



NSW GOVERNMENT
Department of Planning

Commonwealth Environmental Protection and Biodiversity Conservation Act 1999

Guide to implementation in NSW | May 2007

More information and contact details

This guide provides preliminary advice for councils, government departments, consultants and the community on how this system is implemented in NSW.

More information is available from the Commonwealth Government website of the Department of the Environment and Water Resources: www.environment.gov.au/epbc. Information sheets, brochures and guidelines are available from this website.

Comments on the implementation of the Environment Protection and Biodiversity Conservation Act in NSW are welcome and can be emailed to assessments@planning.nsw.gov.au. Any comments on the Act itself should be sent to the Department of the Environment and Water Resources, GPO Box 787, Canberra ACT 2601 or phone **1800 803 772**.

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1. Introduction

This guide provides advice for councils, State government authorities, consultants and the community on how the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the recently signed Assessments Bilateral Agreement between NSW and Commonwealth governments affects the development assessment and approval processes in NSW under the *Environmental Planning and Assessment Act 1979* (EP&A Act).

1.1 What development does the EPBC Act apply to in NSW?

The Commonwealth EPBC Act establishes a requirement of Commonwealth environmental assessment and approval for:

- actions that are likely to have a significant impact on matters of national environmental significance
- actions that are likely to have a significant impact on the environment on Commonwealth land
- actions taken on Commonwealth land that are likely to have a significant impact on the environment anywhere
- actions by the Commonwealth that are likely to have a significant impact on the environment anywhere.

If the Commonwealth Environment Minister determines that an approval is required under the EPBC Act, the proposed action is deemed to be a '**controlled action**' and must undergo assessment under the EPBC Act and obtain an approval under the EPBC Act prior to being undertaken.

The Commonwealth Department of the Environment and Water Resources is the agency in Canberra responsible for administering the EPBC Act. Their contact is the Department of the Environment and Water Resources, GPO Box 787, Canberra ACT 2601 or phone **1800 803 772**. For more information visit the website www.environment.gov.au.

There are approximately 125,000 development applications determined each year in NSW under the EP&A Act. Approximately 60 NSW development applications are referred to the Commonwealth per year to determine if they are controlled actions. Of these, approximately 10 are declared to be controlled actions per year.

1.2 What is the NSW Assessments Bilateral Agreement?

In January 2007 the Commonwealth and NSW governments signed a Bilateral Agreement which accredits the assessment regimes under Part 3A, Part 4 and Part 5 of the EP&A Act for assessment purposes under the EPBC Act. The Bilateral Agreement applies to actions that the Commonwealth Environment Minister has determined are controlled actions under the EPBC Act in relation to a matter of national environmental significance, with the exception of nuclear actions. It does not have any effect in relation to an action taken in a Commonwealth area or an action by a Commonwealth agency. This guideline applies to developments which require an assessment under the EP&A Act and are controlled actions.

The Bilateral Agreement also applies to controlled actions where the EP&A Act does not apply but threatened species, population or ecological communities listed under the *Threatened Species Conservation Act 1995* (TSC Act) or *Fisheries Management Act 1994* (FMA Act) are likely to be significantly affected, an approval may be required

from the Department of Environment and Conservation under the TSC Act or the Department of Primary Industries under the FMA Act. Please contact the Department of Environment and Conservation (info@environment.nsw.gov.au) or Department of Primary Industries (information-advisory@dpi.nsw.gov.au).

(a) Implications of the Bilateral Agreement for assessment in NSW

Prior to the Bilateral Agreement, the NSW assessment process was accredited by the Commonwealth on a project by project basis when a full environmental assessment was required under the EPBC Act. This avoided the need to assess the developments under both Acts. Now under the Bilateral Agreement, project by project accreditation of the process is no longer required.

Following the assessment and determination under the EP&A Act, the Assessment Report and determination including approval conditions (if approved) is forwarded to the Department of the Environment and Water Resources. This means that there is no longer a need for parallel assessments by the Commonwealth and the NSW government for controlled actions, and that projects which require approval from both the State and the Commonwealth would only be assessed once — by a State agency or a council. The same assessment is then used by both the State and the Commonwealth to determine whether to approve the proposal.

The Bilateral Agreement will only apply to projects that are determined to be controlled actions by the Commonwealth. These projects may be assessed under the Bilateral Agreement if Part 3A, Part 4 and Part 5 of the EP&A apply. Where the EP&A Act does not apply but the Threatened Species Conservation Act 1995 or the Fisheries Management Act 1994 requires an approval, the Bilateral Agreement applies with the Department of Environment and Conservation or Department of Primary Industries undertaking the assessment. If the projects falls outside of these NSW assessment processes, it will be subject to a separate assessment process to be determined by the Commonwealth in accordance with the EPBC Act.

The Bilateral Agreement does not apply to developments that affect Commonwealth land or developments undertaken by Commonwealth agencies. Such developments will need to be assessed separately by the Commonwealth and NSW governments, as relevant.

The Bilateral Agreement only provides for accreditation of the specified state assessment processes to meet the assessment requirements of the EPBC Act. The Commonwealth will still need to issue a separate approval for the development (based on the state assessment and approval conditions).

(b) What difference does the Bilateral make?

Prior to the Bilateral Agreement, the NSW assessment process (if undertaken under Part 3A, Part 4 and Part 5 of the EP&A) was typically accredited by the Commonwealth on a project by project basis. The bilateral agreement avoids the need for the Commonwealth to undertake this project by project accreditation process.

Once the Commonwealth has declared a development to be a controlled action, it will notify the Department of this action. The Department of Planning will notify the Department of the Environment and Water Resources that the development will be assessed in accordance with the bilateral agreement under Part 3A, Part 4 or Part 5 as relevant.

- Where the Minister is the approval authority, the Department will undertake the assessment in accordance with the Bilateral Agreement with the assessment report forwarded to the Department of the Environment and Water Resources.

- Where the Minister is not the approval authority, the Department will notify the relevant Council or Agency that the matter is a controlled action indicating that the matter will need to be assessed in accordance with the Bilateral Agreement with the assessment report and decision of the council or agency forwarded to the Department of the Environment and Water Resources.

