



EDO-NQ FACTSHEET SERIES

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

EPBC Act Factsheet #2: Making it easier: Making submissions on referrals of controlled actions

TABLE OF CONTENTS

1. Introduction	p. 3
2. What stage is the approval process at? <i>The referral, assessment and approval process</i>	p. 5
3. Preparing a submission	p. 6
a. Process	p. 6
b. General Information	p. 10
4. Further information	p. 11
5. Useful Contacts	p. 11
<i>Appendix 1: 'Jargon' - Glossary of words and terms</i>	<i>p. 12</i>
<i>Appendix 2: Controlling provisions</i>	<i>p. 14</i>

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

Making it easier: Making submissions on referrals of controlled actions

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.

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.

¹ s.67: EPBC Act

Note:

Current matters of NES protected by the EPBC Act are:

- *World Heritage Areas*
- *National Heritage places*
- *Ramsar wetlands*
- *Commonwealth listed threatened species & ecological communities*
- *Commonwealth listed migratory species*
- *Nuclear actions*
- *Commonwealth marine environment*

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

What impacts each proposed action has is a matter of fact which the Minister decides upon.

Your submission can:

1. Provide the Minister with an alternative perspective and an indication of community concerns associated with the proposal; and
2. Influence the Minister in deciding whether to approve or reject the proposal.

EDONQ's factsheet "[EPBC Act Factsheet #1: Referral and Assessment of Controlled Actions - an overview](#)" gives an overview of the referral and assessment process.

This factsheet will:

1. Provide a brief summary of the referral, assessment and approval process;
2. Cover what needs to be included in a submission to the Minister on the likely environmental impacts which a proposed action may have;
3. Guide you on preparing your own submission on those impacts; and
4. Provide you with a submission template which you can use as a guide for your submissions by simply filling in your own arguments and evidence.

2. What stage is the approval process at?

The referral, assessment and approval process under the EPBC Act

STAGE 1 – REFERRAL STAGE

A proposed action is **referred** to, or “called in” by, the Minister for Environment.

Note: *From the day the proposed action is publicised on the EPBC Act website, the public have 10 business days to make a submission on whether the development will have a significant impact and recommend assessment approach. The Minister must publish the referral and that invite on the EPBC Act website as soon as practicable after receiving the referral.*

STAGE 2 – CONTROLLED ACTION DECISION

The Minister has 20 days from when the proposed action is referred in which to:

- (a) Decide to reject the proposed action without further assessment on the grounds that the proposed action will have “unacceptable” impacts on a matter of NES, or the environment on Commonwealth land (sections 74B to 74D).

Note: *This is a very high threshold to satisfy.*

OR

- (b) If the Minister does not reject the proposed action on those grounds, decide whether or not the action is a “**controlled action**” (section 75).

- **If the proposed action IS NOT a controlled action.**

The EPBC Act is not triggered where there will not be, or is not likely to be, a significant impact on a matter of NES, either because of the type of action or because it will be carried out in a particular manner.

- **If the proposed action IS a controlled action.**

The EPBC Act is triggered - the Minister must also decide **what the controlling provisions are** and **what level of assessment** will be necessary.

Note:

The following are the “assessment approaches” which are available:

- *assessment by accredited assessment process;*
- *assessment on referral information;*
- *assessment on preliminary documentation;*
- *assessment by public environment report;*
- *assessment by environmental impact statement (“EIS”);*
- *assessment by inquiry.*

STAGE 3 - ASSESSMENT

The assessment is carried out under the assessment approach decided by the Minister (this may include assessment by a State department under a bilateral agreement).

