



Environmental Defenders Office

The Environment Protection and Biodiversity Conservation Act 1999 (Cth), Referrals and Opportunities to Comment

Disclaimer: This factsheet is a guide only and is designed to give readers a plain English overview of the law. It does not replace the need for professional legal advice in individual cases. To request free initial legal advice on a public interest environmental or planning law issue, please visit our [website](#).

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Overview of the EPBC Act

The [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (**EPBC Act**) is the main environmental law at the federal level. It aims to regulate and protect aspects of the environment that are matters of national environmental significance (**MNES**).¹ The EPBC Act also regulates activities undertaken by Commonwealth agencies and activities carried out on Commonwealth land.

What are Matters of National Environmental Significance?

There are currently nine matters of national environmental significance listed under the EPBC Act. They are:

1. World Heritage sites
2. National Heritage places
3. Nationally protected wetlands (Ramsar wetlands)
4. Nationally listed threatened species and ecological communities
5. Listed migratory species
6. Nuclear actions (including uranium mines)
7. Commonwealth marine areas
8. The Great Barrier Reef Marine Park
9. Coal seam gas or large coal mining developments likely to have a significant impact on a water resource

The [EPBC Act website](#) allows you to find out whether there are any MNES in your area. You can search an area by browsing maps, entering coordinates, or by Local Government Area using the [Protected Matter Search Tool](#).

¹ [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#), Chapter 2, Part 3, Division 1, ss 12-24C (**EPBC Act**).

How is the EPBC Act relevant to developments that concern me?

The EPBC Act regulates “controlled actions”. Controlled actions include activities (such as developments) or projects that have (or is likely to have) a significant impact on a MNES or Commonwealth land.

Read: [The Significant Impact Guidelines published by the Commonwealth and Actions affecting Commonwealth land and actions by Commonwealth Agencies](#) for more information about what a ‘significant impact’ is.

Before these activities/projects can commence, they must be referred to, and approved by, the Federal Minister for the Environment (**the Minister**) or their delegate.²

How can I get involved?

As part of the referral and approval process, the Minister must invite the public to comment on:

- Whether the activity/project is a ‘controlled action’ and if so, the type of assessment required, and;
- (if the activity/project is found to be a controlled action) the adequacy of the assessment documents prepared by the proponent (e.g environmental impact statement).

N.B. If the proposed activity/project is also subject to assessment under the environmental laws of the relevant state/territory, the type of assessment will be decided by that state/territory – the public cannot comment on which assessment should be required. See “[Single touch approvals](#)” below for more information.

The referral process

To initiate the referral process, the proponent of the proposed activity/project must refer it to the Minister if they believe the activity/project could have a significant impact on a MNES.³ In other words, the proponent must refer their activity/project to the Minister if they believe it could be a controlled action. The notifying document submitted to the Minister is known as a ‘referral’ – see “[Referrals under the EPBC Act](#)” below.

²Note: It is an offence to carry out a controlled action without approval. See EPBC Act, ss 12(1), 15A for World Heritage); ss 15B, 15C for National Heritage; ss 16, 17B for Ramsar Wetlands; ss 18, 18A for Threatened species; ss 20, 20A for Migratory species; ss 21, 22A for Nuclear actions; ss 23, 24A for Marine environment; ss 24B, 24C for Great Barrier Reef Marine Park, and; ss 24D, 24E for Protection of water resources from coal seam gas development and large coal mining development.

³ EPBC Act, s 68.

What can I do if an activity/project is not already a controlled action?

Members of the public cannot formally refer an activity or project to the Minister. However, if you believe that an activity/project may be a controlled action, you can:

- write to any State or Territory government agencies that have oversight of the activity/project and ask them to refer the activity/project to the Minister;⁴
- write to the Minister and ask the Minister to “call in” the activity/project to;⁵ or
- report the proposal to the [Compliance and Enforcement Branch](#) of the Federal Department of Climate Change, Energy, the Environment and Water (**the Department**).