It should be noted that the bilateral agreement imposes a number of additional obligations during the environmental assessments process. These are set out in the next section of the guideline.

Previously, under s130(1B) of the EPBC Act, the Commonwealth Minister for the Environment and Water Resources required a notice from the State certifying that impacts of the controlled action on **non NES matters** had been assessed to the greatest extent practicable, before making a decision whether or not to approve a controlled action. The s130(1B) notices are no longer required to be issued for projects assessed under the Bilateral Agreement, provided those projects have been referred to the Commonwealth prior to 19 February 2007 (the date of commencement to recent amendments to the EPBC Act which removed the requirement for a s130(1B) notice).

(c) *Obligations on the Department of Planning as administrator of the Bilateral*

The Department of Planning has responsibility for administration of the bilateral agreement in NSW including:

- issuing guidelines outlining the relationship between the NSW EP&A Act and the Commonwealth EPBC Act processes under the Bilateral to ensure the assessments of matters of national environmental significance are appropriately integrated into assessments in State processes
- establishing on the Department of Planning's website, a register of controlled actions in NSW and their assessment process with an appropriate link to the Department of the Environment and Water Resources website
- using its best endeavours to ensure actions are referred to the Department of the Environment and Water Resources
- developing co-operative arrangements with Department of the Environment and Water Resources in monitoring the implementation of approval conditions and any compliance or enforcement actions.

2. Proponent's referrals process

2.1 Which actions need to be referred to the Commonwealth?

Any development that needs Commonwealth approval is called a **controlled action**. A controlled action is an action that needs approval under the EPBC Act if the Commonwealth decides:

- it is likely to have a significant impact on matters of national environmental significance
- it is likely to have a significant impact on the environment of Commonwealth land
- it is to be taken on Commonwealth land and is likely to have a significant impact on the environment anywhere
- it is an action to be taken by the Commonwealth that is likely to have a significant impact on the environment anywhere.

Only the Commonwealth can give you definitive advice on whether your development is a controlled action. For help in deciding whether or not an action should be referred, you should consult the EPBC Act Policy Statements. **Telephone:** Freecall 1800 803 772 or **email:** epbc.referrals@environment.gov.au.

(a) What is a matter of national environmental significance?

Matters of national environmental significance (NES) under the EPBC Act are:

- World Heritage properties
- national heritage places
- wetlands of international importance (Ramsar wetlands)
- Threatened species and ecological communities listed under the EPBC Act
- migratory species listed under the EPBC Act
- Commonwealth marine environment
- nuclear actions (including uranium mining).

A list of NES matters in NSW is in Appendix 1 of this guide. The Department of the Environment and Water Resources website should be consulted for an up-to-date list.

(b) What is an action?

An action is defined in the EPBC Act as:

- a project
- a development
- an undertaking
- an activity or series of activities, or
- an alteration of any of the above.

An action may be on:

- Commonwealth land
- State land
- council land
- private land
- water.

An action does **not** include a **governmental authorisation** such as a works approval, a permit or a licence.

An action may potentially include a non-physical action, which is not a governmental authorisation, such as:

- the sale, lease or disposal of land, or
- the rezoning of land.

If that non-physical action is likely to have indirect consequences on a matter of national environmental significance, when rezoning land, planning authorities should consider whether the rezoning facilitates actions that are likely to have significant impact on a matter of national environmental significance.

An action may also include the physical activities that are permitted by a governmental authorisation such as:

- erecting a building
- constructing a road
- drainage works
- clearing native vegetation
- planting an orchard
- a mining operation
- constructing a track in a national park.

(c) How do I know if my action will have a significant impact on an NES matter?

As the proponent of an action, you will need to refer your action to the Commonwealth for a decision on whether their approval will be needed under the EPBC Act. The Department of the Environment and Water Resources has prepared a guideline to help decide whether to refer your action: *Significant impact guidelines: matters of national environmental significance* (DEWR May 2006)

(d) How do I know if my action (taken outside Commonwealth land) will have a significant impact on the environment on Commonwealth land?

As the proponent of an action, you will need to refer your action to the Commonwealth for a decision on whether approval will be needed under the EPBC Act. This applies to actions that are likely to have a significant impact on the environment on Commonwealth land that are located outside Commonwealth land. In addition, approval is required under the EPBC Act for actions on Commonwealth land that are likely to have a significant impact on the environment in general. If you believe that your action may have a significant impact on the environment on Commonwealth land or if you are proposing to take an action on Commonwealth land that is likely to have a significant impact on the environment generally, you should contact the Department of the Environment and Water Resources to discuss whether you will need to make a referral under the EPBC Act. The Department of the Environment and Water Resources has prepared a guideline to help you decide whether to refer your action: *Significant impact guidelines: actions on, or impacting upon, Commonwealth land and actions by Commonwealth agencies* (DEWR May 2006).

(e) Do these provisions apply to existing development or when altering an existing development?

Approval from the Commonwealth is only needed for an existing development or activity if it is proposed to be enlarged, expanded or intensified and the modification is likely to have a significant impact on the environment on Commonwealth land or NES matters.

The EPBC Act lists some exceptions from the need for Commonwealth approval. These include:

- actions that on 16 July 2000 (when the Act commenced) had all necessary State or Commonwealth approvals for the action to be legally carried out
- actions that are a lawful continuation of a use (and are not an expansion or intensification).

For a more detailed list of exceptions, refer to the Department of the Environment and Water Resources's Administrative guidelines *Practice Guide 1: Prior authorisation and continuing use exemptions* - Sections 43A and 43B.

It should be noted that criminal penalties under the EPBC Act for undertaking an action which is likely to have a significant impact on a matter of National Environmental Significance without an approval have recently been strengthened.

2.2 How do I refer a proposed action to the Commonwealth?

When a person proposes to take an action that they believe may need approval under the EPBC Act, they must refer the proposal to the Commonwealth Environment Minister. A person can also make a referral if they are unsure whether approval is needed under the Act or need certainty. The purpose of the referral process is to determine whether a proposed action requires approval under the EPBC Act, and if so, if the Bilateral Agreement applies. The Department of the Environment and Water Resources will advise within 20 business days of receipt of a valid referral as to whether or not a proposal is a controlled action and needs assessment and approval under the Act.

