



# Consultation Paper

The definition of 'small business' and eligibility for exemption from cost recovery fees for environmental assessments under the *Environment Protection and Biodiversity Conservation Act 1999*

## INTRODUCTION

The Department of the Environment and Energy administers the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) which offers protection to nationally protected matters; for example, threatened species and ecological communities, world and national heritage places, and Commonwealth land and marine environments.

When a person wants to undertake a project or action that may have a significant impact on a nationally protected matter then he or she must refer the project to the Minister for the Environment and Energy for assessment under the EPBC Act.

The Department has statutory authority to charge proponents for undertaking environmental assessments of actions. These cost recovery arrangements were first introduced in 2014. Cost recovery more equitably shares the costs of regulating projects that may have a significant impact on the environment between the public and those who stand to derive a private benefit from undertaking projects. This is consistent with the Australian Government Charging Framework which directs that where an individual or organisation creates the demand for government activity, they should generally be charged for it.

However, for environmental assessments only large organisations are liable for the charges while small businesses and individuals may request an exemption from paying fees. Where an applicant is eligible for an exemption the cost for the Department to carry out an environmental assessment is met through the Department's annual budget appropriation so that applicants subject to cost recovery do not subsidise applicants who are exempt from fees.

The policy rationale for the exemption from fees for small businesses (and individuals) is that:

- small businesses have lower revenue than large businesses, which means they will be disproportionately impacted by cost recovery fees
- cost recovery fees may provide a disincentive for small businesses and individuals to refer their project to the Minister, and
- the cost to the Government of increasing compliance to investigate non-referred projects would potentially be greater than the cost to the Government of granting exemptions to small businesses and individuals.

The definition of small business for the purpose of cost recovery is specified at Regulation 5.12A in the *Environment Protection and Biodiversity Conservation Regulations 2000*. It is linked to the definition of small business entities under section 328-110 of the *Income Tax Assessment Act 1997* (ITAA 1997) (other than section 328-110(4)) and relates to businesses that have aggregated turnover of less than \$2 million in the current or prior year (Commonwealth of Australia, 2016). A proposal to amend this section of the ITAA 1997 is currently before Parliament to increase the aggregated turnover threshold to less than \$10 million.

Given the proposed increase in the aggregated turnover threshold it is sensible for the Department to:

- consider the implications of a revised ITAA 1997 definition
- re-examine the public value intent of the fee exemption policy
- identify existing policy outcomes, and
- explore alternative options for a new definition of small business.

## **THE INTENDED VALUE OF THE POLICY TO THE PUBLIC AND SMALL BUSINESSES**

Small businesses are a significant contributor to the Australian economy. In 2015, small businesses accounted for 97 per cent of the total number of businesses in Australia and they employed approximately 45 per cent of the Australian workforce (Commonwealth Treasury, 2016).

The intended public value of the policy is twofold:

1. To facilitate economic activity  
Offering an exemption for small businesses seeks to remove a potential financial burden that would otherwise limit or prevent small businesses from undertaking development activity that may have social and/or economic benefits for society.
2. To protect the environment  
Offering an exemption for small businesses seeks to encourage the referral of proposed actions to the Minister for environmental impact assessment under the EPBC Act. This ensures that projects likely to significantly impact on matters of national environmental significance are properly assessed according to law. It also lessens the need for compliance investigations for non-referred proposals so that the Department's compliance resources may be focussed on areas of higher environmental risk.

The intended public value of the policy is still appropriate and the proposed change in the definition of small business under the ITAA 1997 will not alter this. However, the proposal to change the definition in the ITAA 1997 potentially makes it not fit for purpose as a threshold for fee exemptions for EPBC Act environmental impact assessment processes.

## IMPLEMENTATION AND OUTCOMES OF THE POLICY

Since 2014 when the cost recovery arrangements were introduced, proponents seeking an exemption from fees have done so through a self-assessment and disclosure process. The main sources of information relating to the operation of the exemption is contained in both the *Environment Protection and Biodiversity Conservation Regulations 2000 (Part 5, Division 5.6, Section 5.23)* and the *Cost Recovery Implementation Statement (CRIS) – Cost Recovery for Environmental Assessments under the Environment Protection and Biodiversity Conservation Act 1999, 2016-17* published on the Department's [website](#).

