



EPBC UNIT FACT SHEET - Providing Comments on Referrals



1. INTRODUCTION

The Australian Government's *Environment Protection and Biodiversity Conservation Act 1999* (the "EPBC Act") commenced on 16 July 2000 and brought about major changes in the Australian Government's environmental assessment and approval processes.

The basic stages in the environmental assessment and approval process under the EPBC Act are as follows:

- Stage 1** The project is referred to the Australian Government Minister for the Environment and Heritage (the "Minister").
- Stage 2** The Minister decides whether or not the project requires approval under the EPBC Act.
- Stage 3** If the project requires approval, the Minister decides how the project should be assessed.
- Stage 4** The assessment is carried out.
- Stage 5** The Minister considers results of the assessment and decides whether or not to approve the project, and, if it is approved, what conditions to impose on the approval.

This fact sheet deals with the following issues.

- When must an activity be referred to the Minister?
- The "controlled action" decision.
- Can I comment on whether an activity requires approval?
- How do I find out whether an activity has been referred?
- Where can I get information about a referral?
- How to provide comments on referrals.
- Where do I find more information?

Please refer to the EPBC Unit's Example Referral Submission if you would like to see an example of a referral submission. You can also follow the EPBC Unit's Blueprint Referral Precedent to prepare your submission, contact the EPBC Unit for a word version of the Blueprint, or download a pdf version from the WWF Website.

2. WHEN MUST AN ACTIVITY BE REFERRED TO THE MINISTER?

A person is required to refer a project to the Minister if the project *may* have a significant impact on a matter protected under Part 3 of the EPBC Act. The matters protected under Part 3 of the EPBC Act are:

- the "matters of national environmental significance";
- the environment on Commonwealth land; and
- the environment generally where the project is being taken by the Commonwealth or a Commonwealth agency.



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What are the matters of national environmental significance?

The “matters of national environmental significance” are:

- the world heritage values of declared **World Heritage properties**;
- the ecological character of declared **Ramsar wetlands**;
- listed **threatened species** (other than “extinct” and “conservation dependent” species) and **ecological communities** (other than “vulnerable” ecological communities);
- **migratory species** listed under the EPBC Act;
- “**nuclear actions**” that are likely to have a significant impact on the environment; and
- the **Commonwealth marine environment**, which covers:
 - actions taken in a Commonwealth marine area that are likely to have a significant impact on the environment;
 - actions taken outside a Commonwealth marine area that are likely to have a significant impact on the environment in a Commonwealth marine area; and
 - fishing in a Commonwealth managed fishery that is likely to have a significant impact on the environment.

What does “environment” include?

“**Environment**” is defined for these purposes as including:

- ecosystems and their constituent parts, including people and communities; and
- natural and physical resources; and
- the qualities and characteristics of locations, places and areas; and
- the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).

This broad definition ensures that, for the purposes of the EPBC Act, the “environment” will include the natural, built and social or cultural environment (including heritage related issues).

3. THE “CONTROLLED ACTION” DECISION

On receiving a referral, the Minister must decide:

- whether the project requires approval under the EPBC Act (that is, whether it is *likely* to have a significant impact on a matter protected under Part 3);
- if the project requires approval, which matters triggered the approval requirement.

Projects that require approval are called “**controlled actions**”. The provisions of Part 3 that relate to the matters that trigger the approval requirement are called the “**controlling provisions**”. The controlling provisions are important as they determine the scope of the assessment that is carried out under the EPBC Act.

These decisions are often referred to collectively as the “controlled action” decision.

After making the controlled action decision, the Minister must assess projects that require approval under the EPBC Act (or, in certain circumstances, the projects will be under an accredited State or Territory process, or under another Australian Government law). At the completion of the assessment process, the Minister must decide whether or not to approve the project, and if it approved, what conditions to attach to the approval.



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What is a “significant impact” ?

The EPBC Act does not define “significant impact”. The only existing legal authority on this issue suggests that a significant impact is one that is “important, notable or of consequence” having regard to the context.

The Department of the Environment and Heritage has produced administrative guidelines on this issue. These guidelines are not legally binding. However, they have an important influence on the Minister’s controlled action decisions.

Copies of the guidelines are available at: www.deh.gov.au/epbc/assessmentsapprovals/guidelines/index.html.

