



Australian Government

Department of Sustainability, Environment,
Water, Population and Communities

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

Policy Statement

EPBC Act Delegations: Section 515 of the EPBC Act and regulation 19.01A of the EPBC Act Regulations

Overview

To 'delegate' is to give powers or functions to another person to act as an agent. The agent can then exercise the power or function in their own right.

Section 515 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides for the Minister responsible for administering the EPBC Act (Minister) and the Secretary of the Department to delegate all or any of their powers or functions under the EPBC Act to an officer or employee in the Department or the Director of National Parks by signed instrument. The Director of National Parks may also delegate all or any of the Director's powers or functions under the EPBC Act to a person by sealed instrument.

Similarly, regulation 19.01A of the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations) provides that the Minister and the Secretary of the Department may delegate any or all of their powers or functions under the EPBC Regulations to an employee of the Department. The Director of National Parks may also delegate

all or any of the Director's powers or functions under the EPBC Regulations to a person by sealed instrument.

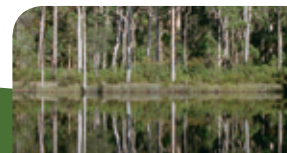
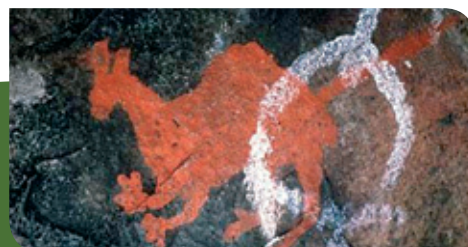
This Policy Statement provides an outline of the current Instrument of Delegation in relation to the Minister's powers and functions under subsection 515(1) of the EPBC Act and regulation 19.01A(1) of the EPBC Regulations, which was signed by former Minister Garrett on 1 December 2009 (the delegations). This instrument replaced all previous instruments of delegation.

The Secretary also has made delegations under subsection 515(2) of the EPBC Act and regulation 19.01A(3) of the EPBC Regulations (the current delegation instrument is dated 7 June 2010) and the Director of National Parks has a number of instruments of delegation, made under subsection 515(3) of the EPBC Act and regulation 19.01A(5) of the EPBC Regulations.

The delegations are divided into three parts:

- Schedule 1—EPBC Act;
- Schedule 2—EPBC Regulations; and
- Schedule 3—Guidelines for delegated decision making.

The delegations operate in a 'cascading' manner.



Approach

The following principles are applied by departmental officers in the exercise of powers on behalf of the Minister, Secretary or the Director of National Parks under the EPBC Act:

- Delegations are attached to the position, not the person. Accordingly, a person acting in a position will have the delegations associated with that position.
- Even if a power has been delegated, the Minister, Secretary or the Director of National Parks can still exercise the power.
- In exercising their delegated power, the delegate is subject to any applicable directions from the Minister, Secretary or the Director of National Parks. Refer to subsection 515(1) of the EPBC Act.
- The current delegations are not affected by changes in Ministers, portfolio responsibilities, or changes in Government.

What if a delegation is not exercised by the correct person?

In some circumstances, in the absence of an express delegation, it will be possible to show that the person who made the decision was otherwise authorised to exercise the power. However, where there is no such authorisation, a decision purportedly made by a person who is not a delegate will be invalid and a new decision will need to be made by an authorised delegate.

Steps for understanding delegations

If a departmental officer relies on a particular delegation, the departmental officer will have gone through the following steps to confirm that the delegation applies.

Step 1: What action needs to be done?

The particular section of the EPBC Act or EPBC Regulations under which the power or function will be exercised is identified. For example, a decision on whether or not to approve a controlled action under subsection 133(1) of the EPBC Act.

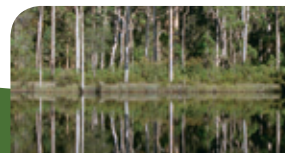
Step 2: Determine whether the power has been delegated

Departmental officers will ensure that the delegations have not been superseded and are current. Departmental officers will then read the delegations and determine whether the decision making power or function has been delegated.

The delegations are made to three categories of officers:

- Firstly, all powers and functions, with specified exceptions, are delegated to the Secretary and Deputy Secretaries.
- Secondly, all powers and functions that are delegated to the Secretary and Deputy Secretaries, with specified exceptions, are delegated to the Director of National Parks and other SES employees, where those officers have administrative responsibility for the matter.
- Thirdly, all powers and functions that are delegated to the Secretary, with specified exceptions, are delegated to all Directors (EL2s) and Assistant Directors (EL1s), to the extent that they relate to matters for which the employee's Branch has administrative responsibility or involve administrative functions such as publication and notification requirements.

The number of exceptions increase the further 'down' the hierarchy the relevant delegate is. This means that Directors and Assistant Directors will check the exceptions listed for them, as well as those exceptions listed for the Secretary, and Deputy Secretaries to confirm the extent of the delegated authority that they have.



Delegate must have administrative responsibility

Only officers who have 'administrative responsibility' for the matters covered in the delegation may exercise the delegations.

Who has 'administrative responsibility' is not be read too narrowly. In particular, all SES in a particular Division can be treated as having 'administrative responsibility' in relation to the work of the Division, even if each officer's day-to-day work involves subject matter that is more limited in scope.

Delegations to Directors and Assistant Directors can only be exercised in relation to routine administrative functions such as publication and notification requirements and limited decision making on minor matters.

