

# **Interim Engaging with First Nations People and Communities on Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999**



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### **Cataloguing data**

This publication (and any material sourced from it) should be attributed as: DCCEEW 2023, Interim Engaging with First Nations People and Communities on Assessments and Approvals Under the Environment Protection and Biodiversity Conservation Act 1999, Department of Climate Change, Energy, the Environment and Water, Canberra.

This publication is available at <https://www.dcceew.gov.au/environment/epbc/publications/engage-early>.

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### **Acknowledgement of Country**

The Department of Climate Change, Energy, the Environment and Water acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

# Contents

<b>Introduction.....</b>	<b>4</b>
Independent Review.....	4
Objectives .....	4
<b>Engaging with First Nations people and communities respectfully and effectively.....</b>	<b>6</b>
Ensuring cultural safety .....	6
Building and maintaining trust .....	6
Engaging early and often .....	7
Negotiating suitable timeframes.....	8
Negotiating suitable submission formats.....	8
<b>Engagement with First Nations peoples and communities under the EPBC Act.....</b>	<b>1</b>
Statutory obligations to invite comments under the EPBC Act.....	1
Engagement guidance developed by Australian Government agencies.....	1
Other useful sources of information include (but are not limited to): .....	2
Other legislation .....	3
Further Information.....	3
Environment referral, assessment and approval process under Part 7 to 9 of the EPBC Act.....	4
Statutory obligations to invite public comments as part of the environment assessment and approval process under Parts 7 to 9 of the EPBC Act .....	4
Strategic Assessments under Part 10 of the EPBC Act .....	7
Statutory obligations to invite public comments as part of the environment assessment and approval process under part 10 of the EPBC Act .....	7

# Introduction

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is Australia's primary piece of national environmental and heritage protection legislation, providing a framework for the protection of the environment, in particular those aspects of the environment that are nationally 'protected matters' including (but not limited to) World Heritage, Ramsar wetlands and threatened species and communities.

This document outlines statutory obligations for proponents, and the Department of Climate Change, Energy, the Environment and Water's (the department's) expectations of proponents, regarding respectful and effective engagement with First Nations People and Communities as part of the environment referral, assessment and approval process under Chapter 4 of the EPBC Act.

## Independent Review

The Independent Review of the EPBC Act (the review) was led by Professor Graeme Samuel AC and finalised in October 2020. The review found that the EPBC Act was not fulfilling its objectives relating to First Nations peoples and communities. The review highlighted the need to facilitate First Nations participation more actively in decision-making processes and incorporate their views and knowledge into regulatory processes.

A National Environmental Standard for First Nations engagement and participation in decision-making is being developed through a co-design process as part of a broader regulatory reform program responding to the findings of the review. The department notes this reform will occur alongside other initiatives such as the Australian Government's commitment to developing partnerships and working towards shared decision making with First Nations peoples and communities under the National Agreement on Closing the Gap.

## Objectives

The department aspires to be a leader in reconciliation, fostering respect, understanding and unity between First Nations peoples and communities and non-First Nations Australians. We value the unique relationship that First Nations peoples and communities have to care for the environment including land, sea, waterways, flora and fauna.

The department is informed by the recognition of, and respect for, the rights of First Nations peoples and communities in fulfilling the EPBC Act objectives. We recognise that First Nations peoples and communities have the right to be fully engaged in any processes, projects and activities that may impact upon them.

The department recognises that First Nations peoples and communities have cultural responsibilities to care for Country and play an important role in the conservation and sustainable use of Australia's environment and heritage. We expect proponents to actively engage with, and consider opportunities for working with, First Nations peoples and businesses as part of the assessment and approval process under the EPBC Act. These opportunities may include employing First Nations peoples and engaging First Nation communities to develop and deliver avoidance, mitigation and compensatory measures, such as, environmental offsets and ongoing environmental monitoring.

This guidance document updates the department's Engage early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the EPBC Act (2016).

