

CHAPTER 04

Statutory context

ALBURY TO ILLABO ENVIRONMENTAL IMPACT STATEMENT

ARTC

INLAND
RAIL
An Australian Government Initiative

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4. Statutory context

This chapter provides a review of the legislation and environmental planning instruments that are relevant to the environmental assessment and approval of the Albury to Illabo (A2I) section of the Inland Rail program (the proposal). The permissibility and approval pathway is summarised, and other planning instruments and legislation that are relevant to the assessment and approval of the proposal are considered.

4.1 Overview of the approval pathway

The (then) NSW Minister for Planning and Public Spaces declared the proposal to be Critical State Significant Infrastructure (CSSI) in 2021. The proposal is listed in Schedule 5, Clause 7 of the State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP) and is subject to approval by the NSW Minister for Planning under Division 5.2 of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act). The assessment and approval requirements under the EP&A Act are described in section 4.2.

Other approvals and permits are also required and are discussed in section 4.5.

4.2 Environmental Planning and Assessment Act 1979

The EP&A Act and Environmental Planning and Assessment Regulation 2021 (EP&A Regulation) establish a framework for the assessment and approval of developments in NSW. They also provide for the making of environmental planning instruments, including state environmental planning policies (SEPPs) and local environmental plans (LEPs), which determine the permissibility and approval pathway for development proposals and form a part of the environmental assessment process.

4.2.1 Critical State Significant Infrastructure

In accordance with section 5.13 of the EP&A Act, State Significant Infrastructure (SSI) may be declared to be Critical State Significant Infrastructure (CSSI) if it is of a category that, in the opinion of the Minister, is essential to the state for economic, environmental or social reasons. The proposal was declared as CSSI in 2021 by the (then) Minister for Planning and Public Spaces.

As CSSI, the proposal is permissible without consent under clause 2.15 of the Planning Systems SEPP and it requires the approval of the NSW Minister for Planning under section 5.14 of the EP&A Act.

Excluded activities

The CSSI for the proposal excludes certain activities as forming part of the proposal. These activities, where carried out before the start of construction, are:

- ▶ surveys, test drilling, test excavations, geotechnical investigations or other tests, surveys, sampling, or investigation for the purposes of the design or assessment of the project
- ▶ the use of an existing rail corridor, or an existing rail facility adjoining an existing rail corridor, for delivery or storage of tracks, sleepers, ballast, posts, or culverts
- ▶ the adjustment, relocation, upgrade, or replacement of existing utilities infrastructure, unless existing water flows within or through the existing rail corridor will be permanently affected or where native vegetation clearing that is likely to significantly affect threatened species within the meaning of Part 7 of the *Biodiversity Conservation Act 2016* (NSW) occurs.

Where these works occur before commencement of construction, separate environmental assessments and approvals would be obtained, where required. This could include utility work as described in Appendix D: Utilities management framework, depending on the final construction methodology and schedule as determined by the construction contractor.

4.2.2 Planning approval process under Part 5, Division 5.2 of the EP&A Act

The assessment and approval process for a CSSI project is established under Part 5, Division 5.2 of the EP&A Act. The key steps in the assessment process are shown in Figure 4-1.

Environmental assessment requirements

In accordance with section 5.16 of the EP&A Act, the Secretary's environmental assessment requirements (SEARs) for the proposal were issued by the (then) Department of Planning, Industry and Environment (DPIE) on 14 October 2020. In 2022, the department changed its name to the Department of Planning and Environment (DPE). The SEARs define the matters that the EIS must address. The requirements detailed in the SEARs, together with where they are addressed by this EIS, are in Appendix A: Secretary's environmental assessment requirements.

The form and content requirements for the EIS are defined by Part 8 Division 5 of the EP&A Regulation. These requirements, and how they are addressed by the EIS, are in Appendix C: Statutory compliance. Preparation of the EIS has considered the *State Significant Infrastructure Guidelines* (DPIE, 2021c) while meeting the requirements of the SEARs (issued October 2020).

