ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.

Environmental Impact Assessment in Queensland

Factsheet 11

This Factsheet describes the processes used to assess the environmental impacts of a proposed development.

Factsheets in this series:

SUMMARY

Environment impact assessment (EIA) is a general term that describes a variety of processes used to assess the environmental impacts of a proposed development and the ways of mitigating those impacts. One form of EIA is the preparation of an environmental impact statement (EIS). EIA in Queensland can be triggered by a several State and Commonwealth laws.

What is the significance of EIA?

EIA does not normally decide whether or not a proposed development should proceed but is normally a component in a larger development approval process. The purpose of EIA is normally to improve the information available to government decision makers and the public of the potential environmental impacts and mitigation measures for a project. This assists the decision on whether to allow a

development proposal to proceed and what conditions, if any, should be placed upon the development to avoid or mitigate its impacts.

When is EIA required in Queensland?

There are four main EIA processes in Queensland:

- An "information request" process under the *Integrated Planning Act* 1997 (Qld) (IPA), which may be coupled with public notification for impact assessable development. These processes can apply to development other than mining.
- An EIS process in the *Environmental Protection Act* 1994 (Qld) (EP Act) for some mining and petroleum activities.
- An EIS process under the *State Development and Public Works Organisation Act* 1971 (Qld) (State Development Act) for "significant projects".
- One of five EIA processes, including EIS, under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act), for actions that have, will have, or are likely to have a significant impact on a matter protected under that Act ("controlled actions").

Commonwealth and State EIA processes can be combined under a bilateral agreement under the EPBC Act. Under this agreement, State EIA processes under the IPA, EP Act or State Development Act can be substituted for EIA processes under the EPBC Act. The procedures for requiring an EIS under the EPBC Act have now been incorporated into the *Integrated Planning Act 1997.*

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FULL TEXT

This factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

What is Environmental Impact Assessment?

Environmental Impact Assessment (EIA) refers to any formal process to identify the environmental effects of a proposed development and the ways of dealing with those effects. It can include social and cultural impacts as well as physical environmental impacts to animals, plants, water, soil, air, etc. It can be linked to community consultation and a community right to object to the development. This information is then used by the government decision-maker for the development to decide whether to approve the proposal and what conditions to attach to the approval (e.g. erosion control, noise limits, buffers on creeks, etc).

There are many different terms used to describe EIA processes which often are simply different names for the same thing. Environmental Impact Statement (EIS) often refers to the physical document produced from an EIA process. Impact Assessment has a special meaning in Queensland under the *Integrated Planning Act 1997* (IPA) and this is dealt with below. At a Commonwealth level "Public Environment Reports", "Public Inquiries" and "Strategic Assessments" are other terms for EIA processes with different levels of assessment. The important thing is not to get caught up in the jargon but to focus on the quality of the information, the public involvement and the decision making which result.

It is important also to recognise that an EIA does not decide an application. The EIA process typically only provides the information (often with recommendations) to the government decision-maker. For example, decision-makers under the IPA may decide applications based on:

- the information supplied in the developer's application;
- the information supplied by the developer in response to any information request;
- submissions from the public;
- the planning scheme and planning considerations;
- requirements of other government agencies; and
- political and practical considerations not mentioned in the IPA (e.g. politicians desire to show they are pro-economic growth).

Within this context EIA is an important tool for informing the public and decision-makers about the potential effects of the proposal on the environment.

What legislation governs EIA processes in Queensland?

This factsheet covers the major EIA processes in Queensland. These include EIA under the:

- *Integrated Planning Act 1997* (Qld) (IPA) for development other than mining and petroleum activities;
- *Environmental Protection Act 1994* (Qld) (EP Act) for mining and petroleum activities;
- *State Development and Public Works Organisation Act 1971* (Qld) (State Development Act) for “significant projects”; and
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) for controlled actions.

EIA under the IPA

The general EIA process under the IPA is the “information request” process. When a development application is lodged under the IPA, the local government and State government departments required to assess it may give the applicant an “information request” asking the applicant to provide further information on a particular topic. This process applies to all development applications and can range from very simple to highly complex requests.