Proponents claiming the exemption are required to sign a declaration on the project referral form that they are a small business or an individual. The CRIS lists the following conditions for the small business exemption:

- The proponent makes a declaration that they are a small business or an individual, and that the Department may require proof in the form of a tax statement(s).
- If the proponent ceases to be a small business while an assessment is underway, they must advise the Department within ten business days of the change in their status and be liable for all subsequent fees from the date they cease to qualify for the exemption.
- Where there is a transfer of an action from an exempt entity to another entity, the transferee cannot automatically obtain the exemption status and must qualify and apply on their own grounds.
- If an applicant wrongly obtains a fee exemption and is later found not to qualify, the full fee is recoverable as a debt to the Commonwealth.

In October 2016 the CRIS was reviewed and updated to reflect a new schedule of fees, however there were no changes to the small business fee exemption. The new fee schedule is set out in the [2016-17 Cost Recovery Implementation Statement](#).

### How many project referrals received a fee exemption?

Since 2014 there were a total of 57 project referrals that received a fee exemption from a total of 605 projects referred to the Minister. This means that only 9.4 per cent of proponents were small businesses or individuals and illustrates that most of the projects referred to the Minister for environmental assessment are from large organisations.

### What was the total value of the fees exempted?

The total value of fees exempted is approximately \$2,282,513<sup>1</sup>.

Of the exempt referrals, 24 were determined to be 'controlled actions' under the EPBC Act<sup>2</sup> and were therefore required to undergo a full environmental impact assessment by the Department before approval to undertake the action could be granted.

The fees applicable for assessing the environmental impact of proposed actions varies depending on the type of assessment approach undertaken, the complexity of assessing the controlling provisions

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<sup>1</sup> Some referrals had not yet had an assessment method determined for the action and therefore the total amount of fees that would be exempt for those actions is as yet unknown. Consequently, the total amount reported here is less than the final amount for the 57 projects referred.

<sup>2</sup> As at 19 December 2016.

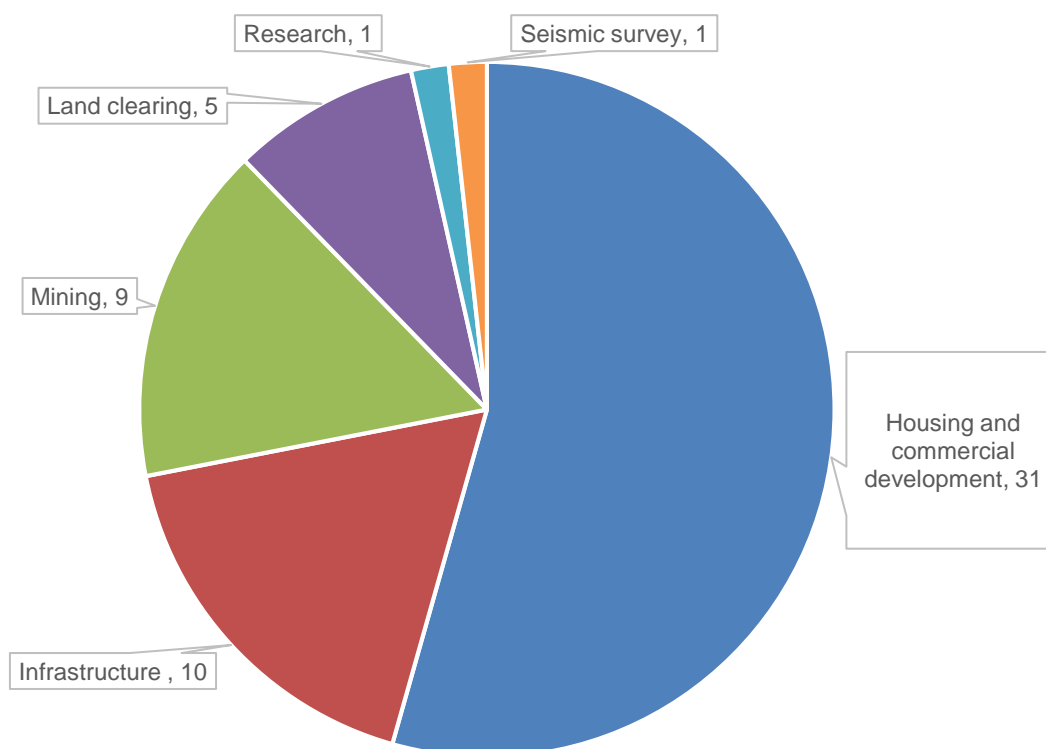
under the EPBC Act, and for other matters. The smallest fee exemption was \$6,577 and is the flat fee for making a referral to the Minister. The largest fee waived was \$284,936 and reflects the complexity of assessment undertaken for the controlled action. The average of the fees exempted for assessing controlled actions was \$88,187 and the median \$56,998.