Public exhibition and submissions

The EIS will be placed on public exhibition by DPE for a minimum of 28 days and will invite submissions to be made on the proposal. At the conclusion of the exhibition period, DPE will ask ARTC to respond to the issues raised in a Submissions Report. The Submissions Report will be made public. If changes are required to the proposal following public exhibition of the EIS, ARTC may prepare an Amendment Report or DPE may request ARTC to prepare a Preferred Infrastructure Report to:

- ▶ respond to the issues raised in submissions or matters identified by DPE in its assessment of the EIS
- ▶ reduce the impacts of the proposal or to refine the design of the proposal.

Any Amendment Report or Preferred Infrastructure Report will be made public; however, DPE may also determine to publicly exhibit these reports. Further information on the proposed approach to consultation during the exhibition period is in Chapter 5: Engagement.

Assessment and approval

Following the exhibition period, DPE will, on behalf of the NSW Minister for Planning, review the EIS, the Submissions Report, and the Amendment Report or Preferred Infrastructure Report (if prepared). The department will prepare an assessment report for consideration by the minister. The minister may refuse the proposal or approve it with conditions and modifications. The minister's decision and the assessment report will be published on DPE's Major Projects' website (majorprojects.planning.nsw.gov.au/) following determination.

Planning process

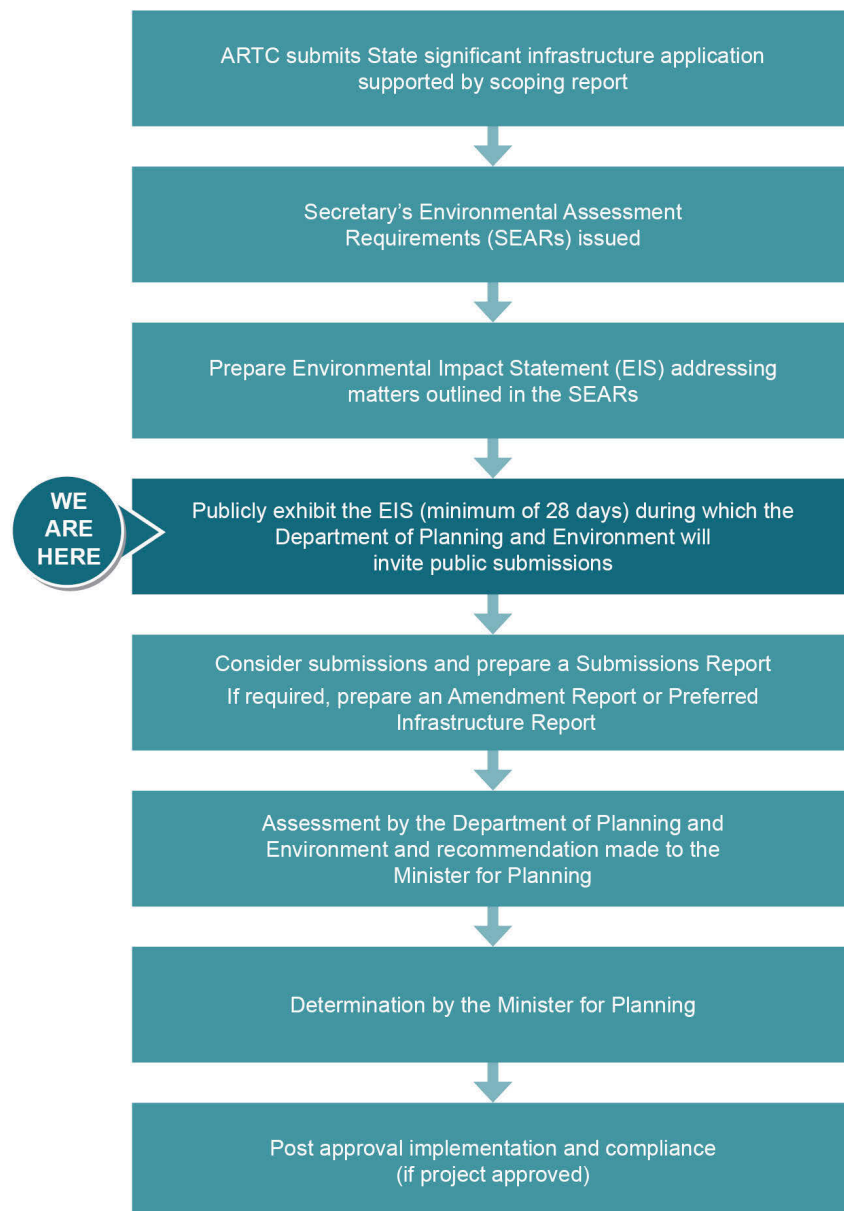


FIGURE 4-1 ASSESSMENT AND APPROVAL PROCESS

4.2.3 Landowner's consent or notification requirements

Clause 181(5) of the EP&A Regulation provides the landowner consent and notification requirements for SSI (including CSSI). In accordance with clause 181(5), as the proposal is SSI being undertaken by a public authority and is also for linear transport infrastructure, the consent of individual landowners is not required for an application. However, the proponent is required to publish a notice of the application on the NSW Planning Portal (planning.nsw.gov.au/About-Us/NSW-Planning-Portal) and must give notice of the application to landowners in accordance with clause 181(6).

4.2.4 NSW environmental planning instruments

Environmental planning instruments are statutory plans developed under Part 3 of the EP&A Act, such as state environmental planning policies and local environmental plans, that guide development and land use. Section 5.22(2)(a) of the EP&A Act provides that environmental planning instruments do not apply to or in respect of SSI, except where they apply to the declaration of infrastructure as SSI or as CSSI and its permissibility. The environmental planning instruments that are relevant in this regard are considered below.

