

PART A

Introduction, project background
and description

**INLAND
RAIL** 



CHAPTER A3 Statutory context



Narromine to Narrabri
Environmental Impact Statement

ARTC

The Australian Government is delivering
Inland Rail through the Australian
Rail Track Corporation (ARTC), in
partnership with the private sector.

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A3. Statutory context

This chapter provides a summary of the assessment and approval requirements for the Narromine to Narrabri project (the proposal) under relevant legislation. The approval pathway is summarised, and relevant planning instruments and legislation are considered.

A3.1 Overview of the approval pathway

The proposal is State significant infrastructure by operation of Part 5, Division 5.2 of the EP&A Act, *State Environmental Planning Policy (State and Regional Development) 2011* (the State and Regional Development SEPP) and *State Environmental Planning Policy (Infrastructure) 2007* (the Infrastructure SEPP). As State significant infrastructure, the proposal is subject to approval by the NSW Minister for Planning and Public Spaces, and the application for approval needs to be supported by an EIS. The assessment and approval requirements under the EP&A Act, including relevant environmental planning instruments, are described in section A3.2.

Other approvals and permits are also required, including approval as a controlled action under the EPBC Act. The requirements under other legislation are described in sections A3.4 and A3.5.

A3.2 Approval and assessment requirements under the EP&A Act

The EP&A Act and the EP&A Regulation provide the framework for development assessment in NSW. The EP&A Act and the EP&A Regulation include provisions to ensure that the potential environmental impacts of a development are considered in the decision-making process, prior to proceeding to construction.

The key requirements of the EP&A Act in relation to the approval and assessment of the proposal are described below.

A3.3 Permissibility of the proposal and role of ARTC

Clause 79(1) of the Infrastructure SEPP permits development for the purpose of a railway or rail infrastructure facilities to be carried out by or on behalf of a public authority without consent. Clause 5(2) of the Infrastructure SEPP provides that the definition of public authority, in respect of development connected with rail corridors or railway infrastructure facilities, includes ARTC (see section A3.3.6).

A3.3.1 State significant infrastructure

Section 5.12(2) of the EP&A Act provides that a State environmental planning policy may declare any development, or any class or description of development, to be State significant infrastructure.

Clause 14(1) of the State and Regional Development SEPP provides that development is State significant infrastructure, if it is permissible without development consent, by virtue of the operation of a State environmental planning policy, and it is specified in the categories of development in Schedule 3 of the State and Regional Development SEPP.

Schedule 3 (clause 3) of the State and Regional Development SEPP specifies as State significant infrastructure: *'Development for the purpose of rail infrastructure by or on behalf of the Australian Rail Track Corporation that has a capital investment value of more than \$50 million.'*

As the proposal is permissible without development consent by virtue of the Infrastructure SEPP, has a capital investment value of more than \$50 million and it is being undertaken by ARTC, it meets the requirements of clause 14(1) of the State and Regional Development SEPP. On this basis, the proposal is State significant infrastructure.

A3.3.2 Critical State significant infrastructure

In accordance with section 5.13 of the EP&A Act, State significant infrastructure may also be declared to be critical State significant infrastructure if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons. ARTC is seeking that the proposal be declared by the Minister for Planning and Public Spaces as critical State significant infrastructure under section 5.13 of the EP&A Act.

As critical State significant infrastructure, the proposal would be permissible without consent under clause 16(a) of the State and Regional Development SEPP (refer to section A3.3.6). It would remain subject to assessment and approval under Division 5.2 of the EP&A Act.

A3.3.3 Approval authority

The approval requirements for State significant infrastructure (including critical State significant infrastructure) are defined by Part 5, Division 5.2 of the EP&A Act. Under section 5.14, the approval of the Minister for Planning and Public Spaces is required for State significant infrastructure.

As the proposal is State significant infrastructure, the Minister for Planning and Public Spaces is the approval authority for the proposal.

A3.3.4 Assessment process and requirements

The key steps in the assessment process are described below and shown in Figure A3.1.

Environmental assessment requirements

In accordance with section 5.15(2) of the EP&A Act, an application for State significant infrastructure needs to describe the infrastructure and contain any other matter required by the Planning Secretary. The final SEARs for the proposal, issued on 9 September 2020, defines the matters the Secretary requires the EIS to address. The requirements detailed in the SEARs, together with where they are addressed by this EIS, are provided in Appendix A.