4. CAN I COMMENT ON WHETHER AN ACTIVITY REQUIRES APPROVAL?

As soon as practicable after receiving a referral, the Minister must publish a notice on the Department of the Environment and Heritage’s (DEH) website inviting members of the public to provide comments on whether the action is a controlled action (ie. whether it is likely to have a significant impact on a matter protected under Part 3). However, the Minister does not have to invite public comments on a referral if the proponent states in the referral form that it believes the project is a controlled action.

Members of the public have **10 business days** from the date the notice is published to submit their comments.

If a project requires approval under the EPBC Act, members of the public will be given a further opportunity to comment on the project during the assessment process (stage 4 of the process).

5. HOW DO I FIND OUT WHETHER A PROJECT HAS BEEN REFERRED?

All notices concerning referrals can be viewed on DEH’s public notices website at: www.deh.gov.au/epbc/publicnotices/index.html.

The EPBC Unit publishes a weekly email that provides information on the actions that have been referred during the previous week. To subscribe, simply send a blank email to the following address: epbc-info-subscribe@yahoogroups.com.

6. HOW DO I GET INFORMATION ABOUT A REFERRAL?

The proponent refers an action to the Minister by the completing and submitting a referral form. Copies of the form are available on DEH’s website at: www.deh.gov.au/epbc/assessmentsapprovals/referrals/index.html.

DEH’s public notices website displays a copy of each referral form. The referral form sets out basic information about the nature of the project and the likely impacts of the action on matters protected under Part 3. This information includes:

- the name of the proponent;
- the location of and a description of the project;
- the relationship of the project to other activities or developments;
- an estimation of the nature and extent of the likely impacts on the matters protected under Part 3;
- any measures taken aimed at avoiding or reducing the likely impacts; and
- the information sources relied on in completing the referral form.



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7. HOW TO PROVIDE COMMENTS ON REFERRALS

7.1 What are the relevant issues?

The **ONLY** issue that is relevant at this stage in the process of providing comments on a referral (ie. stage 2) is:

*Is the project **likely** to have a significant impact on a matter protected under Part 3 of the EPBC Act. That is, is the project likely to have a significant impact on:*

- a matter of national environmental significance;
- the environment on Commonwealth land; or
- the environment generally where the action is going to be carried out on Commonwealth land or is proposed by the Commonwealth or a Commonwealth agency.

In making a decision about whether or not a project requires approval under the EPBC Act, the Minister can **only** have regard to the **adverse** impacts of the project on the matters protected under Part 3. Therefore, there is no need for your submission to counter any statements in the referral form regarding positive environmental impacts that may or may not be associated with a project.

Similarly, as the Minister's decision at this point only relates to whether the project is likely to have a significant impact on a matter protected under Part 3, there is no need to comment on whether the project should or should not be approved or the conditions that should be imposed on the activity if it is approved. These comments should be made when you are given an opportunity to make submissions on the assessment documentation (at stage 4 of the process).

Does "likely" mean probable or possible?

Actions that are "likely" to have a significant impact on a matter protected under Part 3 require approval under the EPBC Act. However, does "likely" mean probable (ie. a greater than 50% chance) or possible (ie. it includes something with a less than 50% chance of occurring)?

In the *Booth v Bosworth* (2001), Justice Branson suggested the preferred interpretation was that "likely" means "*prone, with a propensity or liable*", or a "*real or not remote chance or possibility regardless of whether it is less or more than fifty per cent*". While Justice Branson did not reach a final view on this issue, it appears there is a strong likelihood that "likely", when used in the context of determining whether an action requires or required approval under Part 3 of the EPBC Act, will be taken to include *possible* impacts, provided there is a real chance of the relevant impact occurring.

7.2 The steps in preparing a submission on a referral

Step 1 Determine whether the Commonwealth or a Commonwealth agency is the person who is proposing to take the action.

Who is proposing to take the action?

Part 1 of the referral form will provide the name of the person who is proposing to take the action and the proponent. It is important to recognise that there may be a difference between the proponent and the person who proposes to carry out the action.

The person who proposes to carry out the action is the person responsible for physically taking the action. If approval is required, the approval will be granted to this person and they will be responsible for compliance with the conditions of the approval.



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If that person is an employee or officer of the Commonwealth or a Commonwealth agency, the person taking the action will be the Commonwealth or the relevant Commonwealth agency. If the person is an independent contractor of the Commonwealth or a Commonwealth agency, the person taking the action will usually be the independent contractor, not the Commonwealth or the Commonwealth agency.