STAGE 4 – FINAL DECISION

The **Minister decides** whether the controlled action will be:

- (a) Refused because after assessment it became evident that the proposed action would have significant impacts which could not be satisfactorily reduced or mitigated by conditions, or
- (b) Approved, or
- (c) Approved subject to conditions, or
- (d) Does not need to be approved providing the action is done in a “particular manner” (section 77A)

Note: *This factsheet will address Stage 1 and Stage 2 of the process described above, and explain what should be included in an effective submission to assist the Minister to make a ‘controlled action’ decision, or refuse to approve the development on the grounds it would have “clearly unacceptable” impacts on a matter of NES or the environment on Commonwealth land.*

3. Preparing a submission

Note: *From the day the proposed action is publicised on the EPBC Act website, the public have 10 business days to make a submission on whether the development will have a significant impact and recommend assessment approach. The Minister must publish the referral and that invite on the EPBC Act website as soon as practicable after receiving the referral.*

a. Process

Generally, a helpful process to adopt when preparing and drafting a submission is to:

- Identify the parts of the proposed action which will impact on the environment.
- Identify the parts of the environment which are likely to be adversely impacted by the proposed action.
- Identify what the adverse impacts are that the proposed action will have upon those parts of the environment.

- Work out whether those adverse impacts are significant.
- Work out the likelihood of those adverse impacts.
- Invoke the Precautionary Principle.
- Work out whether any mitigation measures have been suggested, and whether they will sufficiently mitigate the likely adverse impacts identified.
- Suggest a level of assessment (“assessment approach”) to comprehensively assess the impacts which the proposal will have upon matters protected by Part 3.

Identify the parts of the proposed action which will impact on the environment

- Get a copy of the referral and the supporting documents.
- All referrals are listed on the EPBC Act website at:
[http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=invitation to comment&limit=999&text search=](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=invitation%20to%20comment&limit=999&text_search=)
(copy and paste into web-browser)
- Look through all the information provided by the proponent.
- ***Ask yourself:*** *What does the proposed action involve?*
(There may be more involved in the development than you first think. Modifications to existing infrastructure or additional infrastructure, such as road, power or water services, boat or shipping facilities or retail establishments, may be associated with the development).
- List the parts of the proposed action which will impact on the environment.
- Make sure that all parts of the proposed action are adequately described and are included in the referral. If you believe the information in the referral is misleading or incorrect, you should state the reasons why and provide correct information, if available.

Identify the parts of the environment which are likely to be adversely impacted

- Identify the area where the development is proposed, and the areas adjacent to the development site.
- ***Ask yourself:*** *What are the matters of NES found in the area?*
The “protected matters search tool” on the EPBC Act website, will let you know what MNES are found within a specified area, in a local government area or at specific coordinates; the tool can be found here:
<http://www.environment.gov.au/erin/ert/epbc/index.html>
- List all of the matters of NES which are likely to be adversely affected.
- ***Ask yourself:*** *What is the known distribution and range, or what are the important features of the MNES identified?*

- **Ask yourself:** *What is the sensitivity, value and quality of the environment which is impacted?*²
- **Ask yourself:** *What is found in and around the area of the development?*
- Try to prioritise your answer to these three questions in order of importance for each matter of NES
- *The interactive “Environmental Reporting Tool” tool allows you to locate the biodiversity, heritage, wetlands and protected areas, locations and facilities associated with the National Pollution Inventory by postcode, region or you can specify the area. It can be found here:*
<http://www.environment.gov.au/erin/ert/index.html>

Identify the adverse impacts of each part of the development that the proposed action will have upon those parts of the environment

- Consider the intensity duration, magnitude and geographic extent of the impacts³.
- What are the potential impacts of each of the activities and infrastructure and “associated” or “related” parts of the development.
- Look at *each* impact that you can reasonably associate with the development⁴ - this includes all on site and off site impacts.
- Impact can include indirect consequence – so consider all direct *and* indirect impacts providing they are sufficiently close to the action without straining the language that they would be or are consequences of the development (for a discussion of what an “impact” is, see EDONQ’s factsheet “EPBC Act Factsheet #1: Referral and Assessment of Controlled Actions - an overview”).

When doing this consider:

- Whether impacts are within the control of the proponent, or not.
- Impacts downstream or downwind of the site eg pollution
- Facilitated impacts; done by persons other than the principle actor eg contractors
- Avoid using the word “cumulative” as the Minister cannot consider cumulative impacts of an activity.⁵
- Consider adverse impacts only.

