

ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (Cth)

Policy Statement

Listing Events under the EPBC Act

Introduction

This Policy Statement provides guidance on determining whether a 'listing event' affects assessment and approval decisions for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

A listing event creates or affects matters of national environmental significance under the EPBC Act.

A person who proposes to take an action that will have, or is likely to have, a significant impact on a matter of national environmental significance must refer that action to the Minister, under section 68 of the EPBC Act for a decision on whether approval is required under the EPBC Act, unless an exemption applies. Therefore, a person must have regard to listing events in deciding whether to refer an action under section 68 of the EPBC Act.

This Policy Statement provides guidance on:

- what is a listing event;

- the impact of listing events on:
 - actions with prior authorisation (section 43A of the EPBC Act) or lawful continuation of use of land (section 43B of the EPBC Act);
 - actions which have been referred under the EPBC Act for a section 75 decision (a decision on whether or not an action is a controlled action); and
 - actions which have not been referred under section 68 of the EPBC Act.

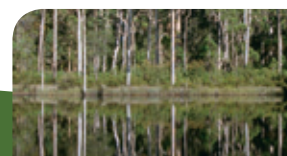
Listing Events

A listing event creates or affects matters of national environmental significance under the EPBC Act.

Section 158A(1) of the EPBC Act, provides that 'listing events' means an addition to an **EPBC Act list**¹ including any of the following events:

- a property becoming a declared World Heritage property;

¹ "EPBC Act list" refers to all lists under the EPBC Act including World Heritage, National Heritage, Commonwealth Heritage, declared Ramsar Wetlands, ecological communities, threatened species and migratory species lists.



- a change in the world heritage values of a declared World Heritage property;
- a place becoming a National Heritage place;
- a change in the National Heritage values included in the National Heritage List for a National Heritage place;
- a place becoming a Commonwealth Heritage place;
- a change in the Commonwealth Heritage values included in the Commonwealth Heritage List for a Commonwealth Heritage place;
- a wetland becoming a declared Ramsar wetland;
- a change in the boundaries of any of: a World Heritage property, a National Heritage place, a Commonwealth Heritage place, a declared Ramsar wetland, the Great Barrier Reef Marine Park;
- a species becoming a listed threatened species;
- an ecological community becoming a listed threatened ecological community;
- a listed threatened species or a listed threatened ecological community becoming listed in another category representing a higher degree of endangerment;
- a species becoming a listed migratory species; or
- any other event of a kind specified in the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) (EPBC Regulations).

A listing process that has not culminated in a listing event will not be taken into account in approval process decisions under Parts 7–9 of the EPBC Act, even if a listing event is imminent.

Information about listed matters of national environmental significance protected under the EPBC Act can be found on the Department website:

- [Species Profile and Threats Database](#) (for information about species and ecological communities listed under the EPBC Act, see www.environment.gov.au/cgi-bin/sprat/public/sprat.pl);
- [Protected matters search tool](#) (including an interactive map tool, see www.environment.gov.au/epbc/pmst/index.html).

Things that are not Listing Events

The following are *not* listing events for the purpose of section 158A of the EPBC Act:

- removal of a place or thing from an EPBC Act list;
- revoking a declaration of, for example, a World Heritage property or Ramsar wetland; or
- transferring a listed threatened species or ecological community to a category representing a lower degree of endangerment.

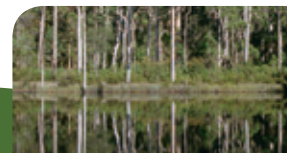
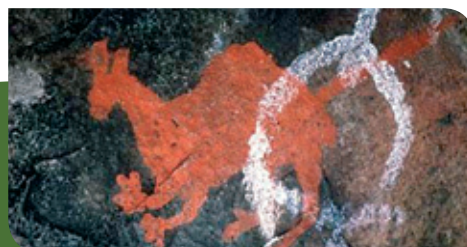
The validity of the original approval process decision would not be affected by the last point, that is, the transfer of a listed threatened species or ecological community to a category representing a lower degree of endangerment.

For example, the ‘downgrading’ of a species from the endangered category to the vulnerable category.

Effect of removal or revocation

The first two points, the removal of a place or thing from an EPBC Act list, or revoking a declaration (a ‘de-listing’), however, could potentially be a basis for reconsideration of a decision under section 78 of the EPBC Act.

For example, if an action was found to be a controlled action only on the basis that it was likely to have a significant impact on a particular listed threatened species, and during the assessment process under



Part 8 of the EPBC Act that species is removed from the threatened species list, then that may justify the Minister revoking the original section 75 decision ('whether or not the action is a controlled action') and substituting it with a new section 75 decision.