Unlike formal EIS processes in other legislation, there is no advertisement of a draft information request for public comment (in other legislation this is called the "terms of reference"). The timeframes for government agencies to make information requests are very short (10 business days with some extensions) even for complex development applications. There is also no requirement to place the information provided in response to the information request on public display.

Only the barest information is legally required to lodge an application for development under the IPA (s3.2.1). An applicant can choose to supply or not supply the information requested in an information request (s3.3.8) but runs the risk of the application being refused for lack of information and having to appeal the decision to the Planning and Environment Court. Normally, at least some attempt is made by developers to respond to information requests.

Public notification of development applications under the IPA is required only for **impact assessment** (as opposed to **code assessment**). The term 'impact assessment' is confusing and does not represent a requirement for a formal EIS. If an application requires impact assessment there must be public notification of the application, there is an opportunity for public submissions about the development, and submitters may appeal a decision about the development to the Planning and Environment Court. In addition the decision maker must assess the environmental effects of the proposed development and the ways of dealing with them against the object of the Act (ecological sustainability), the planning scheme and desired environmental outcomes.

Development applications for code assessable development do not require public notification and are assessed only against the applicable codes under the planning scheme and relevant State laws. Many forms of damaging development are code assessable. For example, all vegetation clearing applications are code assessable, no matter how large or sensitive the area proposed to be cleared. All environmentally relevant activities (e.g. marinas) under the *Environmental Protection Act 1994* (Qld) are also code assessable.

EIS under the IPA for the Queensland Bilateral Agreement

The IPA contains a special EIS process in Part 8 of Ch 5 (ss5.8.1-5.8.15) for assessing controlled actions under a bilateral agreement for the EPBC Act. This section only applies to developments that trigger the operation of the EPBC Act. If this process applies, the following steps apply in the EIS process:

1. a draft terms of reference of an EIS is publicly advertised and public comments are received on the draft terms of reference;
2. the developer prepares an EIS to comply with the terms of reference;
3. a draft EIS is publicly advertised and public comments are received on the draft EIS;
4. a final EIS is prepared taking into account any public comments;
5. the chief executive administering the IPA prepares an EIS assessment report;
6. the final EIS and assessment report are provided to the Commonwealth Environment Minister to decide whether to approve the controlled action and what conditions to attach under the EPBC Act.

EIA for mining

Mining tenure and royalty issues are regulated under the *Mineral Resources Act 1989* (Qld) ("MRA").

The *Environmental Protection Act* 1994 (Qld) ("EP Act") provides a system for assessing and regulating the environmental impacts of mining activities in ss146-309 and a special EIS process in ss37-72. An 'environmental authority (mining activities)' issued under the Act is required to carry out a mining activity. Mining activities are defined to include prospecting, exploring or mining for a mineral, processing a mineral won or extracted, any associated activity that may cause environmental harm and rehabilitating and remediating environmental harm caused by these activities (s147).

It is only once a mining lease is granted under the MRA and an environmental authority (mining lease) is granted under the EP Act that a full-scale mining project can occur and, therefore, most of the environmental assessment and regulation is focused on this stage.

Code compliant and non-code compliant mining activities

Regulation of mining under the EP Act distinguishes between 'code compliant' and 'non-code compliant' authorities for mining activities (s148). It is a confusing distinction but an important one. A code compliant authority is one that is issued with only standard environmental conditions while a non-code compliant authority has special conditions attached.

The standard environmental conditions for mining activities are approved under s549 of the EP Act and stated in *Codes of Environmental Compliance for Mining Activities* available at www.epa.qld.gov.au. For mining leases the standard conditions include:

> Condition 14: The holder of the environmental authority must not carry out activities:
> - in, or within 2 km of, a category A environmentally sensitive area (defined to include a National Park under the *Nature Conservation Act 1992* (Qld)); or
> - in, or within 1 km of, a category B environmentally sensitive area (defined to include areas such as a fish habitat area under the *Fisheries Act 1994* (Qld)).