INTERIM

# Engaging with First Nations people and communities respectfully and effectively

The department expects that proponents will engage respectfully and effectively with First Nations peoples and communities in meeting their statutory obligations. We encourage proponents to consider guidance developed by other Australian Government agencies (refer to relevant guidance at Section 3 of this document), where possible, as part of the environmental referral, assessment and approval process under the EPBC Act.

The department considers that First Nations peoples and communities are best placed to advise on appropriate protocols for respectful and effective engagement. For this reason, we encourage proponents to engage directly with First Nations peoples and communities to determine, and ideally co-design, appropriate protocols in any given situation.

Broadly, the department considers that respectful and effective engagement includes (but may not be limited to):

- ensuring cultural safety
- building and maintaining trust
- engaging early and often
- negotiating suitable timeframes
- negotiating suitable submission formats

## Ensuring cultural safety

Ensuring cultural safety means that the cultural identity, wants and needs of First Nations peoples and communities are protected and not likely to be subject to assault, challenge or rejection.

First Nations peoples and communities have diverse worldviews, languages, communication preferences and cultural protocols. What works well for engaging with one First Nations person or community may not be appropriate for engaging with another person or community.

The department welcomes diverse input and views as part of the environment referral, assessment and approval process, including from both First Nations and other knowledge systems. We understand that many First Nations peoples and communities may hold experiential, totemic and intuitive understandings of the environment based on their cultural knowledge. The department encourages proponents to value the experiences, perspectives and cultures of First Nations peoples and communities and consider a range of engagement options.

## Building and maintaining trust

The department acknowledges that, for some First Nations peoples and communities, experiences of racism and mistreatment may have led to impacts on identity and intergenerational trauma. We note that the building and maintaining of trust may occur within this context.

Building and maintaining trust with First Nations peoples and communities may require the proponent to invest in ongoing relationships and partnerships. Proponents may enhance these partnerships by ensuring that both staff and policies are culturally competent. Cultural competence is an ongoing journey built through self-reflection, knowledge and engagement with others. Proponents may consider our Partnering with Indigenous Organisations for a Sustainable Environment, which provides guidance on cultural competence, and is available at: <https://www.dcceew.gov.au/about/publications/partnering-indigenous-organisations>.

Building and maintaining trust means acting with integrity. The department expects proponents to engage with First Nations peoples and communities in a way that is respectful, ethical, honest and fair and that supports informed decision making including in situations where there may be differences of opinion, challenge or dispute.

We encourage proponents to reach agreement on the process for mediating disputes and conflict at the commencement of consultation. Proponents should be prepared to adapt these arrangements over time and to the situation, as required.

## **Engaging early and often**

First Nations peoples and communities should be engaged as early in the project planning phase as possible. The onus is on the proponent to initiate this engagement and, potentially, to fund this engagement, if required.

Proponents should ideally engage directly and actively with the relevant First Nations people, communities, groups and organisations, as methods such as letters and newspaper and media advertisements may not reach or be seen by First Nations people. Proponents should also be aware that a number of different First Nations people, communities, groups and organisations may be affected by a proposed project. These may include, for example, Traditional Owner organisations, Native Title holders and claimants, Native Title Prescribed Bodies Corporate and Representative Bodies, Aboriginal or Torres Strait landowners and trustees, Land Councils etc.

Proponents should allow time for First Nations peoples and communities to decide if they wish to become involved in a proposal. The time and location of meetings, along with any special measures required, should be on the advice and at the discretion of First Nations peoples and communities. Proponents should also note that First Nations peoples and communities may be considering multiple proposals and issues at any given time and factor this into their forward planning.

Proponents are encouraged to consider the requirement for early and ongoing engagement relative to the complexity and significance of the proposal to First Nations peoples and communities. Proponents should note that engagement may be required over the very long term. For example, providing only the minimum 10 business days to comment on preliminary documentation for a proposal that is likely to impact the environment for hundreds of years is unlikely to be adequate. Proponents are encouraged to undertake consultation beyond the minimum standard required by the EPBC Act, where possible.

The department encourages proponents to maintain suitable records of stakeholder engagement, including engagement with First Nations peoples and communities. We may request this information as part of the environment referral, assessment and approval process.