² The Guidelines *ibid* at 5

³ The EPBC Act Policy Statement 1.1 ‘Significant Impact Guidelines on Matters of National Environmental Significance’ (“EPBC Act Guidelines”) May 2006 page 5, provides useful information to guide you through all the terms and preparing a submission. It can be found on the EPBC Act website at <http://www.environment.gov.au/epbc/publications/pubs/neg-guidelines.pdf>

⁴ “Reasonably imputed as within contemplation” *Booth v Bosworth* [2001] FCA 1452 (“The Flying-Fox Case”) Justice Branson

⁵ Justice Branson’s in The Flying Fox Case mention of context provides the only basis on which to demand the Department assess cumulative impacts. *Queensland Conservation Council v Minister for Environment* (Nathan Dam Case),

- Repeat this for each matter protected by Part 3 of the EPBC Act which is present on the area.
- The referral should consider impacts on MNES in relation to:
 - site selection and the location of buildings or activities on the selected site;
 - the timing of the action or its component activities; and
 - the design of any buildings, or other structures or infrastructure.

Ideally this requires expert opinion. Contact planners, architects, builders for their opinion and if possible, get them to write something for your submission or ask if you can reference them.

Are the adverse impacts significant?

- A significant impact is “an impact that is important, notable or of consequence having regard to its context or intensity”⁶
- This is a *threshold decision* – if it exceeds the threshold of “significant environmental harm”, or is likely to. Elaborate on why the impacts you identified, will be *significant*
- Focus on the impacts which you are most able to support with evidence. You must support your comments with peer reviewed journal articles, authoritative texts, expert reports or expert comments wherever possible. However if you have considerable experience or well recorded observations, they can be included, although they will be less persuasive.
- Can you think of any other similar situations which provide an example of what you are saying?

If the adverse impacts are significant, are they likely?

- “Likely to have” a significant impact means a real or not remote chance, regardless of whether it is less or more than fifty percent”⁷
- Do you have any evidence to support this? Look for peer reviewed journal articles, authoritative texts, expert reports, expert comments.

Invoking the Precautionary Principle

- If there is no evidence to support your argument that either there are or are likely to be significant adverse impacts as a result of the proposed action because insufficient research has been carried out on the subject, then you will need to rely on the Precautionary Principle.
- The Minister must consider the precautionary principle in making decisions⁸.

⁶ Justice Branson in The Flying-Fox Case. This definition is now included in the EPBC Act Policy Statement, Significant Impact Guidelines 1.1 on Matters of National Environmental Significance. See <http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf> for this helpful guide.

⁷ Per Justice Branson in the Flying Fox Case

⁸ s.391(1): EPBC Act

- The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.⁹

Are there any mitigation measures suggested?

- Has the referral identified ways in which potential impacts of the action can be mitigated?
- Will those mitigation measures be effective?
- Are those mitigation measures sufficient?
- If no mitigation measures have been suggested, what conditions are necessary to ensure that the potential impacts of the action are effectively and sufficiently mitigated?

Suggest level of assessment (what is the appropriate Assessment Approach)?

- It is important to suggest the level of assessment that you believe the action will require, as there is no other opportunity to do so once the Minister declares whether the proposed action is a controlled action or not.
- The following are the Assessment Approaches which are available to assess impacts of proposed actions:
 - assessment by accredited assessment process;
 - assessment on referral information;
 - assessment on preliminary documentation;
 - assessment by public environment report;
 - assessment by environmental impact statement (“EIS”);
 - assessment by inquiry.

b. General Information

- Provide clear contact details if the Department needs to get in touch with you to seek clarification.
- Provide comments by the due date.
- If your comments are going to be late, contact the Department before the due date, and advise of your intention to provide comment, and the date the comment will be provided. The Department will advise you if the comments can be accepted after the due date.

⁹ s.391(2): EPBC Act

- Electronic copies in pdf form are preferred.

- Submissions can be sent to:

Email: epbc.referrals@environment.gov.au

Post: The Minister of Environment Water, Heritage and the Arts
Referral Business Entry Point, EIA Policy Section (EPBC Act)
Approvals and Wildlife Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

Fax: (02) 6274 1789

- If you require further information you can contact the Department's Community Information Unit by email ciu@environment.gov.au, or freecall 1800 803 772.
- If you would like guidance on deciding what details to include in your submission, or on finalising the content, please contact EDONQ (our contact details appear at the end of this Factsheet). If one of the solicitors is available they will be happy to provide assistance.