The form and content requirements for the EIS are defined by Schedule 2 of the EP&A Regulation. These requirements, and how they are addressed by the EIS, are provided in Appendix B.

Public exhibition and submissions

If the EIS is considered to meet the SEARs, the Department of Planning, Industry and Environment will place it on public exhibition for a minimum of 28 days and invite submissions. The Department will provide ARTC with a copy of the submissions and ask ARTC to respond to the issues raised in a response to submissions report. ARTC may modify the proposal in response to the issues raised by submissions if appropriate. If the proposal is modified, a preferred infrastructure report will be prepared to describe the scope of the revised proposal. The submissions/preferred infrastructure report will be made public.

Further information on the proposed approach to consultation during the exhibition period is provided in chapter A4.

Assessment and approval

Following the exhibition period, the Department will, on behalf of the Minister for Planning and Public Spaces, review the EIS and the submissions/preferred infrastructure report. The Department will prepare an assessment report, which is submitted to the Minister for Planning and Public Spaces for consideration. The Minister may refuse the proposal or approve it with such conditions and modifications as the Minister may determine. The Minister's decision and the assessment report will be published on the Department of Planning, Industry and Environment's Major Projects' website following determination.

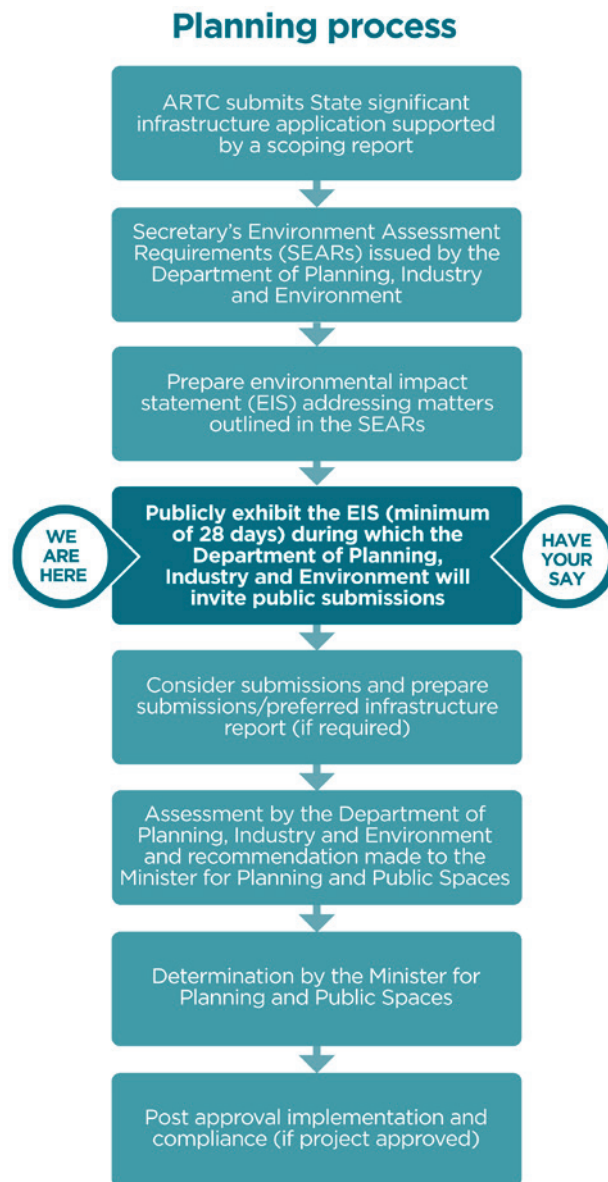


FIGURE A3.1 ASSESSMENT AND APPROVAL PROCESS

A3.3.5 Landowner's consent/notification

Clause 193 of the EP&A Regulation provides the landowner's consent and notification requirements for State significant infrastructure. In accordance with clause 193(1), as the proposal is State significant infrastructure 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, notice of the application needs to be given in accordance with the requirements of clause 193(4).

A3.3.6 Application of relevant environmental planning instruments

Section 5.22(2)(a) of the EP&A Act provides that environmental planning instruments (such as State environmental planning policies and local environmental plans) do not apply to or in respect of State significant infrastructure, except where *'they apply to the declaration of infrastructure as State significant infrastructure or as critical State significant infrastructure (and to the declaration of development that does not require consent)'*. The State environmental planning policies that are relevant in this regard are considered below.

State Environmental Planning Policy (Infrastructure) 2007

The Infrastructure SEPP clarifies the consent arrangements for infrastructure projects. According to clause 8(1), *'if there is an inconsistency between this Policy and any other environmental planning instrument, whether made before or after the commencement of this policy, this policy prevails to the extent of the inconsistency'*.

The proposal meets the definition of rail infrastructure facilities, which are defined by clause 78 of the 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 5(2) of the Infrastructure SEPP provides that a public authority:

- a) *has the same meaning as it has in the Act, and*
- b) *in respect of development connected with rail corridors or railway infrastructure facilities, includes the Australian Rail Track Corporation Limited (ACN 081 455 754).*

Clause 79(1) provides that development for the purpose of a railway or for rail infrastructure facilities may be carried out by, or on behalf of, a public authority without consent on any land. This clause also specifies the conditions whereby such development can be carried out without consent on land reserved under the *National Parks and Wildlife Act 1974* (NSW).

As the proposal site is not reserved under the *National Parks and Wildlife Act 1974* (NSW), the proposal meets the definition of rail infrastructure facilities, and ARTC is defined as a public authority for the purposes of the Infrastructure SEPP, the proposal is permissible without consent.

State Environmental Planning Policy (State and Regional Development) 2011

The State and Regional Development SEPP provides definitions of State significant infrastructure (including critical State significant infrastructure) and State significant development. The proposal does not meet the definitions of State significant development.

As described in section A3.3.1, the proposal meets the definitions of State significant infrastructure provided by the State and Regional Development SEPP.

Development declared to be critical State significant infrastructure under section 5.13 of the EP&A Act is listed in schedule 5 to the State and Regional Development SEPP. Clause 16 of the State and Regional Development SEPP provides that development specified in Schedule 5 of the SEPP:

- a) *may be carried out without development consent under Part 4 of the Act, and*
- b) *is declared to be State significant infrastructure for the purposes of the Act if it is not otherwise so declared, and*
- c) *is declared to be critical State significant infrastructure for the purposes of the Act.*

Schedule 5 includes two sections of Inland Rail (Parkes to Narromine and the Narrabri to North Star) as declared critical State significant infrastructure. As noted in section A3.3.2, ARTC is seeking that the proposal be declared as critical State significant infrastructure under section 5.13 of the EP&A Act.

A3.4 Other NSW approval requirements

Sections 5.23 and 5.24 of the EP&A Act identify the legislation and approvals that do not apply to State significant infrastructure and the approvals that must be applied consistently. These requirements are described below.

A3.4.1 Approvals not required and those that must be applied consistently

In accordance with section 5.23(1) of the EP&A Act, the following approvals, which may have otherwise been required to undertake the proposal, would not be required:

- ▶ A permit under section 201, 205 or 219 of the *Fisheries Management Act 1994* (NSW)
- ▶ An approval under Part 4, or 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)
- ▶ A water use approval under section 89, a water management work approval under section 90 or an activity approval under section 91 of the *Water Management Act 2000* (NSW) (Water Management Act) (other than an aquifer interference approval—see below).

In addition, Division 8 of Part 6 of the *Heritage Act 1977* (NSW) (relating to making heritage orders) does not apply to prevent or interfere with the carrying out of approved State significant infrastructure.

Water Management Act 2000 and Water Act 1912

The *Water Management Act 2000* (NSW) and *Water Act 1912* (NSW) control the extraction of water, the use of water, the construction of works, such as dams and weirs, and the carrying out of activities in or near water sources in NSW. The provisions of the *Water Management Act* are being progressively implemented to replace the *Water Act*. Since 1 July 2004, the new licensing and approvals system has generally been in effect in those areas of NSW covered by operational water sharing plans.

Temporary dewatering and construction activities that interfere with aquifers are generally identified as aquifer interference activities in accordance with the *Water Management Act* and the *NSW Aquifer Interference Policy* (DPI, 2012a); however, the aquifer interference approval provisions of the *Water Management Act* have not commenced, and licensing of these activities is carried out under the water access licence provisions of the *Water Management Act* where it applies, or otherwise. Where the *Water Management Act* applies, dewatering activities would ordinarily require water management work approvals; however, as noted above, such approvals are not required by reason of section 5.23 of the EP&A Act.

Excavation would be undertaken as part of the proposal. Extraction of groundwater is proposed as part of the requirements for water during construction (described in chapter A8). A licence would be sought under Part 5 of the *Water Act*, if required.

