

# ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (CTH)

## Policy Statement

### Staged Developments—Split referrals: Section 74A of the EPBC Act

#### Overview

The purpose of this Policy Statement is to help identify whether a referred action is a 'split referral' and, if so, whether the Minister will treat it as part of a larger non-referred action or separately as a component of a larger action.

Section 74A of the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act') provides that the Minister responsible for the administration of that Act or the Minister's delegate (the Minister), may refuse to accept a 'split referral'. However, in practice, the proponent may also decide to withdraw and re-submit their referral (see Step 4 below under 'Steps for Making a Split Referral Decision').

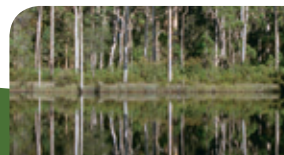
The making of a section 74A decision in relation to a referral is discretionary rather than mandatory, and a 'split referral' is not automatically rejected. Where an action is referred that appears to be part of a larger action, the Minister will consider whether to accept a 'split referral' where it is likely to promote the objects of the EPBC Act.

#### What is an Action?

The EPBC Act prohibits 'actions' that, without approval, have, will have, or are likely to have a significant impact on the matters protected under Part 3 of the EPBC Act. In order to obtain approval, a proposed action must be referred to the Minister for a decision on whether the proposed action will need formal assessment and approval under the EPBC Act.

The EPBC Act defines an 'action' in section 523 to include a project, development, undertaking and activity, or series of activities. An alteration or variation of any of these things may also be an action.

The use of words such as 'project', 'development' and 'series of activities' indicate that, for the purposes of the Act, a number of related activities may be treated as a single action. See Policy Statement: Definition of 'action': Section 523, section 524 and section 534A of the EPBC Act for further definition of 'action' under the EPBC Act.



## What is a Split Referral?

A split referral is where a referred action is part of a larger action that:

- has not been referred;
- has been referred in separate 'lesser referrals' for commercial or other operational reasons;
- will be conducted in progressive stages (also known as 'staged developments').

## Is the same person proposing to take the related actions?

Section 74A only applies to a referred action if that action is a component of a larger action that same legal person (either a natural person or an organisation) proposes to take.

Therefore, if the person proposing to take the referred action is also undertaking the larger action, this may indicate that the larger action is related to the referred action. This is also the case if the person is proposing to take the referred action via a subcontractor or agent.

However, if a referred action is proposed by a different person (as opposed to an agent or subcontractor of that person) it cannot be considered under section 74A.

It is also possible for the same person to refer separate and unrelated proposed actions, and these should not be confused with a potential referred action-larger action relationship.

## The Purpose of Split Referrals

If accepted, a 'split referral' allows a person taking an action to structure their project according to specific requirements. There may, for example, be practical or financial circumstances relating to the design, timeframe or geography of a project that make split referrals a suitable approach for the proponent which is also consistent with the objects of the EPBC Act, defined in section 3.

However, a 'split referral' may mean that all relevant impacts of an action are not assessed, or that the impacts of each individual part of the action are deemed to not be significant, whereas consideration of the action in its entirety would have resulted in the action being found to have a significant impact on matters protected under the EPBC Act. There is, therefore, a risk that a 'split referral' will circumvent controlling provisions and expose Part 3 matters to an unacceptable impact. Section 74A is designed to prevent this exposure and protect Part 3 matters.

## Steps for Making a Split Referral Decision

Departmental officers follow the process outlined below to help ascertain whether it is likely that an action is a component of a larger action and if a Ministerial decision may need to be made under section 74A.

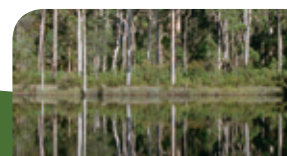
### Step 1: Confirm that the referral is valid

A valid referral must be received before a 'split referral' decision can be considered. The form and content of referrals is specified in section 72 of the EPBC Act, and regulations 4.02 and 4.03 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations).

### Step 2: Determine if there is a larger action

The Minister may decide not to accept a referral if satisfied that a referral is a component of a larger action.

If there is insufficient information within the referral, the Minister may, under subsection 76(2), request that the person proposing to take the action provide further information to assist the determination of whether or not the action is a component of a larger action.



The Minister will only seek additional information in this context if she or he considers that it is likely that there would be reasonable grounds for the Minister not accepting the lesser referral i.e. if it would be contrary to the objects of the EPBC Act to accept the lesser referral.