Referral forms and guidelines for submitting referrals are on the Department of the Environment and Water Resources web page. For help in deciding whether or not an action should be referred, you should consult the EPBC Act Policy Statements.
Telephone: Freecall 1800 803 772 or **email:** epbc.referrals@environment.gov.au

(a) Who makes the referral?

The proponent has the responsibility to refer the proposed development to the Department of the Environment and Water Resources to determine whether the development is a controlled action.

A person proposing to take an action or responsible for the action can make a referral. A State, Territory or Commonwealth Minister, or government agency that is aware of a proposed action can also make a referral, if that Minister or agency has administrative responsibilities relating to the action. The Commonwealth Environment Minister may request a person to make a referral.

(b) What information must be provided with a referral?

The proponent fills out the Referral Form and refers it to the Department of the Environment and Water Resources along with any preliminary assessment, including any assessment that may have been done at the State level.

The referral form requires information on proponent contact details and a brief description of the proposal, its location and a preliminary information on the potential impacts on matters of national environmental significance or Commonwealth land. The referral may be submitted by email or in paper form. It is also recommended that the referral form be accompanied by any preliminary assessment of the impacts on matters of national environmental significance, impacts on Commonwealth land (if the proposed action is to be taken outside Commonwealth land) and impacts on the environment generally (if the proposed action is to be taken by on Commonwealth land or by a Commonwealth agency).

(c) When should it be referred?

To minimise delays in getting approvals under the Commonwealth and State processes, it is best that the development has been referred to the Department of the Environment and Water Resources and a decision has been made on whether it is a

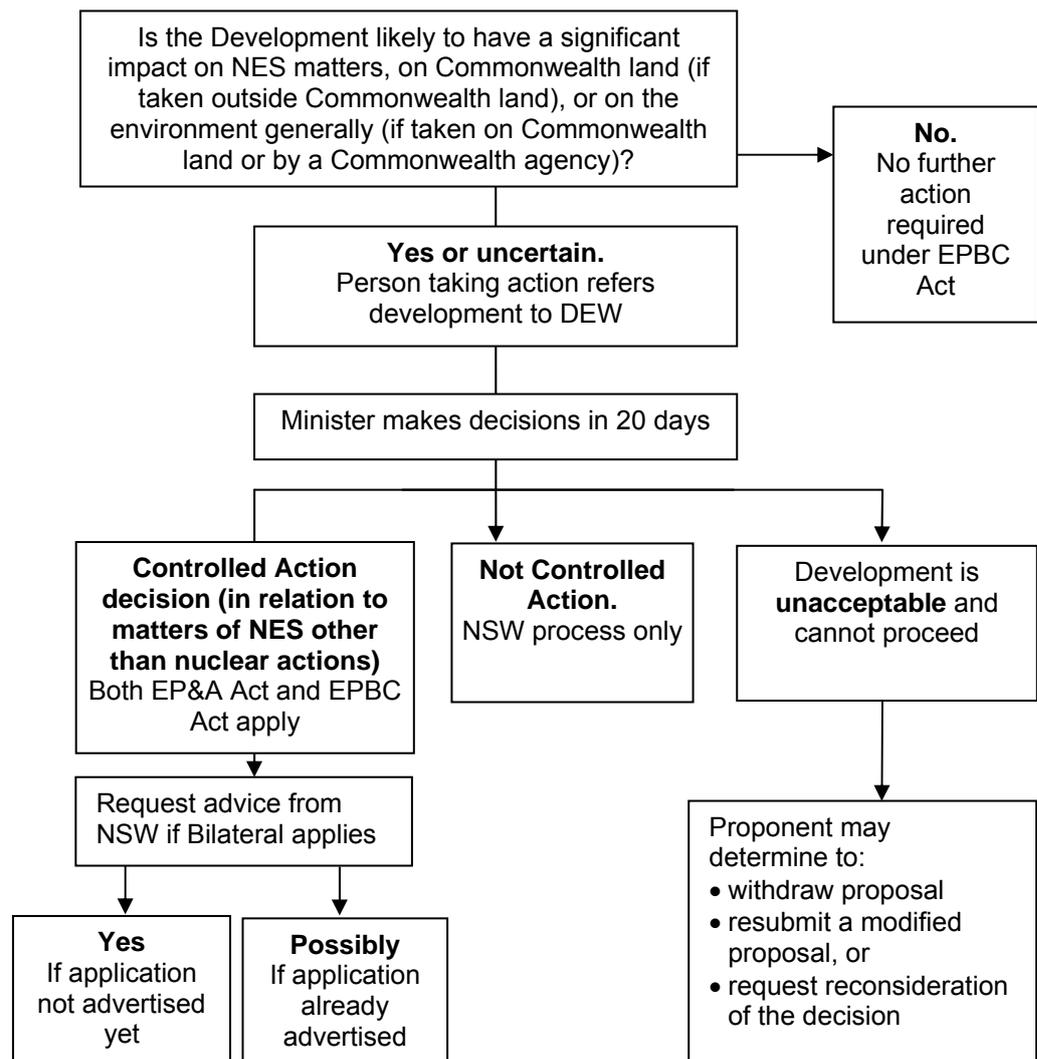
controlled action before the environmental assessment (EIS/EA/SEE/REF) is exhibited under the EP&A Act.

(d) What happens after you have made a referral?

Notices of all referrals are placed on the Department of the Environment and Water Resources Internet, as are all decisions on whether referred actions require approval. They can be accessed via the web site. The public is invited to comment within 10 business days on whether the proposed development is a controlled action. The Commonwealth Environment Minister must also inform relevant Commonwealth, State Ministers of a referral, and invite them to provide comments about whether the action requires approval within 10 business days. The Commonwealth Minister then makes a decision within 20 business days after the receiving the referral for an action, as to whether the development proposal is a controlled action.

This decision determines if the development is a controlled action, and if so will identify the relevant matters of national environmental significance or the Commonwealth land issues that must be addressed in the assessment process.