## **Negotiating suitable timeframes**

The department recognises that the statutory timeframes imposed by the EPBC Act, in which the public are invited to provide comment on proposals, may not reflect the cultural obligations, community dynamics or decision-making processes of First Nations peoples and communities.

Proponents should be aware that cultural obligations, such as protocols governing death and grieving, may require First Nations peoples and communities to engage in ceremony for days, weeks or in some cases months, during which First Nation peoples or communities may not be available for other business. First Nations peoples and communities may also be unavailable on calendar dates that are significant, such as, during NAIDOC Week and National Sorry Day. Proponents should respect these protocols, and build flexibility into engagement strategies, as far and as early as possible in the engagement process.

Proponents should respect that First Nations peoples and communities may need time to reach a consensus in providing input and/or may decide to provide differing and conflicting opinions.

Proponents should not become involved in disputes between First Nations peoples and communities as they need to be resolved at the community level. Proponents should allow time for consensus to be reached, and disputes to be resolved, as far as possible.

Proponents are encouraged to, and members of the public may, contact the department if additional time for engagement, beyond statutory timeframes, is required. Measures exist under the EPBC Act to extend, vary and stop clocks on the referral, assessment and approval process, where required. We will be able to advise on, and consider, these measures on a case-by-case basis.

## **Negotiating suitable submission formats**

The department recognises that many of the submission formats imposed by the EPBC Act and associated policies may not reflect the communication needs or preferences of First Nations peoples and communities. We also recognise that technological inequalities occur across Australia and, for this reason, submission formats requiring online access may be inappropriate for some parts of the Australian community. The department notes that substantial postal delays may also occur in some areas of Australia, particularly regional and remote areas.

Proponents should be aware that First Nations peoples and communities may wish to provide comments in an oral format. English is a second or third language for many First Nations peoples and communities, and ability to read in English cannot be assumed. Interpreters may be required and may be difficult to source in many communities. Proponents should facilitate oral submissions and fund interpreters, if they are required, and be prepared to explain technical language, jargon and scientific concepts in a way that is meaningful and understood by First Nations peoples and communities.

Proponents should be aware that some issues may not be able to be discussed in an open meeting of all stakeholders and there may be restrictions on the disclosure of sensitive information relating to, for example, cultural knowledge and customs.

Proponents are encouraged to contact the department directly if First Nations peoples and communities indicate that submissions may include sensitive information that should not be made

available to the public. Measures exist under national environmental, intellectual property, freedom of information and privacy legislation to restrict access to information in some instances. We will be able to advise on, and consider, these measures on a case-by-case basis.

INTERIM

# Engagement with First Nations peoples and communities under the EPBC Act

The department encourages proponents to engage with First Nations peoples and communities at each stage of the environment referral, assessment and approval process. Further information on this process is available at: <https://www.dcceew.gov.au/environment/epbc/advice>.

## Statutory obligations to invite comments under the EPBC Act

The minister and proponents have statutory obligations to invite public comments at various stages of the environment referral, assessment and approval process. The minister must take this information into account in determining whether (or not) an action is a controlled action and whether (or not) to approve an action under the EPBC Act. Further information on the environment referral, assessment and approval process, including statutory obligations to invite public comment, is available at **Attachment 1** (referral, assessment and approvals) and **Attachment 2** (strategic assessments).

The minister must also inform and invite relevant Commonwealth ministers to provide information on referrals under the EPBC Act. As part of this process, the department routinely informs and invites comments on referrals from the Minister for Indigenous Australians. The department may liaise with the National Indigenous Australians Agency (NIAA) as part of this process.

Proponents should be aware that there may also be obligations to consult with First Nations peoples and communities in relation to, for example, Native Title and Indigenous Protected Areas. The department may request that this information be provided as part of the environmental referral, assessment and approval process under the EPBC Act.

Respectful and effective engagement with First Nations peoples and communities will often require more time than provided by statutory obligations. Proponents should anticipate and plan for this potential situation.