Level 1 and level 2 mining projects

Regulation of mining under the EP Act also distinguishes between 'level 1 mining projects' and 'level 2 mining projects' (s151). Schedule 1A of the *Environmental Protection Regulation 1998* (Qld) states criteria that are central to the distinction between these two levels. For example, level 2 mining projects include mining leases that comply with all of the following criteria:

- the mining does not significantly disturb more than 10ha of land at any one time;
- the mining is not carried out in or within 2km of a category A environmentally sensitive area (defined to include a National Park under the *Nature Conservation Act 1992* (Qld));
- the mining is not carried out in or within 1km of a category B environmentally sensitive area (defined to include areas such as a fish habitat area under the *Fisheries Act 1994* (Qld));
- no more than 20 persons carry out the mining at any one time.

EIS requirements for mining activities

The two distinctions that have just been explained are confusing but they are important because the Environmental Protection Agency may only require an EIS for an application for a non-code compliant authority involving a level 1 mining project (ss161-162). If the application proceeds by way of an EIS a more extensive assessment process begins under Chapter 3, ss37-68 of the EP Act. Generally this process involves:

1. a draft terms of reference for the EIS is publicly advertised and public comment received;
2. the miner prepares a draft EIS to meet the terms of reference;
3. the draft EIS is publicly advertised and public comments received;
4. a final EIS is prepared in light of the public comments received;
5. the chief executive administering the EP Act prepares an EIS assessment report;
6. the final EIS and assessment report are used by the Minister for Mines and the Minister for Environment in deciding whether to approve the mine.

Other EIA and public notification for mining

If a formal EIS is not required for a mining lease the applicant must still provide information to comply with the information requirements under the MRA and EP Act. These requirements include addressing whether the mining will cause any adverse environmental impact.

There are also mandatory public notification and objection rights for mining leases that are separate from the EIS process under the EP Act. Public notices are posted on the land the subject of the mining lease application and advertised in an approved newspaper circulating in the local area. The notices will specify an objection period. Any person who makes a "properly made objection" within the objection period may elect to be heard in an "objections hearing" about the propose mine in the Land and Resources Tribunal.

EIS for mining under the Queensland Bilateral Agreement

Mining activities in Queensland that are controlled actions under the EPBC Act can be assessed under the EIS provisions in the EP Act because of a bilateral agreement between the Commonwealth and State. The EIS process is the same as set out above except that the final EIS must address the matters protected under the EPBC Act and is given to the Commonwealth Environment Minister to decide whether to approve the mine under the EPBC Act.

EIA under the State Development Act

The *State Development and Public Works Organisation Act* 1971 (State Development Act) contains EIA provisions in ss24-35L which are intended to coordinate whole-of-government assessment of environmental impacts for large developments which have importance at a State level. Such development proposals are termed "significant projects". However the terms in which the discretion to declare a significant project (i.e. require EIS) are cast in such wide terms that the discretion of the Coordinator-General (the Director General of the Department of State Development) is both absolute and unenforceable.

One serious consequence of a project being declared a significant project is that the Environmental Protection Agency loses the ability to direct that the application be refused (even for Environmentally Relevant Activities under the EP Act) or impose conditions on it. Assuming that the Coordinator-General decides to declare a proposal a significant project, any application process running under the IPA or EP Act in relation to an application for a mining activity stops and the EIS processes set out in the State Development Act commence. These State Development Act processes are deemed to satisfy any separate EIA requirements under the IPA or EP Act.

The EIS process under the State Development Act involves:

1. the project is declared a "significant project" by the Coordinator-General and public notice is given that an EIS is required;
2. draft terms of reference for the EIS are publicly advertised and public comments are received;
3. the proponent prepares a draft EIS to met the terms of reference;
4. the draft EIS is publicly advertised and public comments received;
5. a final EIS is prepared in light of the public comments received;
6. the Coordinator-General prepares a report on the EIS;
7. the final EIS and Coordinator-General's report are given to any relevant decision-maker at local, State or Commonwealth government levels to decide whether to approve the project.