To assess whether an action is a component of a larger action departmental officers consider the the questions set out in this step. However a finding relating to a particular question may not, individually, determine whether a referred action constitutes part of a split referral or not and, if it does, whether the split referral should be rejected or not.

Departmental officers will consider both the referred action, and the potential larger action in the context of their impact on protected matters. The importance and weight given to individual factors will be determined on a case-by-case basis.

### What is the larger action?

The Minister needs to have sufficient information about the larger action in order to be satisfied about whether a referral is part of that larger action.

Information about the larger action may be obtained from, for example, the referral, reasonable conclusions that may be drawn from the referral and relevant information on the public record. If that information is not sufficient to enable a decision to be made then further information may be requested from the person proposing to take the action (see Step 2). If further information is requested then, under subsection 75(6), the statutory timeframe for making a decision under section 75 is suspended (i.e. the 'clock stops').

Further information may be requested from the person proposing to take the action if this information is required to answer any of the questions under Step 3.

### Can the referred action stand alone?

A stand-alone action should be separate in its own right. If additional actions must be taken before or after the referred action for it to be viable then it may not be a stand-alone action.

EXAMPLE: An open-cut coal mine is the referred action. However, because of its remote location, substantial road upgrades that have not been referred need to take place for the mine to operate. In this example the mine is not a stand-alone action, because the road upgrades are necessary for its operation. (However, this does not necessarily preclude the approval of this component as part of a split referral.)

### Are the referred action and related actions co-dependent?

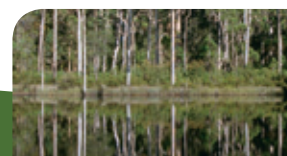
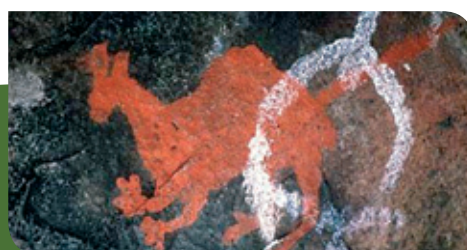
The more that particular actions are co-dependent, the more likely it is that they are both components of a larger action.

EXAMPLE: The referred action is the building of a fitness centre in the Great Barrier Reef World Heritage Area. The proponent is also proposing to build a hotel nearby, which has not been referred. The fitness centre would form one of the integral features of the hotel. From the referral it can be concluded that the building of the fitness centre depends on the building of the hotel and vice versa. In this example there is a high degree of co-dependency between the two actions.

### What is the timeframe between the referred action and the related action?

A lengthy timeframe between two or more related actions may indicate that they are not components of a larger action.

A longer timeframe may suggest that the referred action is separate. Longer timeframes increase the potential or possibility that certain actions may not go ahead, especially actions that are planned to take place well into the future.



EXAMPLE: The development of a proposed pine forest is the referred action. The person proposing the referred action wants to clear an area and plant trees for future harvesting, which may occur in 15–20 years. There is some indication that the person is contemplating building a timber processing plant on the property if there is a business need. As the building of the plant is at least 15–20 years away and is dependent on how commercially viable the building of the plant would be, the development of the pine forest is probably a stand-alone action.

However, to use a different example, the construction of an industrial development may take many years and could involve a number of actions that a proponent may refer separately. As with other factors, time-span alone is not necessarily an over-riding determinant of whether an action is part of a split referral or not.

#### **What is the geographical relationship between the referred action and the related action?**

A substantial distance between the locations of actions may indicate that the referred action should not be treated as part of a larger action. Actions that involve the construction or installation of related facilities that are to be undertaken in significantly different geographic locations may indicate that the actions are stand-alone. However, there may also be cases where spatially separate proposals are co-dependent.

EXAMPLE: The referred action is the building of a railway station and the associated work such as the laying of tracks, perimeter fences etc. The referred action is part of a project that spans a large area and involves the building of several stations and laying down a large network of tracks. While the referred action is obviously part of an overarching strategy, the stations and various track works are geographically separated and the impacts on

protected matters are unlikely to be related. As such, it is unlikely that the entire action will be required to be referred under section 74A.

#### **Is there an overall plan or vision for the larger action and does that plan encompass the referred action?**

The existence of a master-plan or other planning documentation for a number of related actions may indicate that those actions are components of a larger action.

EXAMPLE: The referred action is the construction of a shopping centre. However, it is relevant to consider the proposed shopping centre together with its related actions. These actions include the construction of several large multistorey car parks, which were not included in the referral. This may indicate that the construction of the shopping centre is a component of a larger action that includes the construction of the car parks.