Figure 1. Referral Process



3. NSW assessment process if controlled action

The need for approval under the EPBC Act does not alter the need for approvals under NSW State laws. In fact, under the agreement with the Commonwealth, it is that part of the State's assessment relating to impacts on matters of national environmental significance, that the Commonwealth will rely on to make a determination under the EPBC Act. Under the agreed process for NSW, an approval under the EPBC Act will be obtained only after an approval has been obtained under the NSW law, usually under the EP&A Act.

Most controlled actions will need assessment and approval under the EP&A Act, for example:

- project approval under Part 3A from the Minister for Planning
- a development consent under Part 4 of the EP&A Act from the local council
- an infrastructure project undertaken by a State agency, catchment authority or council which does not require consent but an assessment under Part 5.

The following sections set out the procedures for assessment under Part 3A, Part 4 and Part 5 of the EP&A Act which integrate the provisions required under the Bilateral Agreement. These procedures apply to the assessment of controlled actions where it is known upfront that the development is a controlled action. See section 3.4 for procedures which should apply when a development is declared to be a controlled action when the NSW assessment process is already underway.

3.1 Major Project Assessment under Part 3A

The Minister for Planning is responsible for the determination of major infrastructure and other major projects of State or regional environmental planning significance under Part 3A of the Act. Major projects are identified in State Environmental Planning Policy (Major Projects) 2005 or may be declared by order of the Minister. Such orders are published in the NSW Government Gazette.

(a) Notification that proposal is a Controlled Action and assessment requirements

- (i) If a major project is a controlled action, the Department of the Environment and Water Resources contacts the Department of Planning requesting notification that the development will be assessed under the accredited Part 3A assessment process under the bilateral agreement
- (ii) The Department of Planning should notify the Department of the Environment and Water Resources
 - confirming the assessment will be undertaken under Part 3A under the Bilateral
 - extending an invitation to the Department of the Environment and Water Resources to attend the Planning Focus Meeting (PFM), if a PFM is to be held
 - inviting the Department of the Environment and Water Resources to email to Department of Planning within 21 days, any assessment requirements to be included in the Director-General Requirements (DGRs) for assessment of the development (where there is no PFM held).

- (iii) Any requirements identified by the Department of the Environment and Water Resources will be included in the DGRs for the project. The DGRs must also ask the proponent to address matters set out in EPBC Regulation
- (iv) Schedule 4 of the EPBC Act outlines the matters to be addressed under that Act (see Attachment 2 of Appendix 2). These generally duplicate the requirements under the EP&A Act. However there are a number of matters which may not be typically considered, which should be addressed. These include:
 - how the action relates to any other actions (of which the proponent should reasonably be aware) that have been, or are being, taken or that have been approved in the region affected by the action
 - a statement on the source of the information used in the assessment and how recent the information is and how the reliability of the information was tested
 - identification of affected parties, including a statement mentioning any communities that may be affected and describing their views
 - the cost of the mitigation measures
 - a statement identifying any additional approval that is required and the name of the agency responsible for endorsing or approving each mitigation measure or monitoring program
 - details of any proceedings under a Commonwealth or State law for the protection of the environment or the conservation and sustainable use of natural resources against the person proposing to take the action; or the person making the application
 - if the person proposing to take the action is a corporation—details of the corporation’s environmental policy and planning framework.

(b) Advertising and invitation for public comment where the Minister is the approval authority

- (i) The proponent must prepare its EA taking into consideration the DGRs and submit it to Department of Planning for the adequacy test before it is publicly exhibited.
- (ii) Once the Department of Planning determines that the EA is adequate, it must be advertised for a minimum of 30 days with an invitation for public submissions.
- (iii) An advertisement in a paper circulating nationally (i.e. Sydney Morning Herald, The Australian or Financial Review) must state that the development is a controlled action as well as the advertisement requirements under the EP&A Act.
- (iv) The EA must also be published on the Department’s website, linked to the Department of the Environment and Water Resources’ website.

(c) Assessment of the project

- (i) The Department of Planning assesses the impacts of the controlled action under the EP&A Act both in relation to matters of National environmental significance and other environmental matters.
- (ii) The assessment report prepared by the Department of Planning must include:
 - a description of the development
 - a description of the relevant impacts of the development
 - a description of feasible mitigation measures, changes to the development or procedures, which have been proposed by the

proponent or suggested in public submissions, and which are intended to prevent or minimise relevant impacts

- to the extent practicable, a description of any feasible alternatives to the development that have been identified through the assessment, and their likely impact.
- (iii) The Department of Planning must consult with the Department of the Environment and Water Resources when developing approval conditions.

(d) Determination

- (i) Once the Minister for Planning has made a determination, the Department of Planning submits to the Department of the Environment and Water Resources:
- a copy of the Assessment Report and decision
 - a copy of the approval conditions that apply, or are proposed to apply to the controlled action, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the controlled action
 - any other information available or used by the Department of Planning in the decision-making process.
- (ii) The determination must also be published on the Department of Planning website, and linked to the Department of the Environment and Water Resources website.

(e) Monitoring and enforcement

- (i) The Department of Planning and the Department of the Environment and Water Resources will need to co-operate in monitoring and enforcing conditions of approvals.

3.2 Development application and Assessments Part 4

The local council or the Minister for Planning is the consent authority for development which requires consent under the provisions of the local environment plan or other planning instruments. The development application is assessed and determined under Part 4 of the EP&A Act.

(a) Notification that proposal is a controlled action and assessment requirements

- (i) The Department of the Environment and Water Resources notifies the Department of Planning that a development is a controlled action.
- Where council is the consent authority, Department of Planning will notify the relevant Council that the development is a controlled action indicating that the development application will need to be assessed in accordance with the Bilateral Agreement with the assessment report and decision of the council forwarded to Department of Planning. The Department of the Environment and Water Resources may also separately notify the relevant Council of a controlled action decision.
 - Where the Minister is the consent authority, the Department will undertake the assessment in accordance with the Bilateral Agreement.
- (ii) The Department of Planning will:

- notify the Department of the Environment and Water Resources that the development will be assessed under Part 4 under the bilateral agreement
 - extend an invitation to the Department of the Environment and Water Resources to attend any pre-development application meeting (including the Planning Focus Meeting (PFM) if a PFM is to be held for a designated development)
 - invite the Department of Environment and Water Resources to email to Department of Planning within 21 days, any assessment requirements
- (iii) Any requirements identified by the Department of the Environment and Water Resources will be:
- included in the DGRs if designated development and an EIS is required. The DGRs must also ask the proponent to address matters set out in Schedule 4 of the EPBC Regulation
 - forwarded to the relevant council as the consent authority. The council should indicate to the applicant that the development is a controlled action and that the SEE should include an assessment of the impacts of the development on the controlled action matters (e.g. threatened species listed under the EPBC Act).
- (iv) The Schedule 4 of the EPBC Regulation outlines the matters to be addressed under the EPBC Act (see Appendix 2). These generally duplicate the requirements under the EP&A Act. However there are a number of matters which may not be typically considered, which should be addressed by the applicant in their SEE or EIS. These include:
- how the action relates to any other actions (of which the proponent should reasonably be aware) that have been, or are being, taken or that have been approved in the region affected by the action
 - a statement on the source of the information used in the assessment and how recent the information is and how the reliability of the information was tested
 - identification of affected parties, including a statement mentioning any communities that may be affected and describing their views.
 - the cost of the mitigation measures
 - a statement identifying any additional approval that is required and the name of the agency responsible for endorsing or approving each mitigation measure or monitoring program
 - details of any proceedings under a Commonwealth or State law for the protection of the environment or the conservation and sustainable use of natural resources against the person proposing to take the action; or the person making the application
 - if the person proposing to take the action is a corporation—details of the corporation’s environmental policy and planning framework.
- (v) The applicant will prepare its Environmental Impact Statement (EIS) or Statement of Environmental Effects (SEE) taking into consideration the controlled action matters.

(b) Exhibition of development application

- (i) The Applicant submits the DA with the SEE or EIS to consent authority. Once the consent authority determines that the DA is adequate for exhibition purposes, the SEE or EIS must be advertised for a minimum of 30 days and made available with an invitation for public comment to the consent authority.

- (ii) An advertisement must be placed in a paper circulating nationally (i.e. Sydney Morning Herald, Australian or Financial Review) stating that the development is being advertised under the EP&A Act and EPBC Act. The advertisement must state that the development is a controlled action.
- (iii) The council should also forward a copy of the DA and the SEE/EIS so it can also be published on the DoP website, and linked to the Department of the Environment and Water Resources, website.

(c) Assessment and Conditions

- (i) The consent authority must assess the DA in accordance with the requirements of the EP&A Act and address matters in section 79C in its assessment.
- (ii) The assessment report prepared by the consent authority must include:
 - a description of the development
 - a description of the relevant impacts of the development
 - a description of feasible mitigation measures, changes to the development or procedures, which have been proposed by the proponent or suggested in public submissions, and which are intended to prevent or minimise relevant impacts
 - to the extent practicable, a description of any feasible alternatives to the development that have been identified through the assessment, and their likely impact.
- (iii) The consent authority must consult with the Department of the Environment and Water Resources in the development of approval conditions.

(d) Determination

- (i) Once the consent authority has made a determination, a copy of the Assessment Report and the determination must be sent to the Department of Planning.
- (ii) Department of Planning will submit to the Department of the Environment and Water Resources:
 - a copy of the Assessment Report and determination
 - a copy of the approval conditions that apply, or are proposed to apply to the controlled action, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the controlled action
 - any other information available or used by the Department of Planning in the decision-making process.
- (iii) The determination must also be published on the Department of Planning website, and linked to the Department of the Environment and Water Resources website.

(e) Monitoring and enforcement

- (i) The consent authority and the Department of the Environment and Water Resources will need to co-operate in monitoring and enforcing conditions of approvals.

3.3 Assessments by Public Authorities under Part 5

If the development does not require development consent under Part 4 of the EP&A Act or project approval under Part 3A of the EP&A Act, then Part 5 of the Act may apply. Typically Part 5 applies to the following types of activities which require a permit, licence or allocation of funds from the council or State authorities:

- State or local government infrastructure projects or works such as roads, rail, electricity supply, gas supply, water supply, sewerage systems or maintenance dredging
- activities in National Parks or reserves
- agricultural activities which require an approval from a government agency (other than land clearing)
- exploration activities for minerals or petroleum resources
- environmental restoration works authorised by the CMAs or other authorities
- activities in areas where the council plan does not required consent (such as in the ocean).

In these cases, the public authority responsible for issuing the approval must determine whether the activity will have a significant effect on the environment.

(a) Notification that proposal is a controlled action and assessment requirements

- (i) The Department of the Environment and Water Resources notifies the Department of Planning that an activity is a controlled action.
- (ii) The Department of Planning will notify the relevant determining authority (Council, State government authority or CMA) that the matter is a controlled action indicating that the activity will need to be assessed in accordance with the Bilateral Agreement with the assessment report and decision forwarded to Department of Planning. The Department of the Environment and Water Resources may also separately notify the relevant council or agency of a controlled action decision.
- (iii) The Department of Planning will:
 - notify the Department of the Environment and Water Resources that the development will be assessed under Part 5 under the bilateral agreement
 - extend an invitation to Department of Environment and Water Resources to attend any preliminary meeting (including the Planning Focus Meeting (PFM) if a PFM is to be held if an EIS is required)
 - invite the Department of the Environment and Water Resources to email to Department of Planning within 21 days, any assessment requirements
- (iv) Any requirements identified by the Department of the Environment and Water Resources will be:
 - included in the DGRs if an EIS is required
 - forwarded to the relevant determining authority. The determining authority should indicate to the proponent that the development is a controlled action and that the Review of Environmental Factors (REF) or EIS should include an assessment of the impacts of the development on the controlled action matters (e.g. threatened species listed under the EPBC Act).
- (v) The Schedule 4 of the EPBC Regulation outlines the matters to be addressed under the EPBC Act (see Appendix 2). These generally duplicate the requirements under the EP&A Act. However there are a

number of matters which may not be typically considered, which should be addressed by the applicant in their REF or EIS. These include:

- how the action relates to any other actions (of which the proponent should reasonably be aware) that have been, or are being, taken or that have been approved in the region affected by the action
- a statement on the source of the information used in the assessment and how recent the information is and how the reliability of the information was tested
- identification of affected parties, including a statement mentioning any communities that may be affected and describing their views.
- the cost of the mitigation measures
- a statement identifying any additional approval that is required and the name of the agency responsible for endorsing or approving each mitigation measure or monitoring program
- details of any proceedings under a Commonwealth or State law for the protection of the environment or the conservation and sustainable use of natural resources against the person proposing to take the action; or the person making the application
- if the person proposing to take the action is a corporation—details of the corporation's environmental policy and planning framework.