The proponent is the person responsible for the preparation of the documentation required under the EPBC Act (eg. the referral form, preliminary information, assessment documentation, responses to requests from the Minister etc). This may be the same as the person taking the action or it may be the person who is only preparing the forms such as a lawyer or environmental consultant.

“Commonwealth agencies” include:

- Commonwealth Ministers;
- a body corporate established for a public purpose by a law of the Commonwealth;
- a body corporate established by a Commonwealth Minister otherwise than under a law of the Commonwealth; and
- a company in which the whole of the shares or stock, or shares or stock carrying more than 50% of the voting power, are owned by or on behalf of the Commonwealth.

There are a number of exemptions from this definition of Commonwealth agencies. For example, Telstra Corporation Ltd and its subsidiaries are excluded from this definition under the regulations and certain Aboriginal Land Trusts and corporations are excluded under the EPBC Act. You should check the definition in s.528 and the exemptions in Part 19 of the *Environment Protection and Biodiversity Conservation Regulations 2000* before concluding a person, body corporate or other organisation is a Commonwealth agency.

If the Commonwealth or a Commonwealth agency is the person who is proposing to take the action, is the action likely to have a significant impact on the environment?

If the person who is proposing to take the action is the Commonwealth or a Commonwealth agency, part 4 of the referral form should provide information on the potential impact of the action on the environment generally. Part 3 of the referral form should also provide information on the project area and the area that is likely to be affected by the action. Your submission should address any issues raised by the proponent.

When preparing comments on this issue, remember that “environment” is defined broadly (see page 2 of this fact sheet) and that only adverse impacts are relevant to the Minister’s decision at this stage. You should also remember that “likely” means a “real or not a remote chance” of something happening regardless of whether or not the chance is more or less than 50%.

You should consider such things as:

- adverse impacts on places having natural, cultural and indigenous heritage significance (check whether the action will have any impacts on a place listed on State/Territory heritage lists or on the Register of the National Estate (see www.ahc.gov.au/register/index.html for information on the Register of the National Estate));
- adverse impacts on rare and threatened species and ecological communities (whether or not they are listed under the EPBC Act) (check relevant State/Territory lists and the lists maintained under the EPBC Act);
- adverse impacts on communities and community values;
- adverse impacts on local industries (eg. eco-tourism, agriculture, fishing);
- adverse impacts on conservation activities being undertaken in the area; and
- whether the activity is, or is likely to contribute to, a process that threatens biodiversity (whether or not the process is listed as a key threatening process).



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Step 2 Determine whether an action is going to be carried out on or near Commonwealth land.

Will the action be taken on or near Commonwealth land?

“Commonwealth land” includes land owned or leased by the Commonwealth or a Commonwealth agency, land in external Territories (other than Norfolk Island) and all land in Commonwealth reserves.

If the action will be taken on Commonwealth land part 4 of the referral should provide information on the potential impact of the action on the environment generally. If the action is being taken near Commonwealth land, Part 4 of the referral should provide information on the potential impact of the action on the environment on that Commonwealth land. Part 3 of the referral form should also provide information on the actual project area and the wider area that is likely to be affected by the action.

Is the action likely to have a significant impact on the environment on Commonwealth land?

Part 4.1 of the referral form should contain information on the likely impacts of the action on the environment on Commonwealth land.

If there is Commonwealth land located near the project area, you should consider whether the action could have a significant impact on the environment on that land, even if the action itself does not occur on Commonwealth land. For example, will the action effect water that then flows onto Commonwealth land.

Again, you should remember the broad definition of environment and consider the issues raised in Step 1 above. In particular, you should investigate whether the Commonwealth land contains any important habitats, wetlands, places of heritage significance or rare/threatened species. Your submission should also address any issues raised by the proponent in Part 4.1 of the referral form.

Step 3 Determine whether the action is likely to have a significant impact on a matter of national environmental significance?

What matters of national environmental significance are found on or near the project area?

Parts 3 of the referral form should provide information on the presence of matters of national environmental significance in the project area and in the area likely to be affected by the proposed action.

The DEH website contains an interactive protected matters search tool that can be of assistance when trying to determine what matters of national environmental significance are found in a certain area. The search tool can be found at: <http://www.deh.gov.au/erin/ert/epbc/index.html>.

Recovery plans, listing advice, and wildlife conservation plans also contain information on threatened species, threatened ecological communities and listed migratory species – including the location of habitat that is important for their conservation and processes that threaten their survival. Copies of recovery plans that have been approved under the EPBC Act are available at: www.deh.gov.au/biodiversity/threatened/recovery/index.html.