Referrals under the EPBC Act

Once a valid referral has been received, the Minister has 20 business days to decide if the proposed activity/project is a controlled action.⁶ If the Minister determines that the project is a controlled action, the decision is published together with the method of assessment (e.g., by environmental impact statement or public environment report) – see “[The approval process](#)” below.

N.B. It is an offence for a proponent to commence the activity/project if a referral has been made but a decision regarding whether it is a controlled action is still pending.⁷

How can I get involved?

In determining whether an activity/project is a controlled action or not, the Minister must [invite the public to comment on the referral](#).

This public consultation period must be for a minimum of 10 business days and is accessible via the Department’s website.⁸

Visit: [The Department’s Invitations to Comment](#) to view the current referrals and publish your comments.

Commenting on referrals

There are no formal requirements for commenting on referrals. However, all submissions should include your name, address, and contact details. You should also:

⁴ EPBC Act, s 69.

⁵ EPBC Act, s 70.

⁶ EPBC Act, s 75(5).

⁷ EPBC Act, s 74AA. If you are concerned that a proponent is breaching the EPBC Act (by commencing the activity/project), contact the Department.

⁸ EPBC Act, ss 74(3)(b), 75(1A)(b).

- Clearly reference the proposed activity/project (EPBC number and proposal title) in your submission;
- Read the referral documents carefully and point out any missing or incorrect information (e.g., any listed threatened species not mentioned, any wrong hydrological information);
- Outline how the activity/project would have a significant impact on a MNES in your submission;
- Attach any evidence or reports that you have which support your comments (e.g., lists of migratory birds or threatened species spotted in the area);
- Make reference, if possible, to the things set out in the [Significant Impact Guidelines](#);
- Comment on the type of assessment that you think should follow, and;
- Ensure your submission is lodged with the Department before 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 likely advise you if the comments can be accepted.

EDO has prepared a template that you may use – see [Appendix A](#).

Visit: [The Department’s Help on assessment and approval notifications for more information.](#)

N.B. Submissions from members of the public are not generally deemed confidential and may be made available for viewing on the Department’s website. However, you can request your submission to be undisclosed by clearly marking it as ‘confidential’.

All public comments received within the 10-day period must be considered by the decision-maker, but this does not mean that you will receive a response or acknowledgment of your comment.⁹

Once 20 business days have passed, a decision will be made on whether the referred activity/project is a controlled action that requires formal assessment and approval under the EPBC Act – see “[The approval process](#)” below.¹⁰

If the Minister decides that a proposal is not a controlled action, no Federal approval is required and the proponent cannot be prosecuted under the EPBC Act for carrying out the work, even if it does end up significantly affecting a MNES or Commonwealth

⁹ EPBC Act, s 75(1A).

¹⁰ EPBC Act, s 75(5).

land.¹¹ If the Minister decided that the proposal is not a controlled action because it would be undertaken in a specific manner and the action was not taken in that manner, then the action may still be an offence under the EPBC Act.

The approval process

If the referral process concludes with the Minister determining that the proposed activity/project is a controlled action, the decision will be published on the Department's website along with the preferred method of assessment (e.g. requesting that the proponent submit an Environmental Impact Statement).

There are six avenues for assessment:¹²

1. Accredited or bilateral assessment process (see "[Single touch approvals](#)" below);
2. Assessment on referral information;
3. Assessment on preliminary documentation;
4. Assessment by Public Environment Report;
5. Assessment Environmental Impact Statement (**EIS**);
6. Assessment by public inquiry.

Visit: [The Department's Environment Assessment Manual](#) to learn more about each assessment process.

The Minister must publish a notice of their decision on the assessment approach within 10 business days of making the decision.¹³

How can I get involved?

The documents prepared by the proponent under the assessment process chosen by the Minister will be made available for public comment (i.e. if the Minister requests that the proponent submit an Environmental Impact Statement, that Statement will be made available for you to view and comment on).