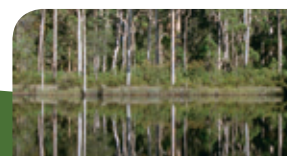
#### **Are the actions authorised by a single local government or State/Territory permit, licence or other authorisation?**

The authorisation of related actions by a single local Government or state/territory authorisation may suggest that they are components of a larger action.

EXAMPLE: The referred action is the building of a dam. The person proposing the action is also planning to develop the area around the proposed dam area. Both actions are authorised by the local council in one permit.

#### **Will the action be financed from a single funding source?**

Evidence that the referred action will be financed by the same funding source may indicate that the related actions are components of a larger action.



### Step 3: Determine if the Minister's discretion not to accept the referral should be exercised

A referred action that is part of a larger action can be refused only if there is a reasonable basis for doing so.

There are many reasons why 'splitting' a project makes good economic and/or planning sense. The existence of a split project is not a reason in itself for the Minister to exercise this discretion. The key question for the Minister is: does the splitting of the project reduce the ability to achieve the objects of the Act?

Other relevant considerations relating to Step 3 include:

#### Can the impacts of Part 3 matters only be assessed through the consideration of a larger action?

This is a critical consideration relating to a decision under subsection 74A(1). If acceptance of the referral might prevent sufficient assessment of the impacts of a larger action, then consideration of this larger action may be the only way to ensure that all the relevant impacts on protected matters are adequately assessed.

#### Will the referral of a series of single actions result in the larger action being effectively taken without the need for an approval?

If a referred action is considered to be one part of a larger action but is dealt with as an action in its own right, its impacts may not be considered to have a significant impact on a protected matter. Therefore, it would not be a controlled action. However, the larger action, when considered in its entirety, may have a significant impact on a protected matter.

If the acceptance of the referred action may prevent adequate consideration of the larger action's impacts on protected matters then it may be preferable for a decision to be made not to accept the referral.

#### Is it preferable to assess and approve the larger action as a whole?

It may be more consistent with the objects of the EPBC Act for the Minister to assess and approve the larger action as a whole. The acceptance of a referral of components in the earlier stages of a larger action may limit the scope of decision-making under the EPBC Act for parts of the larger action at a later date. This could weaken the protection of the EPBC Act by exposing protected matters to risk.

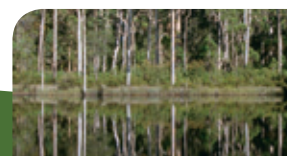
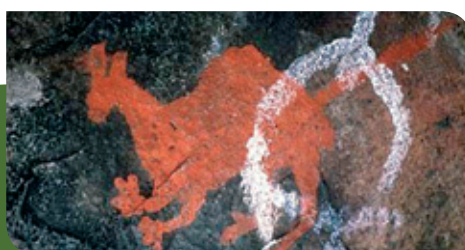
#### Policy considerations

As noted above, the key question for the Minister under subsection 74A(1) is whether or not the splitting of a project will reduce the ability to achieve the objects of the EPBC Act. This means the decision will usually centre on the question of how best to assess relevant impacts in order to promote the objects of the Act as set out in section 3.

### Step 4: Refusing a referral

If the Minister decides not to accept a referral, the Minister:

- (1) will give written notice of the decision to the person who referred the action;
- (2) will give written notice of the decision to the person who is proposing to take the action (if not the person who referred the action); and
- (3) may request (under section 70) that the person proposing to take the action refer the proposal to take the larger action to the Minister (paragraphs 74A(2)(a), (b) and (c)).



## Other considerations

(1) *A Minister cannot make a decision that an action needs approval if a split referral is refused*

The Minister is not permitted to make a decision under section 75 if subsection 74A(1) has been exercised to not accept a referral (see subsection 75(1AA)).

(2) *A proposal cannot be varied if a 'split referral' is refused*

A person proposing to take the action cannot vary their proposal if a decision under subsection 74A(1) has been made not to accept that particular referral (paragraph 156A(2)(a)).

## Examples

The following examples should not be read as prescribing a particular outcome in a given situation. Every decision will be made according to the particular facts of a given proposal. The purpose of these examples is to illustrate the types of matters and the process of reasoning that are relevant to the Minister's decision whether or not to exercise the discretion under section 74A.