(b) *Exhibition of Assessment*

- (i) The proponent submits the assessment to the determining authority. It should be noted that there are no requirements in the EP&A Act relating to REFs including consultation. However as part of good practice, many determining authorities consult with the community on activities which do not require an EIS including exhibition of the REF. In circumstances where a REF has only been prepared under Part 5 and it is a controlled action under the EPBC Act, the REF should be exhibited in the same manner as if it is an EIS.
- (ii) Once the determining authority determines that the assessment is adequate for exhibition purposes, the REF or EIS must be advertised for a minimum of 30 days and made available with an invitation for public comment to the determining authority.
- (iii) An advertisement must be placed in a paper circulating nationally (i.e. Sydney Morning Herald, Australian or Financial Review) stating that the development is being advertised under the EP&A Act and EPBC Act. The advertisement must state that the development is a controlled action.
- (iv) The determining authority should also forward a copy of the DA and the REF/EIS so it can also be published on the DoP website, and linked to the Department of the Environment and Water Resources' website.

(c) *Assessment and Conditions*

- (i) The determining authority must assess the EIS and REF. An assessment report must be prepared which includes:
 - a description of the development
 - a description of the relevant impacts of the development
 - a description of feasible mitigation measures, changes to the development or procedures, which have been proposed by the proponent or suggested in public submissions, and which are intended to prevent or minimise relevant impacts
 - to the extent practicable, a description of any feasible alternatives to the development that have been identified through the assessment, and their likely impact.

- (ii) The determining authority must consult with the Department of the Environment and Water Resources in the development of approval conditions.

(d) Determination

- (i) Once the determining authority has made a determination, a copy of the Assessment Report and the determination must be sent to the Department of Planning.
- (ii) Department of Planning will submit to the Department of the Environment and Water Resources:
 - a copy of the Assessment Report and determination
 - a copy of the approval conditions that apply, or are proposed to apply to the controlled action, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the controlled action
 - any other information available or used by the Department of Planning in the decision-making process.
- (iii) The determination must also be published on the Department of Planning website, and linked to the Department of the Environment and Water Resources website.

(e) Monitoring and enforcement

- (i) The determining authority and the Department of the Environment and Water Resources will need to cooperate in monitoring and enforcing conditions of approvals.

3.4 What happens if the proponent has not referred the development early?

It is desirable that developments with the potential for significant impacts on matters of national environmental significance or Commonwealth land are referred early to the Department of the Environment and Water Resources to minimise delays or the need for duplicated assessment processes. However, sometimes the assessment process may have commenced under the EP&A Act, and the proponent has not referred the development to the Commonwealth under the EPBC Act to determine if it is controlled action.

(a) If referral has not occurred prior to requirements being issued

If the proponent has not referred the development to the Commonwealth prior to the pre-application meeting or the issuing of the Director-General's Requirements (DGRs):

- if the development needs an EIS under Part 4 or 5 or is under Part 3A, a standard clause will be included in the DGRs, advising proponents of their responsibility to refer to the Department of the Environment and Water Resources any development which is likely to have a significant impact on NES matters
- if the development does not need an EIS or is not Part 3A, the consent or determining authority should remind the proponent of their responsibility to refer to the Department of the Environment and Water Resources any development which is likely to significantly affect NES matters.

If the proponent considers that the development may affect NES matters and subsequently refers the development to the Commonwealth, the proponent

should forward any relevant assessment information to the Department of the Environment and Water Resources information along with the Referral Form.

- (i) If it is determined to be a controlled action, the Department of the Environment and Water Resources will notify Department of Planning requesting advice on whether the development is to be assessed in accordance with the bilateral agreement (i.e. will it be assessed under Part 3A, Part 4 or Part 5).
- (ii) Where the Minister for Planning is not the approval authority, the Department will consult with the relevant council or State authority as to what stage the assessment process has progressed to. The development can still be assessed under the bilateral if the environmental assessment has not yet been advertised.
- (iii) Department of Planning will notify Department of the Environment and Water Resources that the assessment process under the EP&A Act is already underway, and will forward the Department of the Environment and Water Resources a copy of any DGRs or other requirements which have been issued. The Department of the Environment and Water Resources will be invited to provide any additional matters within 21 days to be included in supplementary DGRs.
- (iv) The proponent should be notified that additional assessment requirements may be issued and to delay finalising the environmental assessment until notified.
- (v) If the Department of the Environment and Water Resources has any additional matters, supplementary requirements will be immediately issued to the proponent for inclusion in the environmental assessment.
- (vi) The development will then be assessed under the Bilateral Agreement.

(b) *If referral has not occurred prior to the exhibition of the assessment*

Sometimes during or following the exhibition of an application under the EP&A Act, information may come to light regarding the location of threatened species or migratory birds (listed under the EPBC Act) on a site which may not have been known previously. In those circumstances, the proponent may need to refer the proposal to the Commonwealth to determine if it is a controlled action under the EPBC Act during or following exhibition of the environmental assessment.

- (i) If the proponent refers the development to the Commonwealth once the environmental assessment (EA/EIS/SEE/REF) has been exhibited, the proponent should attach the environmental assessment to the Referral Form when referring the development to the Department of the Environment and Water Resources.
- (ii) If the development is then declared to be a controlled action, the Department will be notified by Department of Environment and Water Resources.
- (iii) The Bilateral Agreement may not apply if the NSW environmental assessment has been, or is in the process of being exhibited and the Department will notify the Department of the Environment and Water Resources accordingly.
- (iv) If the Bilateral Agreement does not apply, the environmental assessment process will proceed as normal under the EP&A Act. However, the relevant council or agency should forward a copy of the Assessment Report and determination to the Department of the Environment and Water Resources once a decision has been made for its information.
- (v) The Department of the Environment and Water Resources will proceed with a separate assessment under the EPBC Act to satisfy the requirements of that Act.

