

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (EPBC Act)

Policy Statement

'Indirect consequences' of an action: Section 527E of the EPBC Act

Overview

This Policy Statement provides guidance on determining whether an event or circumstance is an 'indirect consequence' of an action for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). An indirect consequence is frequently referred to as an indirect impact.

Sub-section 75(2) of the EPBC Act requires that the Minister responsible for administering the EPBC Act or their delegate (the Minister) when deciding whether an action is a controlled action, consider 'all adverse impacts **(if any)**' the action has, will have, or is likely to have, on protected matters.

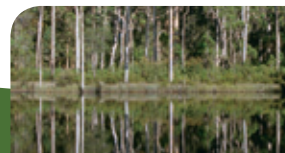
Section 527E defines the 'impact' of an action (**primary action**) as an event or circumstance which is:

- a direct consequence of the action; or
- an indirect consequence of the action, if the action is a substantial cause of the event or circumstance.

However, if the event or circumstance is a consequence of another action taken by a different person (**secondary action**) that was not taken at the direction or request of the person taking the primary action, then even if the primary action is a substantial cause of the event or circumstance, the event or circumstance will only be an 'impact' of the primary action for the purpose of section 527E if:

- the primary action facilitates the secondary action 'to a major extent'; 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 event or circumstance is within the contemplation of the person taking the primary action or is a reasonably foreseeable consequence of the secondary action.

This Policy Statement provides guidance on what impacts constitute a 'indirect consequence(s)', under paragraph 527E(1)(b).



What is an indirect consequence?

The *Significant Impact Guidelines* (Policy Statement 1.1) set out that the 'indirect consequences' of an action may include:

- (a) off-site impacts including, but not limited to:
 - (i) downstream impacts (such as impacts on wetlands from chemicals discharged into upstream river systems); or
 - (ii) upstream impacts (such as the extraction of raw materials which are used to undertake the action), and
- (b) actions taken by third parties, where the third party action is facilitated to a major extent by the primary action and the impacts of the third party action were reasonably foreseeable (as set out in sub-section 527E(2) of the EPBC Act).

Factors for determining what is an indirect consequence

The following questions may help in determining whether an 'indirect consequence' is an impact of an action. Whether a particular impact is an 'indirect consequence' for the purpose of the EPBC Act will often depend on the specific circumstances of a proposed action.

Question 1—Would the impact have occurred without the primary action?

If the answer is 'no', this suggests the impact is a consequence of the action and therefore may be an 'indirect consequence'.

Question 2—Is the action a substantial cause of an indirect consequence?

If the answer is 'yes', this suggests that the consequence is more likely to be an 'indirect' impact.

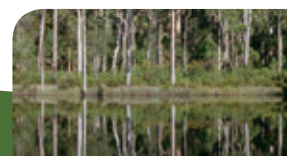
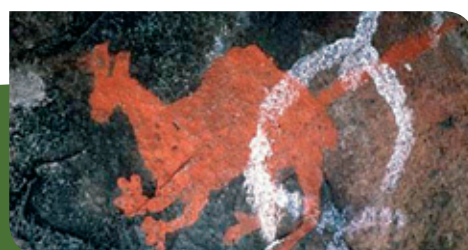
For example, there may be multiple impacts of an action. In order to determine whether an impact is a direct or indirect consequence you should think of them as a chain of events and determine causal effect of the impact. The more removed the consequence is from the action, the weaker the causal link between the action and the indirect consequence. If the action and impact are close in the chain of events, it is more likely that the action is a substantial cause of the impact. Nevertheless, there may also be cases where the consequences of a particular action may not be fully apparent for a considerable period of time.

The 'indirect consequence' of the action must be a substantial cause of an event or circumstance for it to be considered an impact of the action. The 'indirect consequence' must be sufficiently 'close' to the action to be considered an impact. A third party action will only be an impact if the action facilitates to a major extent the indirect consequence.

Question 3—Is the impact too remote from the action?

If the answer is 'yes', it is less likely that the impact is an 'indirect consequence' of the action.

If the impact is too remote from the action, that is, it is physically removed or occurs a long time after the action, it may not, in some cases, be reasonably considered to be an 'impact' of the action. However, in other cases an impact that evidence strongly suggests might manifest itself many years later, or occurs at a substantial geographic distance from the location of the original action, may still be an indirect consequence that is substantial enough to be considered an impact.



