What is this factsheet about?

This factsheet outlines public comment opportunities and possible legal actions arising where a project is referred for federal assessment under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

Key Points

There are two key public notification opportunities for EPBC Act project referrals where the public can comment:

a. Whether or not the project is a ‘controlled action’ and, if so, the type of assessment required; and

b. The adequacy of draft impact assessment documents prepared by the proponent.

Court merits review is not available for challenging decisions made under the EPBC Act; the only avenue of legal review is via judicial review, which looks at whether or not correct legal process was followed. If you have demonstrable and ongoing engagement in environmental activities, you may be able to seek reasons for an EPBC Act decision (e.g. decisions to approve, or to not require assessment under the EPBC Act).

For more detailed information contact EDO Qld or seek advice from a private solicitor.

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DISCLAIMER: This Factsheet is for general information purposes and is not legal advice. Important 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. **EPBC Act Referral Process**

The EPBC Act applies to ‘controlled actions’. A person who wishes to carry out a controlled action must first obtain an approval from the Environment Minister unless the Minister decides that an approval is not needed for that action.\(^1\)

It is an offence to carry out a controlled action without an approval.\(^2\)

**What is a controlled action?**

The Minister considers whether or not a proposed development or activity is a ‘controlled action’. Controlled actions will have, or is likely to have a significant impact on:

1. matters of national environmental significance;
2. the environment of Commonwealth land;
3. the environment anywhere in the world, if the action is undertaken by the Commonwealth.

**What is an ‘action’?**

Under the EPBC Act, an ‘action’ is defined broadly to include:\(^3\)

1. a project; and
2. a development; and
3. an undertaking; and
4. an activity or series of activities; and
5. an alteration to any of the above.

However, an action does not include:

1. a decision granting government authorisation for another person to take an action;\(^4\) and

2. a provision of funding by the commonwealth, a state or territory.\(^5\)

**What is ‘significant impact’?**

In order for an action to have a *significant impact* – consideration must be given to the intensity, duration, magnitude and geographic extent of the impacts. It is sufficient enough for the significant impact on the environment to be real or not remove chance or possibility then it is deemed to be *likely*. The Federal environment department has also published guidelines on determining significant impacts.

**Important!**

For more information on determining whether an action is likely to have a significant impact on a matter of national environmental significance you can visit the Australian Government’s website [here](#).

**What is a ‘matter of national environmental significance’?**

Under the EPBC Act there are nine matters of national environmental significance (MNES), being:

1. world heritage properties;
2. national heritage places;
3. wetlands of international importance (listed under the Ramsar Convention);
4. listed threatened species and ecological communities;
5. migratory species protected under international agreements;
6. Commonwealth marine areas;
7. the Great Barrier Reef Marine Park;
8. nuclear actions (including uranium mines); and
9. a water resource, in relation to coal seam gas development and large coal mining development.

Referrals under EPBC Act

Under the EPBC Act, a proponent must refer a project to the Commonwealth Minister for the Environment if it will or is likely to have a significant impact on a MNES.

Once a valid referral has been received, the Minister has 20 business days to decide if the proposed action is a controlled action and therefore requires a formal assessment and approval.

If the Minister determines that the project is a controlled action, the decision is publically notified together with the method of assessment e.g. by environmental impact statement or public environment report. A state or territory accredited assessment process may be used to assess the project’s impacts for the EPBC Act assessment. Under this process, the state or territory government will undertake an assessment for the Australian Government. The final decision on whether or not to approve the action remains with the Australian Minister for Environment, who will make a decision based on the state government’s assessment.

Comments are invited on whether or not a Referral is a ‘controlled action’ under the Act

When a project is referred for assessment under the EPBC Act, the Minister must open public consultation on whether the project is a controlled action and should therefore be assessed under the EPBC Act. This public notification period is open for a minimum of 10 business days and is published on the department’s website. As there are no extensions on the time available for public comment, it is critical to ensure that you work within the appropriate deadline.

Once the 20 business days is up, a decision will be made on if the action requires formal assessment and approval under the Act. Decisions will be available online at the Australian Government’s Department of the Environment and Energy EPBC Act – Public Notices webpage.