For further guidance on reconsideration, refer to Policy Statement: Reconsideration: Implementing the requirements of sections 78, 78A, 78B and 78C of the EPBC Act.

If the action has been approved under section 133 of the EPBC Act at the time of the de-listing then the approval will still remain in effect until the period specified in the approval expires, or the approval is suspended or revoked in accordance with sections 144 and 145 of the EPBC Act. A de-listing will not affect the validity of the approval.

Contravention of a condition attached to a section 133 approval is a contravention of the Act (sections 142 to 142B of the EPBC Act). There is no provision in the EPBC Act by which a condition of approval attached under section 134 would automatically cease to have effect when, for example, a species which was the subject of a condition of approval was removed from the threatened species list.

Accordingly, contravention of a condition of approval would remain an offence under the EPBC Act unless the condition is revoked or varied in accordance with section 143 of the EPBC Act.

Date of Listing Events

A listing event occurs when either:

- a particular matter **becomes** protected, such as a property becoming a declared World Heritage property or a species becoming a listed threatened species; or
- a particular change **occurs** in the status of the protected matter, namely, a change in the boundaries of a heritage property, or the heritage

values of a heritage property, or an increase in the status of endangerment of a listed threatened species or ecological community (an 'upgrading').

The question of **when** these listing events occur depends on the manner in which the listing was made or given effect under the EPBC Act.

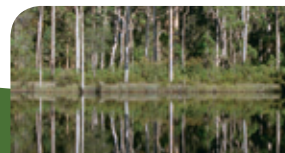
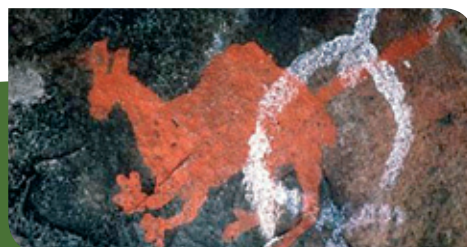
The EPBC Act provides for a listing event to occur by one of three processes:

- By legislative instrument (see for example, sections 184 and 209 of the EPBC Act). A legislative instrument takes effect from the commencement date expressed in the instrument. If the instrument does not specify its commencement date, the instrument commences on the day after the instrument is registered on the Federal Register of Legislative Instruments (**FRLI**) (see section 12(1) of the *Legislative Instruments Act 2003* (Cth)). A legislative instrument is unenforceable unless registered on FRLI;
- By instrument published in the *Gazette* (see for example, sections 14, 17A, 324JJ and 341JI of the EPBC Act). An instrument published in the *Gazette* also takes effect from the commencement date expressed in the instrument. If the instrument does not specify its commencement date, the instrument generally commences on the day it is published in the *Gazette*; or
- By reference to the fact that the matter was listed pursuant to a treaty or other international convention (see for example, sections 13 and 17 of the EPBC Act).

Impact of Listing Events on Actions

Listing events will not have an impact on:

- (1) Actions with prior authorisation under section 43A or are a lawful continuation of use of land under section 43B; and



(2) Actions exempt under section 158A, as a section 75 decision (a decision on whether or not an action is a controlled action) has been made *prior* to the listing.

However, listing events may have an impact on:

Actions which have not been referred under the EPBC Act.

1. Actions with prior approval or lawful continuation

Sections 43A and 43B of the EPBC Act exempt certain actions from Part 9 approval under the EPBC Act. Section 43A exempt actions which have 'prior authorisation' and section 43B exempt actions which are 'lawful continuations of use of land'.

Listing events do not affect the application of exemptions to activities that are covered by sections 43A and 43B of the EPBC Act. The onus of establishing that a section 43A or 43B exemption applies to the proposed action rests with the person proposing to take the action.

2. Actions exempt under s 158A

Listing events must be considered *before* a section 75 decision is made as they may have an impact on whether the action will have, or is likely to have a significant impact on a matter of national environmental significance protected under Part 3 of the EPBC Act.

However, for listing events that occur *after* a section 75 decision is made section 158A of the EPBC Act provides that approval process decisions under Parts 7–9 of the EPBC Act will *not* be affected by the listing event. That is, the listing event does *not* need to be considered.

This is because the validity of the section 75 decision, or any other approval process decision, made before the listing event:

'is not affected by the listing event, nor can it be revoked, varied, suspended, challenged, reviewed, set aside or called

in question because of, or for reasons relating to, the listing event' (section 158A(3))

Section 158A(4) adds that the listing event must be disregarded in making any further approval process decisions under Parts 7–9.

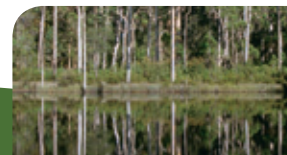
Example: In 2011 company 'ABC Pty Ltd' refers a proposal to construct a highway to the Minister as ABC Pty Ltd is of the view that its action may have a significant impact on an endangered tree species. In 2011 the Minister makes a determination under section 75 of the EPBC Act that the action is not a controlled action. Subsequently, in 2012, a species of frog is listed as threatened.

Due to s158A, the listing of the frog species does not affect the original 2011 determination, that is, it could not be *revoked, varied, suspended, challenged, reviewed, set aside or called into question* (section 158A(3)). This would be the case even if the construction of the highway had not yet started.

3. Actions not referred under the EPBC Act

Obligation to refer action

If a proposal is not referred under section 68 of the EPBC Act then there is no section 75 decision by the Minister. Therefore, section 158A of the EPBC Act would not prevent a new listing event from affecting approval process decisions under Parts 7–9 of the EPBC Act.



Therefore, even if the person proposing to undertake the action had previously determined that it was unlikely that their action would have a significant impact on a matter of national environmental significance, the new listing event means that they should reconsider whether they need to refer their action to the Minister. This is regardless of whether the person had commenced the action prior to the listing event.

It remains the responsibility of the person proposing to undertake the action to ensure that they are compliant with the EPBC Act. Section 68(1) of the EPBC Act provides that:

'A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action.'

Even if the person does not think that the new listing event means that their action will now impact on a matter of national environmental significance under Part 3 of the EPBC Act, for legal certainty, they can still refer their action to the Minister pursuant to section 68(2) of the EPBC Act.

If the person proposing to undertake the action does not proactively refer the action under section 68 then, under sections 69 and 71, the action may be referred by a State or Territory, or a Commonwealth agency.

Further, under section 70, the Minister may request the action be referred. The Minister need only *believe* that the action has become a controlled action due to the new listing event before 'calling it in' under section 70.

In deciding whether to exercise this power the Minister may take into account, amongst other things, similar considerations to those set out in the [Significant Impact Guidelines](#).

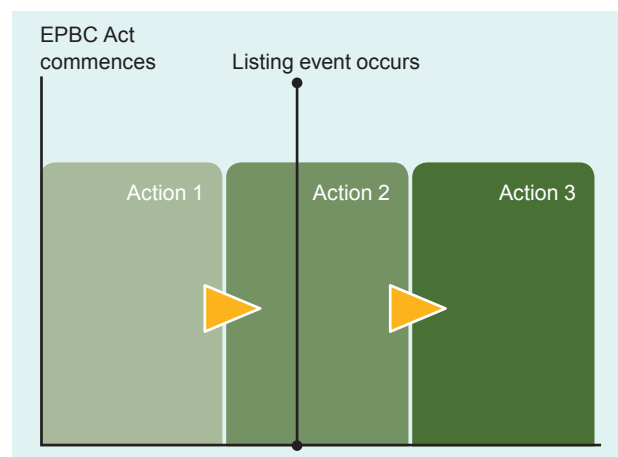
As stated in *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8, at [35]: 'a proposed action may be referred to the Federal Minister against the wishes of the proponent, and regardless of its stage of development...'

The risk of not referring an action lies with the person proposing to undertake the action. Compliance actions may include, but are not limited to: injunctions; remediation orders; civil penalties up to \$8.5 million; and criminal penalties of up to 7 years imprisonment.

For further guidance, refer to the Department's webpage entitled 'Do you need to obtain approval under the EPBC Act' which can be accessed at: <http://environment.gov.au/epbc/approval.html> and the [Significant Impact Guidelines 1.1](#) for assistance in determining whether an action is likely to have a significant impact on a matter of national environmental significance.

Impact of Listing Events: Actions 1–3

Figure 1: Impact of Listing Events



Action 1: Where an action has commenced and finalised prior to the listing event

Where an action has not been referred under the EPBC Act, and the action has been finalised, then any subsequent listing event does not affect it as listing events do not apply retrospectively. An action is finalised when all the relevant steps in the action have been taken. Whether this is so will turn on the facts of each case, including the nature of the particular action.

Action 1, Example: ABC Pty Ltd is proposing to build a residential subdivision but does not refer its action to the Minister as it is of the view it will have no impact on any protected matter under the EPBC Act. Construction is commenced in 2010 and the action is finalised in 2011 (that is, the block has been cleared and subdivided, the homes have been constructed, the roads are finished and the homes are ready to be sold).

In 2012 an orchid is listed as a threatened species. Regardless of any impact the action may have had on this orchid, the new listing does not affect the completed action.

Action 2: Where an action has commenced but not finalised prior to the listing event

Where an action has not been referred under the EPBC Act, and the action has commenced but has not been finalised, the newly listed protected matter must be considered when deciding whether or not to refer the action as it could potentially affect whether the action will have, or is likely to have, a significant impact on a matter of national environmental significance under Part 3 of the EPBC Act.

Despite the action having commenced the remainder of the action may have a significant impact on the newly listed protected matter and, therefore, the action may need to be referred.

In considering a referral, the Minister will consider the impacts of the remainder of the action (the part which is yet to be finalised). Any conditions attached to an approval must only be in relation to the remainder of the action.

If the person is unsure whether their action will have a significant impact, they can still refer their action under section 68(2) for legal certainty. As stated above, the risk of not referring an action lies with the person proposing to undertake the action and includes civil and criminal penalties.

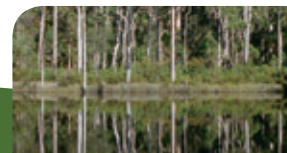
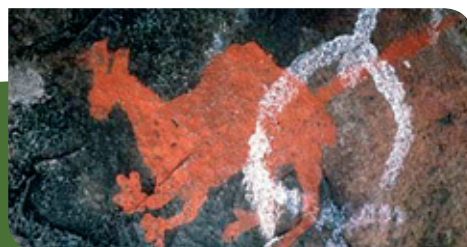
Action 2, Example: In this example, at the time of the listing of the orchid in 2012 the action has just commenced. Only half of the block has been cleared and construction has not started.

If ABC Pty think that the remainder of the action (the clearing of the remainder of the block and construction of the buildings etc) is likely to have a significant impact on the orchid, they should refer the entire action to the Minister.

The referral should include information regarding proposed steps to avoid or offset any likely impact on the orchid.

Action 3: Where an action has commenced after the listing event

Where an action has not been referred under the EPBC Act, and the action commences after the listing event (or is scheduled to commence), the listing event must be considered when deciding whether or not to refer the action as it could potentially affect whether the action will have, or is likely to have, a significant impact on a matter of national environmental significance under Part 3 of the EPBC Act.



Action 3, Example: ABC Pty Ltd has not taken any steps to commence the action at the time the orchid is listed (that is, the land has not yet been cleared).

ABC Pty Ltd must, therefore, re-assess whether their action should be referred taking into account the newly listed orchid. If they think that their action may have a significant impact on the orchid they should refer the action to the Minister.

The referral should include information regarding proposed steps to avoid or offset any likely impact on the orchid.

- section 158A of the EPBC Act provides that approval process decisions will not be affected by listing events that happen after a section 75 decision (a decision on whether or not an action is a controlled action) is made; and
- if the action has been finalised then any subsequent listing event does not affect the action as listing events do not apply retrospectively.

Listing events *must* be considered in relation to actions which:

- have not been referred under the EPBC Act; and
 - have commenced prior to the listing event but not been finalised; or
 - have commenced (or are scheduled to commence) after the listing event.

Summary

A listing event creates or affects matters of national environmental significance protected under Part 3 of the EPBC Act.

A person who proposes to take an action that will have, or is likely to have, a significant impact on a matter of national environmental significance must refer that action to the Minister for a decision on whether approval is required under the EPBC Act, unless an exemption applies. Therefore, listing events may have an impact on approval process decisions under Parts 7–9 of the EPBC Act.

Listing events do *not* need to be considered in relation to the following scenarios:

- where an action is exempt from the requirement of approval under Part 9 of the EPBC Act as the action has prior approval (section 43A) or if the action is a lawful continuation of use of the land (section 43B);

This is because the listing event may affect whether or not the action will have, or is likely to have, a significant impact on a matter of national environmental significance and, therefore, whether or not the action needs to be referred to the Minister for approval under the EPBC Act.

Even if the person does not think that the new listing event means that their action will now impact on a matter of national environmental significance, for legal certainty, they can still refer their action to the Minister pursuant to section 68(2) of the EPBC Act.

The risk of not referring an action lies with the person proposing to undertake the action. Compliance actions may include, but are not limited to: injunctions; remediation orders; civil penalties up to \$8.5 million; and criminal penalties of up to 7 years imprisonment.