In addition, a water access licence is required for dewatering and other taking of water from any water source that is covered by a water sharing plan under the *Water Management Act*. The EP&A Act does not provide an exemption for water access licences, and so a water access licence may be required for the proposal.

A water access licence authorises the taking of a share of water from a specified water source in accordance with the volumetric entitlement in the water access licence. That entitlement is measured by the number of units assigned to the water access licence and the annual volumetric value of a unit for that water source as determined by the Minister administering the *Water Management Act*.

Units can be transferred from one water access licence to another. A water access licence is held personally and may be transferred and otherwise dealt with in accordance with the *Water Management Act*.

A3.4.2 Approvals that must be applied consistently

In accordance with section 5.24(1) of the EP&A Act, the following approvals that are potentially required for the proposal cannot be refused and must be granted on terms that are substantially consistent with the approval for the State significant infrastructure:

- ▶ An environment protection licence under Chapter 3 of the *Protection of the Environment Operations Act 1997* (NSW) (POEO Act)
- ▶ A consent under section 138 of the *Roads Act 1993* (NSW).

The approval requirements of these Acts as they relate to the proposal are summarised below.

Protection of the Environment Operations Act 1997

The POEO Act establishes, among other things, the procedures for issuing licences for environmental protection on aspects such as waste, air, water and noise pollution control. An environment protection licence (EPL) is required under Chapter 3 of the POEO Act to undertake a scheduled activity or scheduled development work. The proposal meets the definitions of scheduled activities provided in Schedule 1: railway activities—railway infrastructure construction (clause 33) and railway activities—railway infrastructure operations (clause 33A).

The proposal meets these definitions and is therefore a scheduled activity that would require an EPL. ARTC or its contractor would obtain an EPL to construct and operate the proposal. In relation to operation, ARTC currently holds an EPL to carry out railway systems activities on other parts of the NSW rail network (EPL no. 3142). It may be appropriate to either amend this licence to include the operation of the proposal or to obtain a new licence. Licensing requirements for the proposal would be considered in consultation with the NSW Environment Protection Authority (the NSW EPA). In addition, from August 2020, rollingstock operators on ARTC's network in NSW will require an EPL issued by the NSW EPA. This change means that rollingstock operators' environmental performance outcomes will be regulated by the NSW EPA.

Roads Act 1993

Under Section 138 of the *Roads Act 1993* (NSW), 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 a number of roads that are classified under the Roads Act (see section A2.3.2). The proposal would also involve works to numerous Crown roads. Approval would be sought under section 138 of the Roads Act.

A3.5 Commonwealth approval requirements

A3.5.1 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, and/or the environment generally, when being carried out by an Australian Government agency, must be referred to the Australian Minister for the Environment for assessment. If the Minister determines that a referred proposal is a 'controlled action' under the EPBC Act, the approval of the Minister would be required.

As a result of the potential for significant impacts on protected matters, the proposal was referred to the Australian Minister for the Environment (EPBC Referral 2018/8259). ARTC was notified on 5 November 2018 that the proposal is a controlled action, with the controlling provision (matters of national environmental significance) being 'listed threatened species and communities' (under sections 18 and 18A of the EPBC Act).

The notification confirmed that the proposal will be '*assessed by an accredited assessment process under Part 5 Division 5.2 of the NSW Environmental Planning and Assessment Act 1979*'. The final SEARs for the proposal included the assessment requirements in relation to the EPBC Act. These requirements have been addressed by the biodiversity assessment (see chapter B1).

Following consideration of the results of the assessment by the NSW Department of Planning, Industry and Environment in accordance with the EP&A Act, the Australian Minister for the Environment will make a separate decision whether or not to approve the proposal under the EPBC Act.

The Assessment Bilateral Agreement between the Commonwealth and the State of New South Wales under the EPBC Act was amended on 24 March 2020 so that it now applies to the proposal. Consequently, the State significant infrastructure scheme in the EP&A Act is accredited for the purposes of assessing actions such as the proposal under the EPBC Act.

The effect of this for the proposal is essentially the same as the separate accreditation of the State significant infrastructure scheme before the amendment of the Assessment Bilateral Agreement, as described above, except that the administrative process under the Bilateral Agreement, which is associated with this assessment, will apply.

Further information on potential biodiversity impacts, including the assessment of the potential impacts on EPBC Act listed threatened species and communities, is provided in chapter B1.