Visit: [The Department's Public Notices - referrals](#) to view all notices published on referrals, including invitations to comment on draft Assessment documentation.

¹¹ Where the Minister has made a decision that an action is not a "controlled action", the prohibition and offence provisions do not apply: see EPBC Act, ss 12(2)(c), 15A(4)(c), 15B(8)(c), 15C(16)(c), 16(2)(c), 17B(4)(c), 19(3)(b), 20(2)(c), 20A(4)(c), 21(4)(c), 22A(8)(c), 23(4)(c), 24A(8)(c), 25(2)(c), 26(3)(d), 27A(6)(c), 27C(5)(c), 28(2)(d).

¹² EPBC Act, s 87(1).

¹³ EPBC Act, s 91(1)(b).

Single touch approvals

The referral and approval processes outlined above apply to activities/projects that have (or is likely to have) a significant impact on a MNES or Commonwealth land.

However, in most cases, the proposed activity/project will also require assessment under the environmental laws of the relevant state/territory. To streamline the federal and state/territory environmental assessment process, “single touch approvals” have been implemented under the EPBC Act.

Single touch approvals are a “one-stop shop” allowing states and territories to assess activities/projects under their environmental laws, which will then be accredited by the federal government as part of their assessment of the same activity/project.

In practice, an applicant will refer projects to the Department, who will determine whether the project is a controlled action (as described in [The referral process](#) above). If it is declared a controlled action, the Department will notify the relevant State/Territory Government that a referral has been made and that State/Territory Government will undertake environmental assessment for the Department using its own processes under the assessment bilateral agreement.

This system of accreditation is made possible by:

- Assessment bilateral agreements; and
- Approval bilateral agreements

N.B. Assessment bilateral agreements have been in place for all states/territories since 2015. However, the Federal Government is still in the process of rolling out *approval* bilateral agreements.

Visit: [The Department has published an accreditation criteria for ‘single touch’ approvals under the EPBC Act.](#)

The applicable state/territory Have Your Say portals to search for public consultations on activities or projects under accredited/bilateral assessment:

- [ACT Have Your Say](#)
- [NSW Have Your Say](#)
- [NT Have Your Say](#)
- [QLD Have Your Say](#)
- [SA Have Your Say](#)
- [TAS Have Your Say](#)
- [WA Have Your Say](#)

Contesting the outcomes of the referral/approval process

What if I disagree with a decision made in the referral/approval process?

You may find yourself disagreeing with a decision made under the EPBC Act by the Minister (or their delegate). Common examples include:

- I disagree with the Minister's decision that a proposed activity/project is *not* a controlled action, I believe it should be a controlled action assessed under the EPBC Act; or
- I disagree with the Minister's decision to approve the controlled action based on the documents the proponent submitted for assessment.

If you disagree with the Minister's decision, here are some actions you might consider:

Seeking a statement of reasons

For decisions made under the EPBC Act, you may be able to seek a 'statement of reasons' under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) as to why and how the decision was made. A statement of reasons provides an opportunity to better understand a decision and then to make informed decisions about whether to exercise any rights of review with respect to the decision.

Normally, statements of reasons are only available to those people who are 'aggrieved' by a decision. The meaning of a 'person aggrieved' for the purposes of seeking review of the decision is extended in the EPBC Act to include individuals and organisations engaged in a series of activities for the protection, conservation or research into the environment within Australia and its territories.¹⁴ If you are located within geographic proximity to a particular action, this may mean you are more likely to be considered a 'person aggrieved' by a decision.

N.B. A request for a Statement of Reasons must be made to the Minister in writing within **28 days** of the decision being made.¹⁵

Once you have reviewed the decision and statement of reasons, you can assess whether you think the decision has been made in accordance with the requirements of the EPBC Act.