EIS for significant projects under the Bilateral Agreement

The EIS process in the State Development Act outlined above can be used to assess a controlled action under the EPBC Act. A bilateral agreement exists between the State and Commonwealth governments for this purpose.

EIA under Commonwealth laws

EIA can be triggered at a Commonwealth level under the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) ("EPBC Act") for "controlled actions". An "action" is a physical activity or series of activities but does not include government decisions or grants of funding (s523). Controlled actions are actions that have, will have or are likely to have a significant impact on:

- a matter of national environmental significance;
- the environment on Commonwealth land;
- the environment generally for an action taken on Commonwealth land; or
- the environment generally if taken by the Commonwealth or a Commonwealth agency.

Matters of national environmental significance under the EPBC Act are:

- the world heritage values of a declared World Heritage area;
- the Nation Heritage values of a National Heritage place;
- the ecological character of a declared Ramsar wetland;
- listed threatened species or a listed threatened ecological community;
- listed migratory species;

- the environment for nuclear actions; and
- the environment in Commonwealth marine areas.

Actions that may be controlled actions must be referred under the EPBC Act for assessment and approval. This involves potentially three stages: referral; assessment; and approval. At the referral stage, the Minister decides whether an action is a controlled action (s75). If the proponent believes the action is not a controlled action the proposal is publicly advertised on the internet at www.deh.gov.au/epbc/publicnotices/ for 10 business days. If the Minister decides the action is a controlled action, it is assessed under one of five EIA methods in Part 8 of the EPBC Act or under State legislation through the Queensland Bilateral Agreement. The EIA processes involve further public consultation. Once the EIA process is completed the Minister decides whether to approve or refuse the action.

A wide approach must be taken when assessing the scope of impacts of actions under the EPBC Act. In *Minister for the Environment and Heritage v Queensland Conservation Council* (2004) 139 FCR 24 (the Nathan Dam Case) the court held that the Minister was required to consider the downstream impacts of farming using water from a dam when assessing the impacts of the dam.

The principle that emerged from the Nathan Dam Case is that EIA under the EPBC Act must consider all likely impacts of an action, including direct and indirect impacts. Impacts of an action may include the impacts of acts done by persons other than the proponent (third party impacts) and activities that are not proposed as part of the action. Impacts of an action include each consequence that is reasonably within the contemplation of the proponent, whether those consequences are within the control of the proponent or not. The width of the enquiry in each case will depend on the facts and on what may be inferred from the description of the "action" which the Minister is required to consider.

The Queensland Bilateral Agreement

Commonwealth and State EIA processes can be combined under a bilateral agreement under the EPBC Act. Under this agreement State EIA processes under the IPA, EP Act or State Development Act can be substituted for EIA processes under the EPBC Act. In addition to being used under State laws, the final EIS produced is given to the Commonwealth Environment Minister to decide whether to approve or refuse the proposed action under the EPBC Act.

Enforcement of EIA requirements

The EIA procedures and the quality of EIS are generally difficult to enforce due to the wide discretions given in the legislation to government decision-makers.

For any application involving the IPA an application can be made to the Planning and Environment Court about procedural requirements (e.g. if required public notification has not been done). For impact assessable development, submitters can appeal to the Planning and Environment Court to challenge the merits of the application and any EIA.

EIA for mining leases for mining leases can be challenged by objectors in an objections hearing in the Land and Resources Tribunal.

The quality of EIA under the State Development Act cannot be challenged and is subject to few meaningful constraints unless imposed by the Coordinator-General.

False or misleading information submitted in EIA documents under the EPBC Act is potentially liable to criminal or civil penalties (see ss489-491 and *Mees v Roads Corporation* (2003) 128 FCR 418) but not merits review.

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Relevant laws

Integrated Planning Act 1997 (Qld)
Integrated Planning Regulation 1998 (Qld)
State Development And Public Works Organisation Act 1971 (Qld)
Mineral Resources Act 1989 (Qld)
Environmental Protection Act 1994 (Qld)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)