## Engagement guidance developed by Australian Government agencies

The department encourages proponents to implement best practice consultation with the public, including First Nations peoples and communities, where possible.

We note that some Australian Government agencies have released policies, which provide guidance on engagement with First Nations peoples and communities. These policies include (but are not limited to):

- Heritage Chairs of Australia and New Zealand (2021). Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and the Best Practice Standards in Indigenous Cultural Heritage Management and Legislation. Available at:

<https://www.dcceew.gov.au/parks-heritage/heritage/publications/dhawura-ngilan-vision-atsi-heritage>.

- Australian Institute of Aboriginal and Torres Strait Islander Studies (2020). Principles for engagement in projects concerning Aboriginal and Torres Strait Islander peoples. Available at: <https://aiatsis.gov.au/publication/94687>
- Great Barrier Reef Marine Park Authority (2019). Strong Peoples – Strong Country Indigenous Heritage Monitoring Framework. Available at: <https://elibrary.gbrmpa.gov.au/jspui/handle/11017/3537>
- Commonwealth of Australia (2021). Indigenous Partnership Principles: National Environmental Science Program. Available at: <https://www.awe.gov.au/sites/default/files/env/pages/2f561690-b47e-4bf2-b028-d18739b3486f/files/nesp-indigenous-partnerships-principles.docx>
- Department of Agriculture, Water and the Environment. Partnership Agreement to Protect Indigenous Cultural Heritage. Available at: <https://www.awe.gov.au/parks-heritage/heritage/about/indigenous-heritage>
- Commonwealth of Australia. Closing the Gap. Available at: <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>
- Commonwealth of Australia (2016). Working with Indigenous Communities: Leading Practice Sustainable Development Program for the Mining Industry. Available at: <https://www.industry.gov.au/sites/default/files/2019-04/lpsdp-working-with-indigenous-communities-handbook-english.pdf>

## **Other useful sources of information include (but are not limited to):**

- [National Indigenous Australians Agency](#)
- [National Native Title Tribunal](#)
- [Australian Institute of Aboriginal and Torres Strait Islander Studies](#)
- [Indigenous Land and Sea Corporation](#)

The Department encourages proponents to have regard to these policies, where possible, when engaging with First Nations peoples and communities as part of the environmental assessment and approval process under the EPBC Act.

## Other legislation

The department notes that proponents may have obligations to engage with First Nations peoples and communities under other legislation including, but not limited to, the Native Title Act 1993 (Cth) and the Protection of Moveable Cultural Heritage Act 1986 (Cth). We note that this engagement may occur alongside obligations under the EPBC Act.

## Further Information

Further information regarding the EPBC Act is available on the department's website at <https://www.dcceew.gov.au/environment/epbc>. Contact us on 1800 920 528 or use our online form.

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# ATTACHMENT 1

## Environment referral, assessment and approval process under Part 7 to 9 of the EPBC Act

The EPBC Act environment referral, assessment and approval process consists of the following stages:

- **Pre-referral stage (voluntary)** – The action is discussed with the department to guide self-assessment and inform the proponent’s decision whether to refer the action to the minister.
- **Referral stage** – The action is referred. The minister (or their delegate) determines whether the action is a ‘controlled action’ (i.e., likely to have a significant impact on nationally protected matters) requiring assessment and approval before the action can commence. Additionally, the minister (or delegate) determines the assessment approach that will be used to undertake the assessment.
- **Assessment stage** – The assessment is carried out in accordance with the requirements of the assessment approach under the EPBC Act.
- **Approval stage** – The minister decides whether (or not) to approve the action, and if so, what conditions be attached to the approval. This stage includes the minister making a proposed decision and then a final decision under the EPBC Act.
- **Post-approval stage** - The approval holder undertakes the action in accordance with the final approval, including any attached conditions. The department has a monitoring and audit program to ensure compliance with the conditions of approval.

## Statutory obligations to invite public comments as part of the environment assessment and approval process under Parts 7 to 9 of the EPBC Act

### Stage of process

#### Referral documentation

Time frames for consultation are 10 business days (measured in Canberra). The department is the coordinating body under EPBC Act Part 7, Division 1.