State Environmental Planning Policy (Transport and Infrastructure) 2021

The NSW State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP) aims to assist in the delivery of public infrastructure across the state through consistent planning and assessment regimes for public infrastructure.

The proposal meets the definition of rail infrastructure facilities, which are defined by clause 2.90 of the Transport and Infrastructure SEPP as including 'railway tracks, associated track structures, cuttings, drainage systems, fences, tunnels, ventilation shafts, emergency accessways, bridges, embankments, level crossings and roads, pedestrian and cycleway facilities'.

Clause 2.3(2) of the Transport and Infrastructure SEPP defines public authority as having the same meaning as the EP&A Act and in respect of development connected with rail corridors or railway infrastructure facilities, includes the Australian Rail Track Corporation Limited (ACN 081 455 754).

Clause 2.91 of the Transport and Infrastructure SEPP identifies that development for the purpose of a railway or rail infrastructure facilities may be carried out by or on behalf of a public authority without consent on any land. However, the proposal as CSSI is permissible without consent under clause 2.15 of the Planning Systems SEPP as discussed in section 4.2.1.

State Environmental Planning Policy (Planning Systems) 2021

The proposal was declared CSSI by the (then) Minister of Planning and Public Spaces and is identified in Schedule 5, clause 7 of the Planning Systems SEPP alongside other Inland Rail projects. Under clause 7(5) of Schedule 5 of the Planning Systems SEPP, the following activities are excluded when carried out prior to the commencement of construction of the proposal:

- ▶ certain utility works, if such works do not permanently affect water flows within or through the rail corridor, and/or do not have a significant effect on threatened species within the meaning of the *Biodiversity Conservation Act 2016* (NSW) (BC Act) as a result of native vegetation removal
- ▶ storage and use of the existing rail corridor or adjoining rail facilities for delivery and storage of tracks, sleepers, ballast, posts or culverts
- ▶ surveys, test drilling, test excavations, geotechnical investigations or other tests, surveys, sampling or investigation for the purposes of the design or assessment of the project.

Any such works would be subject to separate assessment and approvals, where required.

4.3 Other NSW legislation

Other NSW environmental planning legislation that is directly relevant to the approval and assessment of the proposal are considered below.

