of each level of government in Australia in the *Intergovernmental Agreement on the Environment*. The Agreement provides that states have responsibility for:

- developing and implementing policy in relation to environmental matters which have no significant effects on matters which are the responsibility of the Commonwealth or any other states;
- the policy, legislative and administrative framework within which living and non-living resources are managed within the state;
- developing Australia's position in relation to any proposed international agreements of environmental significance which may impact on the discharge of the state's responsibilities; and
- participating in the development of national environmental policies and standards.⁴⁶

2.42 Appendix F lists the principal legislative instruments and some of the additional or supporting legislation and regulation. As the list demonstrates, each state and territory has an extensive amount of environmental legislation. Some of this legislation is implemented by state agencies, but much of it requires consideration or monitoring of environmental outcomes by local governments. A more detailed discussion of the role of local governments is presented in a later section below.

A sample environmental assessment process at the state level: Victoria

2.43 In order to demonstrate the role of state and territory governments in environmental regulation, it is helpful to examine the project assessment and approval system that runs parallel to the Commonwealth system described above. In this section the assessment process in Victoria will be discussed, though it is important to note that each jurisdiction will vary in its assessment measures and processes.

46 Australian Government, 'Intergovernmental Agreement on the Environment (1992)', s. 2.3 <<http://www.environment.gov.au/about-us/esd/publications/intergovernmental-agreement>> viewed 18 November 2014.

- 2.44 The following is based on public information from the Victorian Department of Transport, Planning and Local Infrastructure website, not information supplied to the Committee throughout its inquiry.⁴⁷
- 2.45 In Victoria, environment assessment of the potential environmental impacts or effects of a proposed development may be required under the *Environment Effects Act 1978*.
- 2.46 The process under this Act is not an approval process itself, rather it enables statutory decision-makers (ministers, local government and statutory authorities) to make decisions about whether a project with potentially significant environmental effects should proceed.
- 2.47 If the Minister for Planning decides that an Environment Effects Statement (EES) is required, the proponent of the project is responsible for preparing the EES and undertaking the necessary investigations.
- 2.48 Similar to the Commonwealth referral under the EPBC Act, an EES generally contains:
- a description of the proposed development;
 - an outline of public and stakeholder consultation undertaken during investigations and the issues raised;
 - a description of the existing environment that may be affected;
 - predictions of significant environmental effects of the proposal and relevant alternatives;
 - proposed measures to avoid, minimise or manage adverse environmental effects; and
 - a proposed program for monitoring and managing environmental effects during project implementation.
- 2.49 If an EES is required, the preparation of a Cultural Heritage Management Plan becomes mandatory under the provisions of the *Aboriginal Heritage Act 2006*.
- 2.50 After the EES is completed and released for public comment, the minister provides an assessment to the relevant decision-makers.
- 2.51 The Victorian system also allows for conditions to be set in lieu of an EES, in a similar fashion to the Commonwealth's 'particular manner' proposals. These conditions may provide a practical alternative to an EES or provide additional safeguards or management measures.

47 Information sourced from: Victorian Department of Transport, Planning and Infrastructure, 'What is the EES Process in Victoria?' <<http://www.dtpli.vic.gov.au/planning/environmental-assessment/what-is-the-ees-process-in-victoria>> viewed 18 November 2014.

- 2.52 More information about the Victorian system of environmental assessments for projects can be found at the website of the Victorian Department of Transport, Planning and Local Infrastructure.

Local government

- 2.53 Local governments perform a central role in the environmental legal system by preparing and administering planning schemes to control land development within their areas. Local governments normally implement and enforce much of state planning and development legislation including granting permits (including 'secondary approvals') within their jurisdiction.⁴⁸
- 2.54 To varying degrees, local governments have responsibilities for the following:
- water management;
 - coastal management and the management of the effects of sea level rises;
 - vegetation and weed control;
 - waste management; and
 - air quality and noise.⁴⁹

Committee comment

- 2.55 The Committee acknowledges the vast array of environmental regulation at federal and state levels, and accepts that regulation is an important part of protecting Australia's natural environment. The Committee's focus during this inquiry has been to ensure that the extent and complexity of regulation is not hindering business and community groups, without delivering environmental outcomes.
- 2.56 The Committee was therefore interested to find out about stakeholders' experiences within Australia's complex system of environmental regulation. This is canvassed in the next chapter.

48 Productivity Commission, *Major Projects Development Assessment Processes – Research Report*, Canberra, November 2013, p. 66.

49 For more information, see: Productivity Commission, *Business Regulation Benchmarking: Role of Local Government as Regulator*, Canberra, July 2012, particularly Chapters 11 and 12.