All public comments must be considered by the decision maker, but this does not mean you will receive a response or acknowledgement of your comment.

The Australian Government recommends the following tips for how to frame and draft comments to referrals:

1. Clearly reference the referral (EPBC number and proposal title) in your submission.
2. State clearly whether, and how, you believe the proposal would have a significant impact on matters protected by the EPBC Act. The Minister, or their delegate, can only take into account comments, concerns or issues in respect to those specific matters. Be specific by stating which aspects of the proposal would impact on matters (e.g. a particular listed species or heritage value).
3. If you believe the information in the referral is misleading or incorrect, you

2. Opportunities for Public Comment

A handy flowchart which details the process for EPBC referral assessment can be found here.
should state the reasons why and provide correct information, if available.

4. Give the source of any key information used in reaching your conclusion.

5. Provide clear contact details if the Department needs to get in touch with you to seek clarification.

6. 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 likely advise you if the comments can be accepted.

Any comments submitted may be released under the Freedom of Information Act 1982, and while public submissions are not generally deemed confidential, you can request it to be by clearly marking it as ‘confidential’.

If it is a controlled action comments will be invited on the referral or assessment documents

If the action is decided to be a controlled action then it will require approval and is subject to the formal assessment and approval process. There are six avenues for assessment, being:

1. accredited assessment process (Cth/Qld Bilateral agreement);
2. assessment on referral information (Division 3A);
3. assessment on preliminary documentation (Division 4);
4. public environment report (Division 5);
5. environmental impact statement (Division 6); and
6. public inquiry (Division 7).

The documents prepared by the proponent under the particular assessment process chosen by the Minister are also publicly notified, e.g. the draft environment impact statement (EIS). For each of these assessment processes public notification is mandatory, except public inquiry for which public notification is at the discretion of the decision maker.

If the assessment is being undertaken by an accredited state or territory assessment process the public notification will be undertaken by the state or territory government under the relevant state or territory legislative process. For example, if a project is declared to be a coordinated project under the State Development and Public Work Organisation Act 1971 (Qld) the EIS process under that Act will apply and public notification of the draft EIS will be undertaken by the Queensland government.

3. Statement of reasons for decisions and judicial review

There are no rights to seek merit review of a decision made under the EPBC Act.

For decisions made under the EPBC Act, you may be able to seek a ‘statement of reasons’ as to why and how the decision was made. Statements of reasons provide 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. Under sections 487 and 488 of the EPBC Act, the meaning of a ‘person aggrieved’ is extended to individuals and organisations engaged in a series of activities for the protection, conservation or research into the environment within Australia and
its territories. 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.

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. If you do not think the legal process for making the decision has been complied with, you could consider applying for judicial review of the decision. As a court action, judicial review can be expensive, time consuming and difficult to succeed in. We strongly recommend you seek legal advice prior to undertaking any such legal action in Court.

4. Useful contacts and further information

Environmental Defenders Office (Qld) Inc.
Ph: 07 3211 4466
Fax: 07 3211 4655
Post: 8/205 Montague Road, West End 4101
Email: edoql@edoql.org.au
Web: http://www.edoql.org.au

Federal Government:

Department of the Environment and Energy EPBC Act Referral List

Department of the Environment and Energy MNES Guidelines 1.1

Department of the Environment and Energy, EPBC Act – Public Notices

Department of the Environment and Energy, Help on assessment and approval notifications

5. References

1 Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss 33-36, 75-77A.
2 Note: the prohibited action may either be a criminal offence or incur a civil penalty: see Environment Protection and Biodiversity Conservation Act 1999 (Cth), (World Heritage) sss 12(1), 15A; (National Heritage) sss 15B, 15C; (Ramsar Wetlands) sss 16, 17B; (Threatened species) sss 18, 18A; (Migratory species) sss 20, 20A; (Nuclear actions) sss 21, 22A; (Marine environment) sss 23, 24A; (Great Barrier Reef Marine Park) sss 24B, 24C; (Protection of water resources from coal seam gas development and large coal mining development) sss 24D, 24E.
3 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 523.
4 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 524, defines things that are not ‘actions’.
5 Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 524A.