4.3.1 Approvals that would otherwise apply

As the proposal has been declared SSI (including CSSI), the following approvals are not required in accordance with section 5.23 of the EP&A Act if planning approval is obtained:

- ▶ a permit under section 201, 205 or 219 of the *Fisheries Management Act 1994* (NSW) (FM Act) for dredging, water land reclamation, harm to marine vegetation or blocking of fish passage
- ▶ an approval under Part 4 for works on an item listed on the State Heritage Register including an excavation permit under section 139, of the *Heritage Act 1977* (NSW)
- ▶ an Aboriginal heritage impact permit under section 90 of the *National Parks and Wildlife Act 1974* (NSW) (NPW Act) to allow harm to an Aboriginal heritage object to place
- ▶ a water use approval under section 89, a water management work approval under section 90, or an activity approval (other than an aquifer interference approval) under section 91 of the *Water Management Act 2000* (NSW) (Water Management Act).

As the proposal has been declared as CSSI, section 5.23(3) of the EP&A Act precludes the following directions, orders or notices being made to prevent or interfere with the carrying out of the project if planning approval is obtained:

- ▶ an interim protection order (within the meaning of the NPW Act)
- ▶ an order under Division 1 (stop work orders) of Part 6A of the NPW Act or Division 7 (stop work orders) of Part 7A of the FM Act
- ▶ a remediation direction under Division 3 (remediation directions) of Part 6A of the NPW Act
- ▶ an order or direction under Part 11 (regulatory compliance mechanisms) of the BC Act
- ▶ an environment protection notice under Chapter 4 of the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act)
- ▶ an order from a council to demolish or move a building, to repair or make structural alterations to a building, or to do or refrain from doing things under section 124 of the *Local Government Act 1993* (NSW).

4.3.2 Approvals that must be applied consistently

The following approvals cannot be refused if necessary, for the carrying out of CSSI and must be consistent with the approved project in accordance with section 5.24 of the EP&A Act if planning approval is obtained:

- ▶ an environment protection licence under Chapter 3 of the POEO Act
- ▶ consent under section 138 of the *Roads Act 1993* (NSW) (Roads Act).

The approval requirements of these Acts as they relate to the proposal are discussed further in this section.

Protection of the Environment Operations Act 1997

The POEO Act establishes, among other things, pollution management, pollution incident reporting and the procedures for issuing licences for environmental protection on aspects such as waste, air, water, and noise discharge control.

Schedule 1 of the POEO Act specifies the following rail track related activities as activities that need an EPL: Railway activities—railway infrastructure construction (clause 33) and Railway activities—railway infrastructure operations (clause 33A).

ARTC currently holds a licence to carry out railway systems activities (licence number EPL3142) within the Albury to Illabo rail corridor. This EPL will be amended to include the operation of the proposal. A separate EPL will be obtained by the construction contractor for the construction of the proposal. Licensing requirements for the proposal would be considered in consultation with the EPA.

Rollingstock operators on ARTC's network in NSW are regulated by the NSW EPA and may require a separate EPL.

Roads Act 1993

Under section 138 of the Roads Act, consent from the relevant roads authority is required to disturb, erect a structure, or carry out a work in, on or over a public road. Clause 5(1) of Schedule 2 to the Roads Act exempts public authorities from this requirement, except in relation to works on or over classified and Crown roads. ARTC is not defined as a public authority for the purpose of this exemption.

The proposal would interact with several local, state and Crown roads that are classified under the Roads Act. Separate consents would be sought under section 138 from the relevant road authority for works on each of the following roads:

- ▶ Level crossing works:
 - ▶ Sladen Street (LX625), Henty
 - ▶ Plunkett Street (LX622), Yerong Creek
 - ▶ Yarragundry Street (LX616), Uranquinty
 - ▶ Waterworks Road (LX606), Wantinol
 - ▶ Womes Gate Lane (LX1472), Wantinol and its connection with the Olympic Highway
 - ▶ Shire and Carter property access road (LX605), Illabo and its connection with the Olympic Highway
 - ▶ Brabins Road, Illabo (LX604)
 - ▶ Olympic Highway, Illabo (LX603).

