



EDO-NQ FACTSHEET SERIES

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

EPBC Act Factsheet #1: Referral and Assessment of Controlled Actions - an overview

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Environment Protection and Biodiversity Conservation Act 1999 (Cth) (“EPBC Act”)

Referral and Assessment - an overview

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as 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.

1. Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) or “EPBC Act” is the first overarching piece of Commonwealth legislation for environmental protection in Australia. It was enacted to fulfil Australia’s international obligations under the Biodiversity Convention, which Australia signed in 1993. Central to both the Convention and the Act is the “promotion” of ecologically sustainable development.

2. Sustainable development

“Sustainable development” is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The purpose of the EPBC Act is not exclusively the protection of the environment, but to provide a flexible system for the Commonwealth to assess developments which have, may have or are likely to have a significant impact on:

1. a matter of “National Environmental Significance” (“NES”);
2. the environment anywhere if the action is taken on Commonwealth land;
3. the environment on Commonwealth land if the action is taken outside Commonwealth land; or
4. any environment (whether inside or outside Australia) if the action is taken by the Commonwealth

These actions are called “controlled actions”¹.

When a proposed development is referred to the Commonwealth Environment Minister the public will have an opportunity to comment on its likely environmental impacts, whether it should be declared to be a “controlled action” and whether it should be approved or rejected.

This factsheet gives an overview of that referral and assessment process.

In short, the referral and assessment process is this:

- Stage 1: Referral of proposed action
- Stage 2: Decision on whether the proposed action is a “controlled action”
- Stage 3: Assessment of the impacts that the “controlled action” has or is likely to have on certain environmental matters
- Stage 4: Final decision on whether to approve controlled action

3. What actions must be referred to the Commonwealth Environment Minister?

The EPBC Act establishes a requirement and process for certain proposed actions to be referred to the Commonwealth Minister for the Environment, and for some of those proposed actions to be assessed before a decision is made on whether or not they are approved and may proceed. In short, it is the Commonwealth’s attempt to regulate what are called “controlled actions”.

A “controlled action” is any action(s) that has, will have or is likely to have a significant **impact** on:

1. a matter of “National Environmental Significance” (“NES”);
2. the environment anywhere if the action is taken on Commonwealth land;
3. the environment on Commonwealth land if the action is taken outside Commonwealth land; or
4. any environment (whether inside or outside Australia) if the action is taken by the Commonwealth².

¹ s.67: EPBC Act

² s.67: EPBC Act

The EPBC Act prohibits a person taking a controlled action *unless* the person proposing to take the action has obtained an appropriate approval from the Commonwealth Minister for the Environment (“the Minister”)³.

If a person takes a controlled action without proper approval from the Minister then they may be guilty of an offence under the EPBC Act and prosecuted for it.

If a person intends or proposes to take an action they think is a controlled action then they *must* refer that proposed action to the Minister for a decision as to whether or not it is a “controlled action”⁴.

A Commonwealth or State Government agency may also refer such an action/proposal to the Minister⁵. However, local governments and the community are *not* able to directly refer such actions/proposals to the Minister *but* they are able to make the Minister aware of the action/proposal and request that the Minister ‘call in’ the action/proposal by directing the proponent to refer it⁶.

4. What *can* the Minister do after referral of a proposed action?

The Minister has special powers under the EPBC Act to essentially reject a proposed action *if the Minister believes that it will have unacceptable impacts on a matter of NES or on the environment on Commonwealth land*⁷.

The EPBC Act requires that the Minister must make such a decision within 20 business days after receiving the referral⁸, however there is some recent case law which suggests that this is not a strict timeframe in all circumstances⁹.

The person proposing to take the action may request that the Minister reconsider any such decision¹⁰, and the EPBC Act sets out the procedure which the Minister is to follow if such a request is received¹¹.

³ Part 3: EPBC Act

⁴ s.68: EPBC Act

⁵ ss.69(1) & 71: EPBC Act

⁶ s.70: EPBC Act

⁷ ss.74B & 74C: EPBC Act

⁸ s.74B: EPBC Act

⁹ see *Waratah Coal Inc. v Minister for the Environment Heritage and the Arts* [2008] FCA 1870 (10 December 2008)

¹⁰ s.74C(3): EPBC Act

¹¹ s.74D: EPBC Act

5. Deciding whether or not the proposed action needs approval

If the Minister does not reject the proposed action as having unacceptable impacts as referred to above, then the Minister must go on to decide whether or not the proposed action needs approval.

The Minister's job after a referral is actually to:

1. Decide whether the proposed action is a "controlled action"; and
2. If it is a "controlled action", decide what the "controlling provisions" are for the action¹².

