

The referral and approval process under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act")  
2 April 2004

## The EPBC Act deals with:

- \* Environmental assessment and approval of controlled actions;
- \* Biodiversity protection;
- \* Protected areas; and
- \* Administration and enforcement of the Act

This presentation will address the assessment and approval process and briefly outline enforcement.

## EPBC Act jargon:

- \* **Triggers**– something which activates the EPBC Act
- \* **Ramsar Wetlands**– wetlands which are listed under the Ramsar Convention on Wetlands of International Importance.
- \* **Matters of National Environmental Significance (MNES)**– matters protected by the Act, including threatened species. These are listed in full later.
- \* **Bilateral agreements**– agreements between the Cth and States/Territories to accredit assessment or approval processes for the EPBC Act.
- \* **Environment Australia** – the old name for the newly re-named Department of Environment and Heritage which administers the EPBC Act.

## The EPBC Act will apply to a development if it is:

- \* A **Commonwealth Action** (action by Cth govt or on or affecting Cth land) which has, will have or is likely to have a **significant impact on the environment**;
- \* An action which has, will have or is likely to have a **significant impact on a matter of national environmental significance (MNES)**

## Step 1- A proposed action

### An “action” means:

- \* A project;
- \* Development;
- \* Undertaking;
- \* Activity;
- \* Any alteration or increase in the above;

### BUT NOT:

- \* The granting of an approval or the provision of funding by Cth, State or local government

## Matters of National Environmental Significance ('MNES')

- \* World Heritage areas
- \* Ramsar Wetlands
- \* Listed threatened species and ecological communities
- \* Listed migratory species
- \* Nuclear actions
- \* Commonwealth marine environment
- \* Listed National Heritage Places

## Finding out which Areas and Species are listed

- \* The Environment and Heritage Minister is responsible for keeping lists of Ramsar Wetlands, threatened species and other MNES
- \* This information can be found on the EPBC Act section of the Department's website at [www.deh.gov.au/epbc/](http://www.deh.gov.au/epbc/)

## What does “significant impact” mean?

- \* This is a key phrase in determining whether an action needs Cth approval
- \* “Significant” is not defined by the Act
- \* Department issued Administrative Guidelines on Significance which give suggestions on what amounts to a “significant impact” but they do not have the force of law
- \* Up to Courts to interpret - *Booth v Bosworth* case: “an impact that is important, notable or of consequence having regard to its context or intensity”

## Administrative Guidelines on Significance

These are available from the DEH website.  
Things to be taken into account in determining if “significant” impact:

- \* All on-site and off-site impacts;
- \* All direct and indirect impacts;
- \* The frequency and duration of the impact;
- \* The total impact which can be attributed to that action over the entire geographic area affected, and over time;
- \* The sensitivity of the receiving environment; and
- \* The degree of confidence with which the impacts of the action are known and understood.

## Exceptions – when is it OK to undertake an action to which the EPBC Act applies?

- \* When the person holds an approval from the Minister
- \* When the Minister has decided that the action will not have a significant impact and so is not a controlled action
- \* When the action is covered by an approval under a bilateral agreement (none yet)
- \* When the action is exempted by Ministerial declaration
- \* When the action is covered by a Regional Forestry Agreement
- \* When the action is covered by the Great Barrier Reef Marine Park Act 1975
- \* When the action is a continuation of an action being undertaken as at 16 July 2000 that had all its necessary environmental approvals - with no enlargement, expansion or intensification of the action

## Step 2- Referring the action to the Minister

- \* Proponent (person taking the action) has a duty to refer if they think may have a significant impact on a MNES;
- \* State or a State agency can refer;
- \* Minister can “call in” an action by directing the proponent to refer it
- \* Cth agency or Cth Minister can refer
- \* The public cannot directly refer actions

## Minister determines whether action is “controlled action”

- \* Once the action has been referred, the Minister has 20 business days to determine whether the EPBC Act applies – that is, whether the action is a “controlled action”
- \* Once the action is referred, the public has 10 business days to make submissions to the Department on why the action should be declared a “controlled action”
- \* Public submissions should include the assessment approach that should be taken

### Step 3- Assessing the impact of the action

- \* Once an action is declared a controlled action it must be assessed before it can be approved (or refused, or approved with conditions)
- \* The Minister decides on the appropriate level of assessment, unless a bilateral agreement or a Ministerial declaration says the action should be assessed in another way

The Minister can assess an action in one of these ways:

- \* An accredited process under a bilateral
- \* Assessment on preliminary documentation
- \* A public environment report (PER)
- \* An environmental impact statement (EIS)
- \* A public inquiry
- \* Case-by-case accreditation

### Step 4- Approval

- \* The Minister must decide within 30 business days of receiving the results of the environmental assessment whether to grant an approval, refuse, or condition the action.
- \* The Minister must take into account:
  - \* Relevant impacts on the MNES or Cth land
  - \* The principles of Ecologically Sustainable Development (ESD)
  - \* The Assessment report
  - \* Any comments received by the Minister from other Cth Ministers
  - \* The proponent's history in environmental matters

### Summary of public participation opportunities

- \* Comment on whether action should be controlled action, within 10 business days of referral going on Public Notices section of DEH website – comments should include the assessment approach that should be taken
- \* If an action is declared a controlled action, there is opportunity for public submission for all assessment approaches – see Public Notices section of DEH website:

<http://www.deh.gov.au/epbc/publicnotices/index.html>

## Other useful EPBC titbits

- \* s74: Minister can reject referral of part of a project and require the whole project to be referred
- \* s489: offence to provide false or misleading information in a referral
- \* s77A: offence to perform action in a manner other than that specified by the Minister when declaring action is not a controlled because it will be taken in particular manner
- \* New information means Minister can reconsider referral or conditions decisions
- \* Remediation can be ordered where unlawful damage has occurred

## Enforcement – the public can take Court action to:

- \* Get an injunction to stop actions being taken without EPBC Act approval
- \* Get an injunction to stop breaches of approval conditions
- \* Enforce manner specified conditions
- \* Get a declaration that a referral is false or misleading
- \* Judicially review decisions of the Minister – procedural grounds only, not merits review