- ▶ Road bridge works and other road works:
 - ▶ Townsend Street, South Albury
 - ▶ Edmondson Street, Turvey Park
 - ▶ Erin Street, Turvey Park
 - ▶ Best Street, Wagga Wagga
 - ▶ Little Best Street, Wagga Wagga
 - ▶ Kemp Street, Junee
 - ▶ Joffre Street, Junee
 - ▶ Pretoria Avenue, Junee
 - ▶ Seignior Street (Olympic Highway), Junee
 - ▶ Railway Parade, Junee
 - ▶ Ducker Street, Junee
 - ▶ Edgar Street, Junee.
- ▶ Pedestrian bridge tie in works:
 - ▶ Railway Place, Albury
 - ▶ Cassidy Parade, Turvey Park.

Consent would not be required for works at the Dampier Street level crossing at Bomen as the crossing has been closed.

Temporary activities that are likely to impact traffic flow (such as traffic management controls or where lanes would be temporarily closed) and utility works would also require consent under section 138 of the Roads Act.

4.3.3 Other NSW legislation that is still applicable

Some environmental planning related legislation and regulations can apply to approved CSSI. The following legislation and/or regulations apply to the proposal:

- ▶ *Aboriginal Land Rights Act 1983* (NSW)
- ▶ *Biodiversity Conservation Act 2016* (NSW)
- ▶ *Biosecurity Act 2015* (NSW)
- ▶ *Crown Land Management Act 2016* (NSW)
- ▶ *Contaminated Land Management Act 1997* (NSW)
- ▶ *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)
- ▶ *Marine Safety Act 1998* (NSW)
- ▶ *Native Title (New South Wales) Act 1994* (NSW)
- ▶ *Transport Administration Act 1988* (NSW)
- ▶ *Water Management Act 2000* (NSW) and Water Management (General) Regulation 2018, with respect to water access licences
- ▶ *Waste Avoidance and Resource Recovery Act 2001* (NSW).

Appendix C: Statutory compliance outlines how the above legislation and/or regulations apply to the proposal and how these have been considered in the EIS.

4.4 Commonwealth requirements

4.4.1 Environment Protection and Biodiversity Conservation Act 1999

Under the EPBC Act, proposed 'actions' that have the potential to significantly impact on matters of national environmental significance, the environment of Commonwealth land, or that are being carried out by a Australian Government agency, must be referred to the Australian Government Minister for the Environment and Water for assessment.

Preliminary environmental investigations identified threatened species under the EPBC Act, which have the potential to be impacted by the proposal. As a result of the potential for impacts on protected matters, the proposal

was referred to the then Australian Government Minister for the Environment on 2 June 2020 (EPBC Referral No 2020/8670). On 29 June 2020, the Australian Government Department of Agriculture, Water and Environment (DAWE) notified that the proposal is a not controlled action, and hence approval under the EPBC Act is not required. In July 2022, the department changed its name to become the Department of Climate Change, Energy, the Environment and Water (DCCEEW).

4.4.2 Other Commonwealth legislation

The following Commonwealth legislation apply to the proposal:

- ▶ *Native Title Act 1993* (Cth)
- ▶ *Disability Discrimination Act 1992* (Cth).

Appendix C: Statutory compliance outlines how the above legislation applies to the proposal and how these have been considered in the EIS.

4.5 Summary of approval requirements

In summary:

- ▶ approval from the NSW Minister for Planning under Division 5.2 of the EP&A Act
- ▶ a modified and new EPL under the POEO Act as required for the construction and operation of the proposal
- ▶ authorisation under the *Crown Land Management Act 2016* (NSW) to allow occupation of Crown land located outside the ARTC lease area
- ▶ approval under section 138 of the Roads Act where works are required on or over public roads
- ▶ a water access licence would be sought under the Water Management Act due to groundwater take during excavation that is greater than three ML per year or other water take which needs a water access licence, subject to confirmation during detailed design
- ▶ approval under the *Marine Safety Act 1998* for access restrictions on the Murray River during construction on the Murray River bridge.