3.5 What is the relationship between Commonwealth and State approvals?

The proponent must have all the necessary approvals to legally carry out a development. As a result, if a development is a controlled action, an approval is required under both the Commonwealth and State legislation. If the Commonwealth, State Government or local council do not approve the development under the relevant legislation, then it cannot proceed.

If the State or a local council approves a development, the Commonwealth can still refuse it. In those circumstances, even though a Commonwealth approval only relates to the impacts of an action on NES matters or significant impacts on the environment of Commonwealth land, the development would not be able to proceed.

There are a range of appeal rights under the EP&A Act. In relation to decisions made under the EPBC Act, including a decision whether to approve an action by the Commonwealth Minister for the Environment and Water Resources, a proponent can seek a review of the decision on administrative law grounds in the Federal Court of Australia. The grounds for appeal are set out in section 5 of the Commonwealth *Administrative Decisions (Judicial Review) Act 1997*, and include:

- a breach of the rules of natural justice
- procedural error
- the decision not being authorised by the EPBC Act
- the decision being made for improper purposes.

Appendix 1. List of NSW NES matters

The following list identifies the NES matters in NSW, as of February 2007. While all care has been taken in extracting the NSW list from the national list, this is provided as a guide only and no responsibility is taken for any errors or omissions. The national lists and detailed information on particular sites can be obtained from the Department of the Environment and Water Resources' website (www.environment.gov.au).

Declared World Heritage properties

- Willandra Lakes Region
- Central Eastern Rainforest Reserves
- Lord Howe Island Group
- Greater Blue Mountains Area

National Heritage Places

- Kurnell Peninsula
- Brewarrina Aboriginal Fish Traps (Baiames Ngunnhu)
- Sydney Opera House
- First Government House Site
- North Head, Sydney
- Ku-ring-gai Chase National Park, Lion Island, Long Island and Spectacle Island Nature Reserves
- Warrumbungle National Park
- Royal National Park and Garrawarra State Conservation Area

Declared Ramsar wetlands

- Lake Pinaroo wetland (north-west of Tibooburra)
- Blue Lake wetland (Kosciusko alpine lake)
- Little Langotholin Nature Reserve (New England)
- Macquarie Marshes Nature Reserve (Warren/Quambone in central northern NSW)
- Hunter Estuary (Newcastle)
- Towra Point Nature Reserve (Kurnell/Botany Bay)
- Gwydir Wetland (west of Moree)
- Myall Lakes National Park (Hawks Nest and Tea Gardens)
- Narran Lake Nature Reserve (Murray-Darling, north-west of Walgett)
- Central Murray State Forests (State forests near Deniliquin)
- Fivebough and Tuckerbil Wetlands (near Leeton)

Listed threatened species

- lists established by the Minister under Part 13, Division 1, Subdivision A of the EPBC Act—from Schedules 1 and 2 of the Endangered Species Protection Act 1992. (Note. The EPBC Act may list species that are not listed under the NSW Threatened Species Conservation Act or the Fisheries Management Act.)

Listed ecological communities in NSW

- Buloke Woodlands of the Riverina and Murray–Darling Depression Bioregions
- Cumberland Plain Woodland
- Eastern Suburbs Banksia Scrub
- White Box – Yellow Box – Blakely's Red Gum Grassy Woodland and Derived Native Grassland
- Natural Temperate Grassland of the Southern Tablelands of NSW
- Semi-evergreen Vine Thickets of the Brigalow Belt (North and South) and Nandewar Bioregions

- Bluegrass (*Dichanthium spp.*) Dominant Grasslands of the Brigalow Belt Bioregions (north and south)
- Brigalow (*Acacia harpophylla* dominant and codominant)
- Blue Gum High Forest of the Sydney Basin Bioregion
- Turpentine – Ironbark Forest in the Sydney Basin Bioregion
- Shale Sandstone Transitional Forest
- Temperate Highland Peat Swamps on Sandstone
- Weeping Myall – Coobah – Scrub Wilga Shrubland of the Hunter Valley
- The Community of Native Species Dependent on Natural Discharge of Groundwater from the Great Artesian Basin
- Upland Wetlands of the New England Tablelands and the Monaro Plateau

Note. The EPBC Act may list ecological communities that are not listed under the NSW Threatened Species Conservation Act or may list only highest condition classes of State listed communities.

Listed migratory species

- lists established by the Minister under Part 13, Division 2, Subdivision A of the Act —from appendices to the Bonn Convention and for which Australia is a Range State under the convention; JAMBA and CAMBA; any international agreements.

Commonwealth marine areas

Under the United Nations Convention on the Law of the Sea, Australia has rights and responsibilities over some 16 million square kilometres of ocean. The great majority of Australia's marine area is under sole Australian Government jurisdiction. Around continental Australia, the Commonwealth Marine Area stretches from the external boundaries of the Exclusive Economic Zone (EEZ) which constitutes the waters 200 nautical miles seaward of the coastal baseline to three nautical miles from the coastal baseline.

In the Commonwealth Marine Area, Australia has the right to explore and exploit living and non-living resources, and the concomitant obligation to protect and conserve the marine environment.

Nuclear actions (including uranium mining)

A nuclear action is:

- establishing or significantly modifying a nuclear installation
- transporting spent nuclear fuel or radioactive waste products arising from reprocessing
- establishing or significantly modifying a facility for storing radioactive waste products arising from reprocessing
- mining or milling uranium ores, excluding operations for recovering mineral sands or rare earths
- establishing or significantly modifying a large-scale disposal facility for radioactive waste. A decision about whether a disposal facility is large scale will depend on factors including:
 - the activity of the radioisotopes to be disposed of
 - the half-life of the material
 - the form of the radioisotopes, and
 - the quantity of isotopes handled, or
- decommissioning or rehabilitating any facility or area in which an activity described above has been undertaken, or
- any other type of action set out in the EPBC Regulations.