### What types of projects received a fee exemption?

The majority of projects that received the fee exemption were from the housing, commercial development and construction sector, with 31 referrals. The second largest group of exempt referrals were for infrastructure projects with ten referrals.

The following chart illustrates the number and types of actions that received the fee exemption.

*Chart 1: Number and type of actions that were exempt from cost recovery fees*



This chart raises questions about the efficacy of the fee exemption policy for small businesses. While the result for the housing and commercial development industry seems plausible the presence of infrastructure and mining projects less so. Some of the infrastructure projects were for small roads and fencing and others for wind, water and other energy infrastructure. The mining projects included sand and gravel mining and small quarries, but also for open cut coal and bauxite mines.

## **TOWARDS A NEW DEFINITION OF SMALL BUSINESS**

### **Starting with a critique of the current definition**

The definition of small business for the purpose of cost recovery refers to businesses that have an aggregated turnover of less than \$2 million in the current or prior year. The application of this definition requires an understanding of the phrase 'aggregated turnover'.

'*Turnover*' is generally understood to be the annual sales volume, revenue or money received by a business. The Australian Taxation Office (ATO) defines annual turnover as the total ordinary income derived in the income year in the ordinary course of carrying on a business (Australian Taxation Office, 2016). Typical sources of income for a business are the sale of goods or services, commission, rent, leasing or hiring, interest, royalties and dividends.

'*Aggregated turnover*' is defined by the ATO as the annual turnover of an entity and any entities that the entity is connected or affiliated with. An entity is connected with another entity if it has control of or is controlled by the other entity, or both entities are controlled by a third entity. An affiliate is any individual or company that acts, or could reasonably be expected to act, in accordance with your directions or in concert with you (Australian Taxation Office, 2016).

This definition of small business focuses on a single measure of business – turnover – and does not take account of other attributes of a business. As long as the business has aggregated turnover under the threshold throughout the referral and assessment period they will be exempt from the associated fees. It allows for businesses that are newly established with little or no history of turnover to be eligible for fee exemption. The policy and definition takes no account of the potential turnover of the business once the EPBC Act assessment has concluded.

Should the ITAA 1997 be amended and the turnover threshold increase to \$10 million the definition will provide fee exemption to larger businesses which have the capacity to pay EPBC Act cost recovery fees. This may affect the wider public's view of how equitably the costs of regulating projects that may have a significant impact on the environment are shared between the public and those who stand to derive a private benefit from undertaking development projects.

### **The characteristics of Australian businesses**

Any definition of small business for the purpose of exemption from environmental assessment cost recovery should generally meet the public's view of how equitably the costs of regulating projects that may have a significant impact on the environment are shared between the public and those who stand to derive a private benefit from undertaking development projects. It should also take into account the policy rationale of acknowledging small businesses' capacity to pay for costs and the risk of small businesses not referring projects to the Minister.

In order to achieve these outcomes, an understanding of the characteristics of Australian businesses is necessary. The ABS records the characteristics of businesses in Australia. In 2014-15, 93.4 per cent of Australian businesses had an annual turnover of less than \$2 million and 60 per cent had less than \$200,000. The median annual turnover was in the range of \$50,000 to \$200,000 (Australian Bureau of Statistics, 2016). This is in distinct contrast to businesses that refer projects to the Minister where less than ten per cent had a turnover of less than \$2 million

The ABS also reports that in 2014-15, 60.5 per cent of Australian businesses were non-employing, that 27.5 per cent employed one to four people, and that 97.3 per cent employed less than 20 people (Australian Bureau of Statistics, 2016). In 2013-14, the mean net value of unincorporated businesses in Australia was \$263,200 (Australian Bureau of Statistics, 2015).