Section 75(7) of the EPBC Act provides that the running of time on the minister making a referral decision may be suspended by agreement in writing between the minister and the proponent. If an agreement is made, those days are not to be counted for the purposes of the referral decision.

Section 76 of the EPBC Act provides that the minister may request more information for making the referral decision. The time in which the minister must make a referral decision (20 business days) does not run while further information is being sought by the minister.

<b>Stage of process</b>	<b>Time frames for consultation<sup>1</sup></b>	<b>Coordinating body</b>	<b>EPBC Act reference</b>
Assessment – assessment on referral information	10 business days (measured in Canberra) on Department’s recommendation report	Department	Part 8, Division 3A
Assessment – preliminary documentation	At least 10 business days on preliminary documentation	Proponent	Part 8, Division 4
Assessment – Public Environment Report (PER)	Minimum of 20 business days on Draft PER	Proponent	Part 8, Division 5
Assessment – Environmental Impact Statement (EIS)	Minimum of 20 business days on Draft EIS	Proponent	Part 8, Division 6
Assessment – Inquiries	Hearings held as part of the inquiry must be conducted in public unless the Commission directs otherwise.	The minister appoints commissioners and sets terms of reference. Commission conducts inquiry and provides an inquiry report to the minister.	Part 8, Division 7

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<sup>1</sup> The information provided in relation to time frames for consultation is to be read subject to Part 11 (Miscellaneous rules about assessments and approvals) including section 156 (General rules about time limits) of the EPBC Act.

Stage of process	Time frames for consultation <sup>1</sup>	Coordinating body	EPBC Act reference
Assessment – Assessment under bilateral agreements with states and territories	Invitation to provide comment will be in accordance with the relevant state or territory legislative process.	Relevant state or territory agency	Part 5

### Assessment – all of the above processes

Section 132 of the EPBC Act provides that, if the minister believes on reasonable grounds that he or she does not have enough information to make an informed decision whether or not to approve for the purposes of a controlling provision the taking of an action, the Minister may request specified information relevant to making the decision.

# ATTACHMENT 2

## Strategic Assessments under Part 10 of the EPBC Act

Strategic Assessments are landscape-scale assessments made under Part 10 of the EPBC Act. They are voluntary agreements that are undertaken with a strategic assessment partner that enable a big-picture approach to the protection of matters of national environmental significance. Strategic assessment can allow for a broad set of actions to operate under a single assessment and approval process.

Design, preparation and approval of a strategic assessment consists of the following stages:

- **Agreement** – the minister (or their delegate) and the strategic assessment partner negotiation and sign an agreement to undertake a strategic assessment and to develop draft terms of reference to guide the impact assessment process. The draft terms of reference are made available for public consultation before finalising the terms of reference.
- **Strategic environmental assessment of the policy, plan or program**– the strategic assessment partner prepares a draft policy, plan or program that details the development proposal and a draft strategic impact assessment report that assess the impacts of implementing their policy, plan or program. The draft strategic impact assessment report and draft policy, plan or program are made available for public consultation.
- **Endorsement** – if appropriate, and taking into account of public comments, the minister will endorse the policy, plan or program.
- **Approval** – the minister may approve a ‘class of actions’ and may set conditions to ameliorate the impacts of these actions on matters protected.

Opportunities for engagement with and by First Nations peoples and communities may occur during the parts of the strategic assessment process outlined in the table below.

## Statutory obligations to invite public comments as part of the environment assessment and approval process under part 10 of the EPBC Act

Stage of process	Time frames for consultation	Coordinating body	EPBC Act reference
Public Consultation – Draft terms of reference	Minimum of 28 days	Department or strategic assessment partner	Part 10, s146 (1B) (b.ii)
Public Consultation – Draft Strategic Impact Assessment Report (and	Minimum of 28 days	Department or strategic assessment partner	Part 10, s146 (2.b)

Interim

draft policy, plan or program <sup>2</sup> )			
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<sup>2</sup> Non legislative step under the EPBC Act