Appendix 2. Environmental Protection and Biodiversity Conservation Act matters

The Commonwealth Minister for the Environment and Water Resources has declared the project to be a controlled action under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Under the provisions of the Bilateral Agreement between New South Wales and Commonwealth Governments, the environmental assessment of the impacts in the SEE/REF/EIS/EA should include the following matters required under the EPBC Act and Schedule 4 of the EPBC Regulations 2000.

The environmental assessment in the SEE/REF/EIS/EA should include enough information about the controlled action and its relevant impacts to allow both the decision maker under the EP&A Act as well as the Commonwealth Environment Minister to make an informed decision whether or not to approve the development.

The following matters should be address in the assessment if it is a controlled action:

1. General information

The background of the action including:

- (a) the title of the action
- (b) the full name and postal address of the designated proponent
- (c) a clear outline of the objective of the action
- (d) the location of the action
- (e) the background to the development of the action
- (f) how the action relates to any other actions (of which the proponent should reasonably be aware) that have been, or are being, taken or that have been approved in the region affected by the action
- (g) the current status of the action
- (h) the consequences of not proceeding with the action.

2. Description of the controlled action

A description of the action, including:

- (a) all the components of the action
- (b) the precise location of any works to be undertaken, structures to be built or elements of the action that may have relevant impacts
- (c) how the works are to be undertaken and design parameters for those aspects of the structures or elements of the action that may have relevant impacts
- (d) to the extent reasonably practicable, a description of any feasible alternatives to the controlled action that have been identified through the assessment, and their likely impact, including:
 - (i) if relevant, the alternative of taking no action
 - (ii) a comparative description of the impacts of each alternative on the matters protected by the controlling provisions for the action
 - (iii) sufficient detail to make clear why any alternative is preferred to another.

3. A description of the relevant impacts¹ of the controlled action;

An assessment of all relevant impacts that the controlled action has, will have or is likely to have on:

- (a) threatened ecological communities and threatened species potentially present and listed under sections 18 and 18A of the EPBC Act
- (b) migratory species listed under the EPBC Act
- (c) RAMSAR Wetlands
- (d) places listed on the National heritage list and protected under the EPBC Act
- (e) World heritage areas.

Information must include:

- (a) a description of the relevant impacts of the action on matters of national environmental significance
- (b) a detailed assessment of the nature and extent of the likely short term and long term relevant impacts
- (c) a statement whether any relevant impacts are likely to be unknown, unpredictable or irreversible
- (d) analysis of the significance of the relevant impacts
- (e) any technical data and other information used or needed to make a detailed assessment of the relevant impacts.

4. Proposed safeguards and mitigation measures

A description of feasible mitigation measures, changes to the controlled action or procedures, which have been proposed by the proponent or suggested in public submissions, and which are intended to prevent or minimise relevant impacts.

Information must include:

- (a) a description, and an assessment of the expected or predicted effectiveness of, the mitigation measures
- (b) any statutory or policy basis for the mitigation measures
- (c) the cost of the mitigation measures
- (d) an outline of an environmental management plan that sets out the framework for continuing management, mitigation and monitoring programs for the relevant impacts of the action, including any provisions for independent environmental auditing
- (e) the name of the agency responsible for endorsing or approving each mitigation measure or monitoring program
- (f) a consolidated list of mitigation measures proposed to be undertaken to prevent, minimise or compensate for the relevant impacts of the action, including mitigation measures proposed to be taken by State governments, local governments or the proponent.

5. Other approvals and conditions

Any other requirements for approval or conditions that apply, or that the proponent reasonably believes are likely to apply, to the proposed action. Information must include:

- (a) details of any local or State government planning scheme, or plan or policy under any local or State government planning system that deals with the proposed action, including:
 - (i) what environmental assessment of the proposed action has been, or is being, carried out under the scheme, plan or policy
 - (ii) how the scheme provides for the prevention, minimisation and management of any relevant impacts

¹ The term 'relevant impact' is defined in section 82 of the EPBC Act.

- (a) a description of any approval that has been obtained from a State, Territory or Commonwealth agency or authority (other than an approval under the Act), including any conditions that apply to the action
- (b) a statement identifying any additional approval that is required
- (c) a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

6. Environmental record of person proposing to take the action

- (1) Details of any proceedings under a Commonwealth, State or Territory law for the protection of the environment or the conservation and sustainable use of natural resources against:
 - (a) the person proposing to take the action, and
 - (b) for an action for which a person has applied for a permit, the person making the application.
- (2) If the person proposing to take the action is a corporation—details of the corporation's environmental policy and planning framework.

7. Information sources

For information given in an environment assessment, the draft must state:

- (a) the source of the information
- (b) how recent the information is
- (c) how the reliability of the information was tested
- (d) what uncertainties (if any) are in the information.

8. Consultation

- any consultation about the action, including:
 - (i) any consultation that has already taken place
 - (ii) proposed consultation about relevant impacts of the action
 - (iii) if there has been consultation about the proposed action—any documented response to, or result of, the consultation
- identification of affected parties, including a statement mentioning any communities that may be affected and describing their views.

Appendix 3. Terms and abbreviations used in this guideline

assessments bilateral agreement	an agreement under the EPBC Act between a State government and the Commonwealth government, that the Commonwealth will use the State's assessment which requires Commonwealth approval under the EPBC Act
CAMBA	China and Australia Migratory Bird Agreement
controlled action	an action that needs approval under the EPBC Act if the Commonwealth decides the action is: <ul style="list-style-type: none"> ▪ likely to have a significant impact on matters of national environmental significance ▪ likely to have a significant impact on the environment on Commonwealth land, or ▪ to be taken on Commonwealth land and is likely to have a significant impact on the environment anywhere ▪ to be taken by the Commonwealth and is likely to have a significant impact on the environment anywhere
DA	development application under Part 4 of the EP&A Act
DEC	Department of Environment and Climate Change (NSW)
DEW	Department of the Environment and Water Resources (Commonwealth)
EA	environmental assessment
EIS	environmental impact statement
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i> (NSW)
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Commonwealth)
JAMBA	Japan and Australia Migratory Bird Agreement
NES	national environmental significance
PA	project application under Part 3A of the EP&A Act
REF	review of environmental factors (under Part 5 of EP&A Act)
SEE	statement of environmental effects (under Part 4 of EP&A Act)
SIS	species impact statement