4. 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.**

5. Useful Contacts

EDO-NQ

Suite 1, Level 1
96-98 Lake Street
CAIRNS QLD 4870
Ph : 07 4031 4766; Fax: 07 4041 4535
Email: edong@edo.org.au

EDO (Qld)

30 Hardgrave Road,
WEST END QLD 4101
Ph: 07 3211-4466; Fax: 07 3211-4655
Email: edoqld@edo.org.au

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 edong@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edong

Appendix 1: 'Jargon' – Glossary of words and terms

Bilateral Agreements

Where a matter of NES is protected under both State and Commonwealth legislation, the EPBC Act's assessment process for development applications would usually create an additional assessment process that a development application would have to go through in order to gain approval. It would be inefficient, expensive and unduly restrictive on applicants to have to satisfy two different approvals processes. A bilateral agreement between the Commonwealth and States or Territories under the EPBC Act means that an accredited assessment process is agreed to which involves assessment by the State according to the State assessment process, which is then submitted in a report to the Commonwealth Minister for the Environment, who then makes the final decision on whether to approve the action.

Department of Environment, Water, Heritage and the Arts ("DEWHA")

Currently the Commonwealth department responsible for the environment that administers the EPBC Act (it can be prone to change).

The Minister

"The Minister" under the EPBC Act is always the Commonwealth Minister responsible for the environment.

Triggers

Something which activates the EPBC Act.

Ramsar Wetlands

Wetlands which are listed under the Ramsar Convention on Wetlands of International Importance.

Controlled action

An action which the Minister has decided has, will have or is likely to have a significant impact on a matter of NES.

Matter of National Environmental Significance (or "NES")

A matter which is protected by Part 3, Division 1 of the EPBC Act ("Requirements relating to matters of national environmental significance"), which currently are:

- World Heritage properties
- National Heritage places
- Ramsar wetlands
- Listed threatened species and threatened ecological communities

- Migratory species
- Nuclear actions
- Commonwealth marine area

Levels of Assessment

There are 5 different types of assessment processes which the Minister can choose from for a controlled action, and we have very briefly described them below:

1. Accredited Process

Queensland has a bilateral agreement in place with the Commonwealth, so the activity will be assessed under Queensland law (a State referral agency will prepare the report), but to a standard acceptable to the Commonwealth Minister for the Environment.

2. Referral information

DEWHA will prepare the draft Recommendation Report, which is made available for public comment for 10 days, once completed (but the whole process can only take 30 days).

3. Preliminary Documentation

The public may provide comments on whether the decision should be approved based on the same information provided by the proponent to the Minister in the original referral UNLESS the Minister requests additional information. The whole process will be completed in 40 days.

4. Environmental Impact Statement (EIS)/Public Environment Report (PER)

Minister provides guidelines to the proponent for a draft EIS or PER. The proponent then prepares the draft, which is then published for public comment. A report to the Minister is prepared taking into account public comment. The Minister has 40 days to decide on the activity after receiving the final report.

5. Public Inquiry

The Minister appoints commissioners and sets out terms of reference for the inquiry. A report is prepared for the Minister, and the Minister has 40 days to decide.

Appendix 2: Controlling provisions

Controlling provisions are the sections of the EPBC Act that cover the protection of each matter of NES¹⁰, or protect the environment from proposals involving the Commonwealth or Commonwealth land¹¹.

Once the Minister has declared an action to be a “controlled action” the section of the EPBC Act that relates to the impacted matter of NES, becomes a “controlling provision” for the assessment and approval stages of the process.

Sections 12 and 15A	World Heritage property
Sections 15B and 15C	National Heritage place
Sections 16 and 17B	Ramsar wetland
Sections 18 and 18A	Listed threatened species and threatened ecological communities
Sections 20 and 20 A	Migratory species
Sections 21 and 22A	Nuclear action
Sections 23, 24 & 24A	Commonwealth marine area
Sections 26 and 27A	Commonwealth Land
Sections 28	Action by Commonwealth

¹⁰ In Part 3, Division 1: *EPBC Act*

¹¹ In Part 3, Division 2: *EPBC Act*