Judicial review

If, after reviewing the statement of reasons, you believe the decision-maker did not follow the proper process or the decision is not legally valid, you may consider making an application for judicial review of the decision in the Federal Court of Australia (**Court**). Judicial review proceedings look at the legality of the decision that is being challenged. Section 5 of the ADJR Act provides a list of grounds for which judicial

¹⁴ EPBC Act, ss 487-488.

¹⁵ *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), s 13(5).

review can be sought, including jurisdictional error, procedural error, or improper exercise of power.

As a court action, judicial review can be expensive, time consuming and difficult to succeed in. The Court can invalidate or void decisions that have been made unlawfully; however, often, even if successful, the decision is simply referred back to the decision-maker to remake the decision in accordance with the law, so there may not be a substantial change to the outcome. If unsuccessful, you may be ordered to pay the other party's costs. We **strongly** recommend you seek legal advice prior to undertaking any such legal action in Court.

N.B. Applications to review a decision made by the Minister (or their delegate) under the ADJR Act must be lodged with the Federal Court within **28 days** of receiving the statement of reasons.¹⁶

No merits review available

Courts and tribunals are authorised to review some government decisions – this is called ‘merits review’. However, merits review is not available for decisions made by the Minister (or their delegate) under the EPBC Act.

Glossary

Key terms used in this factsheet:

EPBC Act means the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#)

EIS means Environmental Impact Statement

Minister means the Federal Minister for the Environment

MNES means “matters of national environmental significance”

The Department means the Federal Department of Agriculture, Water and the Environment

¹⁶ [ADJR Act](#), ss 11(1)(c), 11(3).

Appendix A – Template for a submission relating to an EPBC referral

[# Use your letterhead or insert your postal address]

[#Insert date]

By post: Referrals Gateway
Environment Assessment Branch
Department of the Environment
GPO Box 787
Canberra ACT 2601

Dear Minister,

RE: Proposed Action [# insert description and insert EPBC Act government reference number]

I am writing on behalf of [#insert group name, number of members and area of interest]. Thank you for the opportunity to comment on whether the proposed action should be assessed under the EPBC Act and what the controlling provisions should be.

Summary

In summary my submission states:

- (a) The proposed action should be assessed as a controlled action under the EPBC Act because it is likely to have a **significant impact/s** on the following matters of national environmental significance for the following reasons:
 - (# identify matter 1 of national environmental significance and reason, giving authority or main expert reference);
 - (# identify matter 2 of national environmental significance and reason, giving authority or main expert reference);
 - (# identify matter 3 of national environmental significance and reason, giving authority or main expert reference).
- (b) The action needs to be assessed using the following **level of assessment** for the following reason [#insert preferred method Preliminary Documents/ Public Environment Report/ EIS and reasons why that approach is appropriate]

Where relevant include sections c and d as well

- (c) [# If appropriate, the action has not been correctly described, or is really part of a larger action and the Minister needs to assess the larger action which is #X insert description]

(d) [# If appropriate, alternative approaches could be used to achieve the same or a similar outcomes.]

Background [to your objection]

[Insert half a page only, as the public servants are more interested in matters of national environmental significance. Make sure that you point out any errors in the referral document]

Where relevant detail the following sections:

Action

[Only include this section if you think the action has not been properly described. For example if land clearing is described as “to maintain a cleared zone around an airport” but you have evidence that the developer is planning a subdivision for housing and that is the real purpose of the clearing you might ask the Minister to assess the whole development not what is on the referral form].

[Identify Matter of National Environmental Significance 1 – eg RAMSAR Wetlands]

Detail the significant impact the action will have on MNES 1

[Identify Matter of National Environmental Significance 2 – eg Great Barrier Reef World Heritage Area]

Detail the significant impact the action will have on MNES 2

[Identify Matter of National Environmental Significance 3 – eg migratory species]

Detail the significant impact the action will have on MNES 3

Conclusion and Recommendations

#Summarise whether you believe the referral will have significant impacts and is a controlled action that needs to be assessed quite specifically.

[# Your signature]