Further, Directors and Assistant Directors normally only exercise routine administrative powers and functions. They are given limited decision-making powers and functions.

Step 3: When should a delegation be exercised?

The delegations are divided into three parts and Schedule 3 of the delegations contains guidelines for exercising the delegations (the Guidelines).

The Minister will be briefed to make decisions on all strategic, complex or controversial matters, where there is likely to be a major disagreement with a State or Territory Government, or where there is likely to be a disagreement with an Australian Government Minister or agency.

A delegation will only be exercised when a matter is straight-forward and there are unlikely to be any contentious issues or grey areas in policy.

Example 1—Species Listing

A species of bird has been nominated for inclusion on the threatened species list. However, the area that is its main habitat has been inaccessible due to bad weather conditions and planned research trips have been unable to take place. The Scientific Committee have requested under section 194P of the EPBC Act to the Minister for more time to complete the assessment.

• *Who has the power to extend the assessment completion time?*

The first step for Departmental officers will be to identify the section of the EPBC Act, which confers the power to extend the assessment completion time—subsection 194P(3).

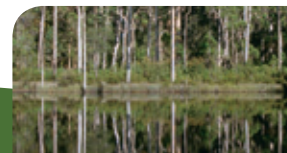
The second step will be for them to read the delegations, to determine whether, and if so to who, the power has been delegated.

Section 194P(3) is listed on page 3 of the delegations (under the heading 'Relating to Part 13—Species and Communities'). It is one of the exceptions to the matters otherwise delegated to the Secretary and Deputy Secretaries of the Department.

This power cannot, therefore, be exercised by the Secretary or by any of the Deputy Secretaries of the Department. It follows that neither can it be exercised by any other officer of the Department. This means that the decision will be made by the Minister.

Example 2—Controlled Action Decision

A proposed action for clearing some land is referred to the Department. A decision about whether the proposed action is a controlled action or not under subsection 75(1) of the EPBC Act must be made.



- ***Who has the power to make the section 75 decision?***

Subsection 75(1) specifies that the Minister must decide whether the action that is the subject of a proposal referred to the Minister is a controlled action or not.

Under the delegations, all powers are delegated except those listed in the delegations. Subsection 75(1) is not listed as an exception and therefore can be exercised by the Secretary, Deputy Secretaries, Director of National Parks, SES employees, Directors and Assistant Directors.

- ***Should the delegate make the decision under section 75?***

A delegate may only exercise a power if they have relevant administrative responsibilities. For example, in this example an Assistant Secretary in the Water Group could not make a decision under subsection 75(1) of the EPBC Act as it is outside of their administrative responsibilities.

However, any Assistant Secretary or the First Assistant Secretary in the Environment Assessments and Compliance Division could make a decision under section 75 of the EPBC Act. This is because the exercise of that power is part of their administrative responsibilities as a member of the executive of the Division.

Also, this power will not be made by Directors or Assistant Directors, even though it may be a matter to which the employee's Branch has administrative responsibility as the delegated powers are only to the extent that they involve routine administrative functions such as publication and notification requirements.

In addition, consideration will be given as to whether the matter is contentious or the policy in the matter is not clear. If so, the decision will be made by the Minister.

Example 3—Recovery Plan

The Minister has adopted a recovery plan for a threatened species. Subsection 278(1) of the EPBC Act stipulates that the Minister must publish the recovery plan as soon as possible. This involves making copies of the plan available for purchase, for a reasonable price in each State and Territory, giving notice of the adopting of the plan, and publishing the notice in the Gazette, in a daily newspaper that circulates in each state and territory, and in any other way required by the regulations.

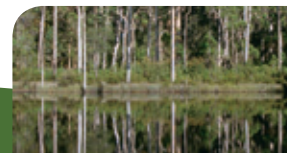
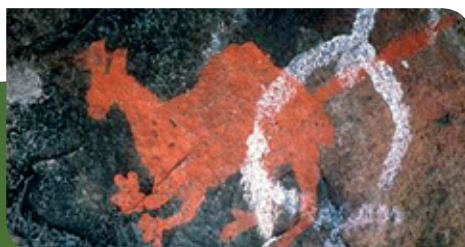
- ***Who can publish the recovery plan under section 278?***

The delegations do not list subsection 278(1) as an exception to what is delegated to any particular employee. Therefore, the function under the section has been delegated to the Secretary, the Deputy Secretaries, Director of National Parks, SES employees, Directors and Assistant Directors.

- ***Which delegate should exercise the function under section 278?***

A delegate that has relevant administrative responsibilities can exercise the function under subsection 278(1).

For Directors and Assistant Directors, the delegations specify that they can only exercise the power if it is a matter for which their Branch has responsibility, and if it is a routine administrative function, such as publication and notification requirements. As the function of publishing the recovery plan under subsection 278(1) is an administrative function, Directors and Assistant Directors of the relevant Branches may publish the recovery plan.



Attachment A

Flowchart of Delegations under the Instrument of Delegation

The delegations operate in a cascading manner. The sequence of delegation is as follows:

- Firstly, all powers and functions, with specified exceptions, are delegated to the Secretary and Deputy Secretaries.
- Secondly, all powers and functions that are delegated to the Secretary and Deputy Secretaries, with specified exceptions, are delegated to SES employees.
- Thirdly, all powers and functions that are delegated to the Secretary, with specified exceptions, are delegated to Directors (EL2s) and Assistant Directors (EL1s).

This is visually represented in the following flow chart:

