



Australian Government

Department of the Environment and Energy

# *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* Policy Statement

Reconsideration: Implementing the requirements  
of sections 78, 78A, 78B and 78C of the EPBC Act



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(Back) Overview of a box gum grassy woodland near Williamsdale, with the Murrumbidgee River in the background

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# Overview

## An Introduction to Reconsideration

Decisions made under section 75 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) ('whether or not the action is a controlled action') can only be reconsidered in a limited set of circumstances. The ability to reconsider a decision is an important provision of the EPBC Act, as it is the only way specifically provided in the legislation to revoke and remake a decision made under section 75.

The EPBC Act does not set a time limit for processing reconsideration requests. However, requests will be processed as soon as practicable. The timeframe for processing requests will depend on the individual facts and circumstances of a request.

## When does this Policy Statement apply?

This Policy Statement focuses on reconsideration requests made under section 78A of the EPBC Act and in accordance with the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations).

Section 78A was inserted into the EPBC Act on 19 February 2007 and the requirements for requests and notifications under the EPBC Regulations commenced on 1 June 2010. As a result, the procedures in this Policy Statement will not necessarily apply in relation to actions referred prior to February 2007. If reconsideration is sought for an action which was referred prior to 2007 please contact the Community Information Unit about the appropriate processes.

*Note:* The process for State and Territory Ministers seeking reconsideration of a decision is different to that set out in this policy statement and is set out in section 79.

## How is a Decision Reconsidered?

The reconsideration of a decision involves a two-stage process. The Minister responsible for administering the EPBC Act or their delegate (the 'Minister') will determine whether or not the decision may be changed. To be a valid request, the reconsideration request must:

- set out one of the grounds for changing the decision as provided for in section 78 of the EPBC Act;
- meet the other requirements under the EPBC Regulations.

If one of the grounds outlined in Step 4 for changing the decision is satisfied, then the original decision must be revoked and substituted with a new section 75 decision.

# Steps for Making a Reconsideration Decision

The Department will work through the following steps when preparing a reconsideration for the Minister.

## Step 1: Confirm that the Request is Valid

Under section 78A, a proponent or any other person may lodge a request for reconsideration of a section 75 decision.

For the request to be valid under subsection 78A(2), it must:

- be in writing;
- set out the basis on which the person thinks the decision should be reconsidered; and
- if the EPBC Regulations specify other requirements for requests under subsection (1)—comply with those requirements.

Part 4AA.01 of the EPBC Regulations sets out further general additional requirements and specific requirements for various types of reconsideration requests under paragraph 78(1)(a) (substantial new information); paragraph 78(1)(aa) (substantial change in circumstances); or paragraph 78(1)(b) (action not being taken in a particular manner for not controlled action—particular manner ('NCA-PM') decisions).

Generally, a request must also:

- identify the ground or grounds in paragraphs 78(1)(a) to (ca) of the Act that are being relied upon to make the request;
- include the source of any information provided; and
- provide details of when the information became available.

A valid request in relation to paragraph 78(1)(a)(substantial new information), for a matter protected under Part 3, must also contain:

- any new information that was not considered when the original decision was made; and

- demonstrate that a change in the potential impacts of the action is likely to happen with a high degree of certainty (regulation 4AA.01(3)).

The Minister will need to be satisfied that, in considering the new information provided in a request that with a high degree of certainty there is a likely change in the potential impacts of the action.

A valid request in relation to paragraph 78(1)(aa) (substantial change in circumstances), for a matter protected under Part 3, must also:

- clearly identify the change in circumstances;
- establish why the circumstances were unforeseen at the time the original decision was made; and
- demonstrate that a change in the potential impacts of the action is likely to happen with a high degree of certainty.

A valid request in relation to paragraph 78(1)(b)(ii) (action not being taken in a particular manner for NCA-PM decisions), must also contain information that establishes that the action is not being taken, or will not be taken, in the manner identified in the original decision.

The Minister will determine whether the request satisfies the requirements in the EPBC Act and EPBC Regulations detailed above for a valid request. For further guidance regarding the meaning of 'new information' and 'change in circumstances' refer to Step 4 below.

If the request is not valid the Minister will write to the person making the request and explain why it is invalid, allowing them the option of resubmitting a valid reconsideration request. The following steps will not be completed if the request is invalid.

## Step 2: Confirm that the Request can Proceed

Even if the request is valid, the original decision cannot be revoked or reconsidered if the action has already been:

- taken (see subsection 78(3)); or
- granted or refused approval by the Minister under Part 9 of the EPBC Act (see subsection 78(3)). Once a controlled action has been assessed and approved the conditions attached to the approval can be varied (section 143), the approval may be suspended (section 144), or revoked (section 145), but the section 75 decision cannot be reconsidered.

If either of these circumstances applies, the Minister will write to the party requesting the reconsideration to explain why the decision cannot be reconsidered. The following steps will not be completed if the decision cannot be reconsidered.

## Step 3: Process the Valid Request

If the request is valid, the following steps will be completed.

- The Minister will inform and invite comments, for a period of 10 business days, from the following people (see section 78B):
- the designated proponent, where the request for reconsideration is lodged by someone other than the proponent;
- any other Commonwealth Ministers who have administrative responsibilities relating to the action; and
- where relevant, any appropriate Minister of the particular State or Territory, where the action may impact on a matter protected by a provision of Division 1 of Part 3 of the Act.
- The Minister will also publish the request on the internet and invite public comment, for a period of 10 business days.

The original decision will only be reconsidered after this consultation period has taken place.

## Step 4: Grounds for Reconsideration

If any of the following grounds are satisfied then the Minister will revoke a decision and substitute a new decision.

If none of the grounds are met, the Minister must confirm the original decision.

### 1. Availability of substantial new information (paragraph 78(1)(a))

The Minister must revoke the original decision and substitute a new decision if it is warranted by the availability of substantial new information about the impacts of the action on a protected matter.

To determine if there is substantial new information about the impacts each of the following requirements must be satisfied:

#### (a) Has the person making the request provided “substantial information”?

The information must be substantial. That is, the information must be real or of substance, and not trivial or inconsequential.

Documents or evidence that are attached or referred to in the reconsideration request must provide some form of factual evidence relating to the impacts of the action to qualify as “substantial information”.

Rumours or reports of discussions may be less likely to be considered to be “substantial information”.

#### (b) Is the information new?

Information is not “new” if it was submitted to or in the possession of the Minister for consideration when making the original referral decision. However, the information can be considered “new,” even if it was in existence at the time the Minister made the original referral decision but the Minister or Department did not consider it in the context of making the decision.

(c) Does the information relate to the adverse impacts of the action on a protected matter?

The information must relate to the adverse impacts of the action on a protected matter. The information must show that the adverse impacts of the action are either substantially more or less significant than originally determined by the decision maker. While the information could be perceived as being beneficial to the proponent in that it shows the impacts of the action are less significant than previously thought, it still must relate to the adverse impacts of the action.

**Is revocation and substitution warranted?**

If the Minister is satisfied that there is substantial new information about the impacts that the action has or will have or is likely to have on a Part 3 protected matter, the Minister must then decide if revocation of the original section 75 decision is warranted.

Revocation will be warranted if there is substantial new information about the impacts of the proposed action that satisfies the Minister that either:

- i. there will be or be likely be significant impacts on different matters protected such that there would be different or additional controlling provisions for the action; or
- ii. there will not be or be likely to be significant impacts on the matters protected found in the original section 75(1) decision such that the provision(s) of Part 3 will not be a controlling provision for the action.

In essence, if the new information would result in a change to the controlling provisions, then it warrants revocation of the original decision.

For example if the 'matter protected' is listed threatened species (sections 18 and 18A), information about impacts on additional listed threatened species will not warrant revocation because the controlling provisions (sections 18 and 18A) will remain the same. All adverse impacts on listed threatened species

will be required to be assessed prior to a decision on approval. However, if the information identifies impacts on a migratory species (that is not a listed threatened species) revocation is warranted because different controlling provisions (sections 20 and 20A) should be included for the proposed action.

## 2. Substantial change in circumstances (paragraph 78(1)(aa))

The Minister may revoke the original decision and substitute a new decision if it is warranted by a substantial change in circumstances that was not foreseen at the time of the original decision, and that relates to the impacts of the action on the protected matter.

To determine if there has been a substantial change in circumstances each of the following requirements must be satisfied:

### (a) Is there a change in circumstances?

There must have been a real change in circumstances. A mere intention to change how an action is to be taken is not a change in circumstances. There must be some external, tangible influence that affects the impacts the action will have, or which necessarily affects the way an action can be taken.

Changes in circumstances may include, but are not limited to:

- changes to the physical environment in which the action is to be taken; or
- changes to Commonwealth or State laws that relate to the action.

### (b) Was the change in circumstances unforeseen?

The change in circumstances must have been unforeseen at the time of the original decision. When referring actions, proponents frequently submit contingency plans outlining potential changes in circumstances and detailing how these changes will be dealt with should they

eventuate. Additionally, the Department will also consider potential changes in circumstances when providing recommendations to the Minister on whether or not a proposed action should be approved. The change in circumstances will be unforeseen if it was not considered by the Minister when making the original referral decision (for example it was not included in the referral documentation or the assessment brief).

(c) Was the change in circumstances substantial?

The change in circumstances must be substantial. To be substantial, the change in circumstances must:

- be real or of substance and not trivial or inconsequential
- be about the impacts that the action has, will have, or is likely to have on a Part 3 protected matter.

(d) Does the change in circumstances relate to the adverse impacts of the action on a protected matter?

The change in circumstances must relate to the adverse impacts of the action on a protected matter. If the change merely alters the way part of the action is to be taken, but does not affect the adverse impacts of that action on protected matters, then the change is not relevant.

**Is revocation and substitution warranted?**

If the Minister is satisfied that there is a substantial unforeseen change of circumstances that relates to the impacts that the action has or will have or is likely to have on a Part 3 protected matter, the Minister must then decide if revocation of the original section 75 decision is warranted.

Revocation will be warranted if there is a substantial unforeseen change of circumstances that relates to the impacts of the proposed action that satisfies the Minister that either:

- i. there will be or be likely be significant impacts on different matters protected such that there would be different or additional controlling provisions for the action; or

- ii. there will not be or be likely to be significant impacts on the matters protected found in the original section 75(1) decision such that the provision(s) of Part 3 will not be a controlling provision for the action.
- iii. In essence, if the new information would result in a change to the controlling provisions, then it warrants revocation of the original decision.

### 3. Reconsidering NCA-PM decisions (section 78(1)(b))

A NCA-PM decision can be reconsidered pursuant to paragraphs 78(1)(a), 78(1)(aa) and 78(1)(b).

The Minister may revoke the original decision and substitute a new decision if the original decision was a not controlled action because the Minister believed that the action would be taken in an identified manner (see subsection 77A(1)) and the Minister is satisfied that the action is not being or will not be taken in the manner identified.

The original decision **MUST** have been a NCA-PM decision.

To determine if the action is not being or will not be taken in the manner identified, departmental officers will consider the following:

- Was the original decision a NCA-PM decision?
- Has the person submitted information that demonstrates that the person taking the action is not, or will not, be taking an action in a particular manner?
- The person must submit information that demonstrates that the action will not or cannot meet one or more particular manner requirements set out in the NCA-PM decision. The party making the reconsideration request ought to provide documentary evidence either:
  - i. demonstrating that the action has been taken in a way that does not comply with one or more of the requirements of the particular manner decision; or
  - ii. indicating why one or more of the requirements of the particular manner decision cannot or will not be complied with by the proponent in the future.

The requesting party may also provide additional documentation as to how the action may be carried out by alternative means should a reconsideration take place. The provision of this information may assist the Minister when making a new decision should the Minister revoke the original decision.

In the case of the proponent, the request may include a statement that they cannot or will not comply with a particular manner requirement.

It is generally not sufficient for the request to merely indicate that the proponent is having difficulty complying with the requirements of the particular manner decision.

In order to satisfy the Minister that the action will not be taken in accordance with the particular manner conditions, the party making the request must demonstrate that the proponent does not intend, is unable or is presently failing to comply with the NCA-PM decision. Notification of this requirement, if relevant, will be included in the Minister's correspondence to the proponent (see Step 7 below).

If the request relies on this ground for reconsideration, the proponent must stop work that would lead to a breach of the particular manner decision until the original approval has been reconsidered. If the proponent continues to work in a manner other than that required by the particular manner decision, they risk compliance and enforcement proceedings for breach of the NCA-PM decision (see subsection 77A(2)).

## 4. Other Grounds for Reconsideration

It is important to also be aware of the following additional grounds for reconsideration:

- An action was originally found to be a Not Controlled Action (NCA) because of a provision in a bilateral agreement, a bilaterally accredited management arrangement or authorisation process, but the relevant provision of that bilateral agreement, bilaterally accredited

management arrangement or authorisation process is no longer operational (see subsection 78(1)(ba)); or

- An action has been classified as a NCA because of a declaration that the action does not require approval made under section 33 or section 37A, but the relevant declaration is no longer operational (see subsections 78(1)(c) and 78(1)(ca));

Please note that:

- a decision on an assessment approach (section 87) cannot be reconsidered;
- reconsideration of a 'clearly unacceptable' decision is addressed by a separate process under section 74C(3)(c) which is not covered by this Policy Statement; and
- the addition of a new listing (e.g. a new species) after the original referral decision is not a valid ground for reconsideration (section 158A).

## Step 5: Reconsidering the Original Decision and Making a New Decision

If any one of the grounds (as detailed in step 4) for changing the original decision is satisfied, then a new decision will be required. This means that the original decision should be revoked and a new section 75 decision must be made.

The following steps apply to making a new decision:

### 1. Consider the Information

In making a new decision, the Minister will consider whether or not the information provided with the reconsideration request has the potential to demonstrate that the adverse impacts of the action will be:

- reduced so that they are not likely to have a significant impact; or
- prevented in their entirety.

*Note:* the reduction or prevention may be achieved because the action will now be taken in a particular manner.

Or, the information must have the potential to demonstrate that:

- the adverse impacts of the action are likely to be significant, contrary to earlier findings; or
- the action is likely to have different or additional significant impacts or controlling provisions to those previously considered or identified.

## 2. Evidence to consider

When making this new decision, the Minister will consider (among other things and where relevant):

- the recommendation from departmental officers (and all attachments) regarding the original section 75 decision;
- the request for reconsideration and any new information provided with the request;
- comments provided under section 78B; and
- all other relevant information that would be considered in making the original decision under section 75.

## Outcome of the Reconsideration

In remaking the decision, the Minister may make any of the decisions provided for under section 75. That is, the Minister may determine that the action is:

- a not-controlled action;
- a not controlled action—particular manner; or
- a controlled action.

Once the Minister makes a new section 75 decision, any provisions of Chapter 4 that applied in relation to the action because of the first decision cease to apply in relation to the action (paragraph 78(4)(a)). For instance, a decision on assessment approach will need to be made if it is decided that the action is a controlled action and the action is not covered by a bilateral agreement.

## Step 6: Reconsidering the Original Decision and Confirming it

If none of the grounds in step 4 for reconsidering the original decision are satisfied, then the original decision must be confirmed.

## Step 7: Notification

The Minister will then give written notice of the outcome of the reconsideration (i.e. either that the original decision was confirmed or revoked and substituted) to all relevant parties which include: the person who requested the reconsideration, the person proposing to take the action, the designated proponent, and the relevant Minister of the State or Territory, if appropriate (see subsection 78C(2)).

The Minister will also publish a notice of outcome of the reconsideration under subsection 78C(3) of the EPBC Act and regulation 4A.01 of the EPBC Regulations. The EPBC Regulations state that the notice must be published on the internet, in the Gazette, and if relevant, in the Government Gazette of the relevant Territory (Norfolk Island, Cocos (Keeling) Islands or Christmas Island). The notice will contain:

- the identification number, descriptive title and location of the action;
- the proponent or the person proposing to take the action; and
- notice of the outcome of the reconsideration.

A person who has received written notice of the outcome of the reconsideration can request (within 28 days of receipt of the notice) the reasons for the reconsideration decision. The Minister will provide this statement of reasons within 28 days after receiving the request (subsection 78C(4)).

Where the Minister revokes the original decision and makes a new decision under section 75, the Minister will also publish a notice of the new decision. This may be published jointly with the notice of the outcome of the reconsideration.

# Other Considerations

## Relationship between reconsideration and approval process

A reconsideration request received after an action has reached the approval stage of the EPBC Act (Part 9) but before the approval decision is made, may still be a valid reconsideration request.

Once an approval decision is made, the Minister can no longer revoke the original section 75 decision (section 78(3)(a)).

Where a reconsideration request is made and the approval decision has not yet been made, the reconsideration request will be dealt with before the approval decision. This includes deciding whether or not it is a proper reconsideration request under Part 4AA.01 of the EPBC Regulations.

Such a situation may involve the Minister extending the time for making the approval decision in accordance with the EPBC Act.

## Stopping the Clock

Where a reconsideration request is made by the proponent, the assessment of the action is suspended until the reconsideration decision is made (paragraph 78A(3)(a)) and the period does not count towards the statutory time limits for approval decisions.

Where a third party makes a reconsideration request, the assessment of the action is not suspended (paragraph 78A(3)(b)).