Similarly, management plans for World Heritage properties and Ramsar wetlands can also provide important information on the location of these areas, the world heritage values of World Heritage properties, the ecological character of Ramsar wetlands and threats to these areas. DEH’s website also contains information on :

- World Heritage properties and their values (see www.deh.gov.au/heritage/awh/worldheritage/index.html); and
- Ramsar wetlands and their ecological character (see www.deh.gov.au/water/wetlands/ramsar/index.html).



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If a matter of national environmental significance is located in the project area or in an area that could be affected by the action, is the action likely to have a significant impact on that matter?

Part 4 should provide information on the nature and extent of the likely impacts of the action on matters of national environmental significance. Your submission should address issues raised by the proponent.

DEH has produced Administrative Guidelines on Significance that set out criteria for determining when an action is likely to have a significant impact on a matter of national environmental significance. For example, the guidelines state that an action is likely to have a significant impact on the world heritage values of a declared World Heritage property if it is likely to result in:

- one or more of the World Heritage values being lost; or
- one or more of the World Heritage values being degraded or damaged.

Although these guidelines are not legally binding, they have a substantial influence over the way in which controlled action decisions are made.

You should use the guidelines to prepare your submission. In doing so, try to address the criteria. For example, if the project is likely to have an adverse impact on the world heritage values of a declared World Heritage property, explain why the action is likely to result in one or more of the values being lost, damaged or degraded and quote the criteria in the guidelines.

Note also that supplementary guidelines have been prepared on certain subjects (such as seismic testing and bluegrass ecological communities). Use these guidelines if they are relevant to the action in question. Copies of the guidelines are available at: www.deh.gov.au/epbc/assessmentsapprovals/guidelines/index.html.

7.3 Important things to remember!

When preparing a referral submission, the important things to remember are:

- focus on whether the action is likely to have a significant impact (ie. an impact that is “important, notable or of consequence”);
- if the action may adversely affect a matter of national environmental significance, address the criteria in the Administrative Guidelines on Significance (and any criteria in relevant supplementary guidelines on significance);
- your comments should only address matters relevant to whether the action is likely to have a significant impact on a matter protected under Part 3 – don’t waste time making irrelevant comments;
- the impacts need not be probable, only that there is a “real chance” that they will occur;
- when making assertions about the potential impacts of the action, include references to scientific papers and other peer reviewed sources of authority (where possible);
- if you quote from a scientific paper or journal article, include a copy of the article; and
- try to avoid making spurious statements about the potential impacts of the action (they have the potential to discredit your case).



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7.5 Where do I send my submission?

Send your comments **quoting the relevant title of the referral and reference number** to:

Referrals Section (EPBC Act)
Approvals and Wildlife Division
Department of the Environment and Heritage
GPO Box 787
CANBERRA ACT 2601
Fax: 02 6274 1789 or
Email: epbc.referrals@deh.gov.au

7.6 What happens now?

Once public comments have closed, the Minister generally has 10 business days to make a decision as to whether the action requires approval under the EPBC Act, (there are no penalties if the decision takes longer). Your comments must be taken into account in making this decision. If the Minister decides the action does require approval, the proponent must provide further preliminary information, and the Minister then decides what level of assessment will be required. There will be further opportunity for public comment at the assessment stage.

If the Minister decides that the action does not require approval, and you are unhappy with the decision, it may be possible to challenge the decision. Your State Environmental Defender's Office can be contacted to provide advice on this issue.

8. FURTHER INFORMATION

The EPBC Act and related information is available on DEH's website at: www.deh.gov.au/epbc.

The EPBC Unit has also produced an Example Referral Submission and a Blueprint Referral Precedent. These documents may help you to prepare your referral submission. Copies of these documents (and all EPBC Unit publications) are available on the EPBC Unit's website at www.wwf.org.au/epbc.

EPBC Unit

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Fax: (02) 6257 4030
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DEH

Community Information Unit
Ph: 1800 803 772
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Compliance and Enforcement

Ph: (02) 6274 1474
Email: compliance@deh.gov.au

WWF Australia

Website: www.wwf.org.au
Phone: 1800 032 551
Email: enquiries@wwf.org.au

Tasmanian Conservation Trust

Website: www.tct.org.au
Phone: (03) 6234 3552
Email: tct@southcom.com.au

Threatened Species Network

Website: www.wwf.org.au/tsn

National Environmental Defender's Office Network

Website: www.edo.org.au

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