Question 4—Were flow-on actions and the impacts reasonably foreseeable?

If the answer to the following questions is ‘yes’, then it is more likely that the impact is an ‘indirect consequence’ of the action. To determine whether impacts are reasonably foreseeable, consider:

- (a) Whether a flow-on action was intended, or that such a flow-on action would occur in the normal course of events; or
- (b) Whether the person who referred the action knew, or should they have known, the potential impacts from flow-on actions.

It may be reasonable for departmental officers to conclude from the information provided that the person referring the action intended or knew that an impact might occur, even if they did not disclose this in the referral.

If the person who referred the action contemplated that certain flow-on effects would be likely, then those effects may be considered to be impacts of the action.

Question 5—What was the likelihood of the impact occurring?

Even if an impact is a consequence of an action, it is not an impact for the purposes of subsection 75(2) of the EPBC Act if it is not likely to occur.

An impact is likely to occur if there is ‘a real chance or possibility’ that it will occur or is a ‘reasonably foreseeable consequence’ of the referred action.

In considering whether there is a possibility of the impact or if the impact is a foreseeable consequence, departmental officers will consider the particular factual situation and the degree to which there is scientific certainty surrounding the likelihood of the impact. Scientific views are important but a lack of scientific certainty will not necessarily

mean that the impact is unlikely to occur. The precautionary principle will apply where the impact may be serious or irreversible (refer to the significant impact guidelines for further information).

Factual matters, such as whether an impact will be reduced or negated by other regulatory regimes should also be taken into account. This would include the existence of state or territory regulatory regimes for avoiding or mitigating the relevant impacts.

Question 6—What is the magnitude of the impact?

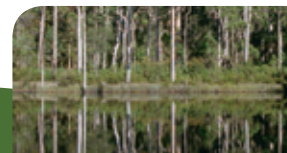
The magnitude of the total impacts, both direct and indirect, must be examined to determine whether those impacts are likely to be significant in relation to protected matters. Where impacts are likely to be significant this will lead to a decision that the action is a controlled action.

Examples

The following are examples of ‘indirect consequences’ of actions. The purpose of these examples is to illustrate the types of matters and the process of reasoning that are relevant to considering whether or not an action is an indirect consequence under paragraph 527E(1)(b) of the EPBC Act. While these examples provide guidance, every decision must be made according to the particular facts, and different outcomes can legitimately arise from similar facts.

Example 1—Increased traffic

If a new residential development is proposed, indirect consequences may flow from increases in the numbers of people in an area that was previously unpopulated or less populated and this would constitute an impact. The development of roads and the increase of vehicles on the roads may have an impact on threatened species and this



may be considered an indirect consequence of the action which is substantially caused by the action. Increased numbers of people will most likely mean increased use of infrastructure such as roads which in turn may result in increased traffic in the area. This increased traffic may result in a higher likelihood of animals, including threatened species, being killed on the roads.

Example 2—Downstream impacts

‘Indirect consequences’ may include ‘downstream impacts.’ For example, if a proponent wants to construct a dam and the Great Barrier Reef World Heritage Area (GBRWHA) is situated downstream from the proposed dam site. The proponent foresees that water from the dam will be used by farmers for agricultural irrigation, and subsequent farm run-off which could contain pesticide and fertiliser residue will run into the river and downstream to the GBRWHA.

The impacts of the third party irrigation activities would be sufficiently ‘close’ to the referred action to be seen as impact of the referred action on the GBRWHA. The impact would not have occurred without the primary action of construction of the dam.

Example 3—Road upgrade

A proponent wants to upgrade a facility and a narrow access road to allow greater access to the facility. A narrow road connects that site to a nearby highway which runs directly into the local city centre. The existing road capacity is well below that required for the facility to properly function. The road upgrade would make it easier to access the facility and also to access the nearby town centre. Accordingly, the town centre could potentially become more attractive to residential developers. Both the road upgrade and any possible development may be considered impacts of the action.

Whilst the causal link between the referred action and the third party road upgrade is strong and the facility is the material or substantial cause of the road upgrade, the link with any potential further development is weaker further down the chain of events. It is arguable that the referred action would be too remote from any potential third party development and its associated impacts, and accordingly would not be ‘sufficiently close’ to be seen as consequences of that action.