6. What is a "controlled action" and what is a "controlling provision"?

The terms "controlled action" and "controlled provision" are defined in section 67 of the EPBC Act as follows:

*"An action that a person proposes to take is a **controlled action** if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be (or would, but for section 25AA or 28ABB, be) prohibited by the provision. The provision is a **controlling provision** for the action."*

So, in general:

1. a "**controlled action**" is an action which has, will have, or is likely to have a significant impact on:
 - a. a matter of "National Environmental Significance" ("NES");
 - b. the environment anywhere if the action is taken on Commonwealth land;
 - c. the environment on Commonwealth land if the action is taken outside Commonwealth land; or
 - d. any environment (whether inside or outside Australia) if the action is taken by the Commonwealth.
2. a "**controlling provision**" is the section in Part 3 of the EPBC Act which prohibits the taking of the action without proper approval from the Minister (e.g. for an action which has, will have or is likely to have a significant impact on a World Heritage property the controlling provisions would be sections 12 and 15A). The Minister will decide which controlling provisions will apply to each controlled action.

¹² s.75(1): EPBC Act

7. What *must* the Minister consider when deciding whether the action is a “controlled action” and what any “controlling provisions” are?

When the Minister is deciding whether the action is a controlled action and what any “controlling provisions” are:

1. the Minister must consider all adverse impacts (if any) that the action has, will have or is likely to have upon a matter protected by Part 3 of the EPBC Act; and
2. the Minister must not consider any beneficial impacts that the action has, will have or is likely to have upon a matter protected by Part 3 of the EPBC Act¹³.

The impacts that the Minister must consider include both direct and indirect impacts. Therefore, the Minister must consider activities which are ‘associated with’ or ‘related to’ the action and the impacts which they will or may have.

8. What is an “impact”?

The EPBC Act defines “impact”, and the recent case of *Minister for the Environment and Heritage v Queensland Conservation Council Inc.*¹⁴ (“the Nathans Dams Case”) provides some assistance on interpreting that definition. We will deal with both of those below.

The EPBC Act definition

A “**direct**” impact of an action is an event or circumstances which is a direct consequence of the action¹⁵.

An “**indirect**” impact of an action is an event or circumstance that is an indirect consequence of the action and is substantially caused by the action¹⁶.

Note:

The EPBC Act limits the definition of “indirect impact” by stating that if:

- *Person A (“A”) takes Action A; and*
- *Person B (“B”) takes Action B as a consequence of Action A; and*
- *A does not direct or request B to take Action B; and*
- *an event or circumstance is a consequence of Action B;*

then that event or circumstance is only an impact of Action A if:

¹³ s.75(2): EPBC Act

¹⁴ [2004] FCAFC 190 (30 July 2004)

¹⁵ s.527E(1)(a): EPBC Act

¹⁶ s.527E(1)(b) & (2): EPBC Act

- Action A facilitates Action B “to a major extent”; and
- Action B is within A’s contemplation and a reasonably foreseeable consequence of Action A; and
- the event or circumstance (which was a consequence of Action B) is within A’s contemplation and a reasonably foreseeable consequence of Action B.

The Nathan Dams Case

The Full Court of the Australian Federal Court specifically considered the EPBC Act’s definition of the “impact” in the Nathan Dams Case¹⁷ at paragraphs [53] to [57] inclusive.

Drawing from those paragraphs:

- "Impact" in the relevant sense means the influence or effect of an action: *Oxford English Dictionary, 2nd ed, vol VII, 694-695.*¹⁸
- "Impact" in its ordinary meaning can readily include the "indirect" consequences of an action
- “Impact” may include the results of acts done by persons other than the principal actor (facilitated impacts).¹⁹
- "Impact" in the sense used in the EPBC Act:
 - is not confined to direct physical effects of the action on the matter protected but can include downstream, downwind or upstream impacts ;
 - includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter.²⁰
- It is not appropriate for the Court to attempt to provide an exhaustive definition of "adverse impacts" which an "action" may be likely to have.²¹
- It is sufficient in this case to indicate that "all adverse impacts" includes each consequence which can be reasonably considered as being within the contemplation of the proponent of the action, whether those consequences are within their control or not.²²

¹⁷ *Minister for the Environment and Heritage v Queensland Conservation Council Inc.* [2004] FCAFC 190 (30 July 2004)

¹⁸ Nathan Dams Case, para. [53]

¹⁹ Nathan Dams Case, para. [53]

²⁰ Nathan Dams Case, para. [53]

²¹ Nathan Dams Case, para. [57]

²² Nathan Dams Case, para. [57]

9. What happens if the Minister decides that the action *is not* a “controlled action”?

If the Minister decides that the action *is not* a controlled action, then the EPBC Act will not apply to prevent the action being taken. *However*, State or local laws may apply to prevent the action being taken, or limit the circumstances in which it may be taken.

10. What happens if the Minister decides that the action *is* a “controlled action”?

If the Minister decides that the action *is* a controlled action, then the Minister must:

1. decide what the “controlling provisions” are for the action²³; and
2. decide which of the following “assessment approaches” is to be used to assess the relevant impacts of the action²⁴:
 - a. assessment by accredited assessment process;
 - b. assessment on referral information;
 - c. assessment on preliminary documentation;
 - d. assessment by public environment report;
 - e. assessment by environmental impact statement; or
 - f. assessment by inquiry.

11. Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

²³ s.75(1)(b): EPBC Act

²⁴ s.87: EPBC Act

12. Useful Contacts

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To become a member of the Environmental Defenders' Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edonq@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edonq