The characteristics of small businesses include having few or no employees, few owners or shareholders, a net capital base of approximately \$250,000, annual turnover under \$200,000, or any combination of these.

### Alternative definitions of small business

Australian government agencies use various definitions of 'small business' for various purposes. For example, Fair Work Australia defines a small business as one that has less than 15 employees; the ABS defines it as a business that employs fewer than 20 people; the Australian Securities and Investments Commission (ASIC) and the Department of Immigration and Border Protection (DIBP) uses a combination of three criteria – revenue/turnover, number of employees and assets held by the entity. The following table displays the various business attributes contained within definitions used by various government agencies or pieces of Australian legislation.

*Table 1: Business attributes used in the definition of small business across government agencies or legislation*

	Annual turnover	Number of employees	Assets
Australian Bureau of Statistics <sup>3</sup>	-	< 20	-
Australian Securities and Investment Commission <sup>4</sup>	< \$25m	< 50	< \$12.5m gross
Australian Small Business and Family Enterprise Ombudsman Act 2015 <sup>5</sup>	< \$5m	<100	-
Australian Taxation Office	<\$2m	-	-
Department of Immigration and Border Protection <sup>6</sup>	< \$300,000	<= 2	< \$200,000 net
Fair Work Australia <sup>7</sup>	-	< 15	-
Privacy Act 1988 <sup>8</sup>	<\$3m	-	-

The ABS also considers small businesses to have independent ownership and operations, close control by owners who are the principal decision makers and contribute most, if not all, of the operating capital (Australian Bureau of Statistics, 2002).

<sup>3</sup> (Australian Bureau of Statistics, 2002)

<sup>4</sup> (Australian Securities and Investment Commission, 2016) in relation to 'small proprietary companies'.

<sup>5</sup> (Commonwealth of Australia, 2015)

<sup>6</sup> (Department of Immigration and Border Protection, 2016) in relation to a permanent business visa Subclass 888.

<sup>7</sup> (Commonwealth of Australia, 2009)

<sup>8</sup> (Commonwealth of Australia, 1988)

This can alternatively be expressed as businesses with a lack of affiliation with or control by other business entities, with ownership structures including sole trader, small partnerships, and proprietary limited companies, though excluding publicly listed companies.

Each of the aforementioned government agencies and legislation have a definition of small business that are, on face value, tailored to its objectives. A definition for fee exemption from environmental assessment under the EPBC Act should be no different and the following table sets out the positives and negatives for adopting various characteristics for defining small businesses under that light.

*Table 2: Comparison of characteristics for defining small businesses*

Characteristic	Positive	Negative
Aggregated turnover	<p>A threshold can be set that is appropriate for a business's capacity to pay environmental assessment fees.</p> <p>It is a historical measure of business size.</p> <p>The ABS prepares statistics of turnover amounts of Australian businesses which can help to inform policy.</p> <p>Captures the turnover of connected and affiliated entities.</p>	<p>As an indicator on its own, it allows for businesses that are newly established with little or no history of turnover in Australia to be eligible for fee exemption despite future growth potential.</p>
Assets	<p>A good indicator of the size of capital intensive businesses.</p> <p>It is a present time measure of business size.</p> <p>The ABS prepares statistics of net assets of Australian businesses which can help to inform policy.</p>	<p>A poor indicator of the size of labour intensive businesses.</p> <p>As a measure, net assets and gross assets tell a different story of business size. Large businesses may report low net asset amounts if they also have large debts. Therefore, using an asset measure may create unintended consequences for the exemption policy.</p>
Employees	<p>A good indicator of the size of labour intensive businesses.</p> <p>It is a present time measure of business size.</p>	<p>A poor indicator of the size of capital intensive businesses.</p>

	The ABS prepares statistics of the number of employees in Australian businesses which can help to inform policy.	
Structure	Small businesses are often sole trader, partnerships, but not publicly listed companies.	As an indicator on its own, ownership structure is not sufficient evidence of the size of a business.

A method for determining eligibility for fee exemption that is not considered above, for it is not a characteristic of a business, is the capital value of the project or action referred for environmental assessment by the Department. The expected or estimated capital value of a project reflects the size of investment that a business believes it can undertake sometime into the future and can give an indication of a business's capacity to pay cost recovery fees. It stands to reason that the larger the capital value of the project then the larger the business needs to be to undertake it. However, large businesses also refer small projects and so project value should not be used as a criterion on its own, but could be used in combination with other business criteria.