### Example 1: Proposal to develop a residential subdivision and to build a shopping precinct

The referred action is the construction stages 1–6 of a residential subdivision. Stages 7–10 of the project involve the construction of a shopping precinct, and have not been referred. The same person is proposing to undertake all 10 stages. A master plan has been published, which clearly covers stages 1–10 of the project. Stages 7–10 are set to take place soon after the completion of the residential subdivision, in a designated area next to the location of the residential precinct. The referral notes that the viability of the residential subdivision (i.e. the saleability of the houses in the subdivision) is dependent on the construction of the shopping precinct and that the building of the

shopping precinct is dependent on the completion of the residential subdivision. While habitat for a listed threatened species is scattered across the entire site, the major concentration of this species occurs within the proposed location of the shopping precinct.

*Is the building of the residential subdivision a component of a larger action?*

The development of stages 1–6 of the residential subdivision may be viewed as a component of a larger action. This is indicated by:

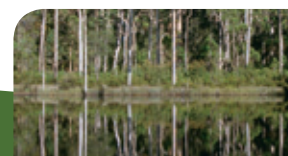
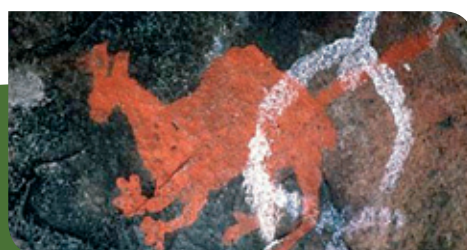
- the co-dependency of the development of the residential subdivision and the construction of the shopping precinct;
- the published master plan;
- the same person proposing to undertake all 10 stages; and
- the close spatial and temporal relationship between the two projects.

*Will the Minister exercise the discretion not to accept the referral of the component of the larger action?*

In this example the protection of Part 3 matters is likely to be best achieved through consideration of the larger action, as opposed to consideration of the component action by itself. Viewed as a separate action, the referred component is not likely to have a significant impact on the listed threatened species. Consideration of the larger action, however, would allow a proper consideration of relevant impacts on the threatened species. Accordingly, the Minister may have a reasonable basis to exercise his or her discretion not to accept the referral of the component of the larger action.

### Example 2: Proposal to upgrade a highway

The referred action is the upgrade of section 1 of a highway. The referral indicates that the upgrade of sections 2 and 3 of the highway will also be required, each of which will be referred separately. Information received from the person proposing to take the action indicates that the related actions are co-dependent.



The sections of road to be upgraded are spatially connected and the upgrades are temporally related. The upgrades are to be financed by the same funding source within the same funding period.

It is also apparent that the upgrade of section 1 will necessitate the upgrade sections 2 and 3 because heavy traffic can properly utilise the upgraded section 1 only when the other two sections have also been upgraded. The upgrade of all three sections is likely to impact on a protected matter because section 3 borders a Ramsar Wetland.

### Is the upgrade of section 1 of the highway a component of a larger action?

The referred action may be viewed as a component of a larger action as indicated by:

- the co-dependency of the upgrade to the three sections of the highway;
- the same funding source for all three sections;
- the same person proposing to undertake all three section upgrades;
- the close spatial connection between the sections of highway; and
- the close temporal relationship between the upgrades (i.e. the upgrade of section 2 will commence shortly after the completion of section 1 and so on).

### Will the Minister use the discretion not to accept the referral of the component of the larger action?

In this example the protection of Part 3 matters is likely to be best achieved through consideration of the larger action, as opposed to consideration of just the referred action by itself. The Minister would have a reasonable basis on which to exercise the discretion not to accept the referral of section 1 of the highway upgrade, as it is only when all three upgrades are considered that the impacts on the Ramsar Wetland can be properly considered.

## Summary of Approach

If a referral appears likely to be a 'split referral', the Minister will determine:

- (1) whether the referred action is a component of a larger action; and, if so
- (2) whether a decision should be made not to accept the referral. The Minister may then determine whether to request the person who made the referral to re-submit a proposal which includes all components of the larger action.

Section 74A of the EPBC Act provides that the Minister can:

- (1) decide not to accept a referral if s/he is satisfied that the action is a component of a larger action (section 74A(1)). The use of this power is discretionary. It is used when it is preferable, for the purposes of the EPBC Act, to assess the larger action rather than assess related actions separately. A referral is not automatically refused because it may be a 'split referral'; and
- (2) under section 70, request the person proposing to take the action to refer the larger action (s 74A(2)(c)).

The Act does not provide a process for the Minister to request a person to withdraw and re-submit their proposal, although this may be the usual process followed by the person who is proposing the action. There may be other alternatives available to a person whose referral is not accepted—e.g. if the referred action is a part of a larger action that has already been referred, the person may request to vary the referred larger action under section 156A of the Act, or withdraw the referral for the larger action and re-submit that referral.