## **CONSIDERING OPTIONS**

The Department is seeking public comment on the most appropriate way to determine eligibility for exemption for cost recovery fees for small businesses. Any new eligibility definition should seek to equitably share the costs of regulating projects that may have a significant impact on the environment between the public and those who stand to derive a private benefit from undertaking development projects, while taking into account the capacity of small businesses to pay for fees.

The Department has identified five options for how to approach making new eligibility criteria though is open to consider any appropriate criteria. The five options are:

### **Option 1: Maintain the status quo**

This option would retain the link to the ITAA 1997 definition of small business. Any future change to the ITAA 1997 definition would automatically result in a change to which businesses would be eligible for fee exemption.

As discussed above, the ITAA 1997 definition is currently before Parliament with the proposal of increasing the aggregated turnover threshold from \$2 million to \$10 million. Should the Parliament agree to the proposal then the fee exemption would become available to a group of businesses that are larger than the majority of Australian businesses.

### **Option 2: Maintain a \$2 million turnover definition**

This option would replicate the current regulation and define a small business as one with aggregated turnover of less than \$2 million in the current or prior year, while removing the link to the ITAA 1997 definition.

### **Option 3: Adopt the definition used by another Government agency**

This option would require selecting an existing definition used by another Government agency considered to be the most appropriate for cost recovery fee exemption. The implications are similar to Option 1 where any future change by another agency to their definition would automatically result in a change to which businesses would be eligible for fee exemption, which may or may not be appropriate.

### **Option 4: Use a combination of business criteria**

Both ASIC and DIBP adopt three business characteristics and determine an entity to be a small proprietary company or small business if they meet any two of the three characteristics. A similar approach could be used for cost recovery fee exemption.

The benefit of this approach is that it acknowledges different types of small businesses: how they operate, how they are owned and the nature of their finances.

Appropriate thresholds to each business criteria would also need to be set that balance the size characteristics of small businesses with the size of assessment fees.

### Option 5: Use a combination of project value and business criteria

Providing a fee exemption based on the value of a project on its own would create policy integrity issues for the simple fact that large businesses can and do refer small projects. However, the eligibility for fee exemption could be based on a combination of project value and various business criteria. The Department has considered a possible definition working as follows:

#### *Eligibility of a business for exemption from cost recovery fees*

A business is eligible for exemption if it meets all of the following characteristics:

- a) Aggregated turnover of less than \$2 million in the current or prior year; and
- b) Less than 20 full time equivalent employees across all associated entities; and
- c) The estimated capital value of the proposed action is less than \$10 million.

The rationale for including these criteria and thresholds is provided in the following table.

*Table 3: Rationale for exemption criteria*

Element	Threshold	Reason
Aggregated Turnover	< \$2million p.a.	Same as the current threshold  Historical measure of business size  Excludes large businesses or connected businesses from fee exemption  Less than 10% of referrals since 2014 had turnover under \$2m
Employees	< 20 full-time equivalent (FTE)	Present time measure of business size  Consistent with ABS definition of small business  Excludes large businesses with no or low turnover  20 FTE at average weekly ordinary time earnings = \$1,576,640 wage bill per annum. Therefore business size is not dissimilar to a \$2m turnover business.
Project Capital Value	< \$10million	Measure of future investment capacity of a business  Businesses that fall under the business thresholds but still have the capacity to pay fees would be ineligible for the fee exemption  Not an unrealistic amount for a business with up to \$2m in turnover to be able to borrow and commit to a project. Therefore business size is not dissimilar to a \$2m turnover business.

## **HOW TO PROVIDE COMMENT**

The Department welcomes all comments on this consultation paper. It would be helpful if submissions identified a preferred method for determining which businesses or projects should be exempt from cost recovery fees and the positives and negatives for that method. Any proposed threshold criteria should also include the limits to apply to those thresholds and the rationale for those limits.

Please direct submissions to the Director of Environment Protection – Assurance and Reform and send to [environment.protection@environment.gov.au](mailto:environment.protection@environment.gov.au)

## **FURTHER STEPS**

Once public feedback is received the Department will review all comments and develop a recommendation for the consideration of the Minister of the Environment and Energy.

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