

AUSTRALIA'S *National Heritage*



MAKING A REFERRAL

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INTRODUCTION

ONCE INCLUDED IN THE NATIONAL HERITAGE LIST, A PLACE BECOMES A MATTER OF NATIONAL ENVIRONMENTAL SIGNIFICANCE (NES) UNDER THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999* (EPBC ACT), JOINING:

- World Heritage places;
- Wetlands of international importance (Ramsar wetlands);
- Threatened species and ecological communities;
- Migratory species;
- Commonwealth marine areas; and
- Nuclear actions.

Other matters protected under the EPBC Act include:

- The environment, including places on the Commonwealth Heritage List and the Register of the National Estate.

These matters are provided specific protection under the EPBC Act and the referrals process is an important trigger in protecting the National Heritage values of National Heritage places.

It is important to conserve and protect the heritage values of a National Heritage place and to ensure that actions proposed for the place will not have a significant impact on the heritage values. The owner or manager of the place is required to decide whether or not the action proposed has the potential to have a significant impact on National Heritage values. Any action that has, will have or is likely to have a significant impact on any matter of NES, including National Heritage values, must be referred to the Federal Environment Minister for a decision about whether the action should be a controlled action or not.

If a person or entity is uncertain as to whether or not a proposed action constitutes a controlled action, they can refer the matter to the Federal Environment Minister for legal certainty.

WHAT IS A REFERRAL?

A 'referral' is an application for approval by the Federal Environment Minister of an action which has, will have, or is likely to have a significant impact on any matter of NES, including National Heritage values.

WHAT IS AN ACTION?

In broad terms, an 'action' could include a project, a development, an undertaking, an activity or series of activities, or an alteration of any of these things. More details of actions can be found in the *EPBC Act Policy Statement 1.1 Significant Impact Guidelines - Matters of National Environmental Significance* prepared by the Department in 2006.

See:

➤ www.environment.gov.au/epbc/publications/nas-guidelines.html

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WHEN DO I HAVE TO REFER ACTIONS TO THE MINISTER?

If an action will be undertaken by a constitutional corporation (for example any incorporated company) or Commonwealth agency, the agency, owner or lessee must refer a proposed action to the Federal Environment Minister for a decision if they consider that the action has, will have, or is likely to have a significant impact on National Heritage values.

If included on a state heritage register or list, protection measures for heritage places are likely to be adequate to protect the historic National Heritage values of places owned by state and local governments and private individuals. However, these owners should still consider submitting a referral for an action that has the potential to have a significant impact on National Heritage values.

If you are not sure whether significant impacts are likely, you can still make a referral and you will have a decision within 20 business days as to whether or not approval is required.

If at any stage of a project it emerges that there may be significant impacts on a protected matter, the proposed action should be referred to the Federal Environment Minister for a decision on whether approval is required.

WHAT IS A SIGNIFICANT IMPACT?

The *EPBC Act Policy Statement 1.1 Significant Impact Guidelines* can also assist an agency to establish whether an action is considered to have a 'significant impact'. Generally, a significant impact is an impact which is important, notable or of consequence having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value and quality of the environment which is impacted, and is also dependent on the intensity, duration, magnitude and geographic extent of the impacts. All these factors should be considered when determining whether an action is likely to have a significant impact on the National Heritage values of a place.

The *EPBC Act Policy Statement 1.1 Significant Impact Guidelines* state that an action is likely to have a significant impact on the National Heritage values of a place if there is a real chance or possibility that it will cause:

- One or more of the National Heritage values to be lost;
- One or more of the National Heritage values to be degraded or damaged; or
- One or more of the National Heritage values to be notably altered, modified, obscured or diminished.

An owner or manager may find it useful to seek the advice of a heritage professional in determining significant impacts on National Heritage values. The Heritage Division of the Department of the Environment, Water, Heritage and the Arts can provide informal advice about works proposals.

HOW DO I IDENTIFY SIGNIFICANT IMPACTS?

Understand the National Heritage values of your place

Management decisions and/or future actions have the potential to impact on heritage values if the values are not clearly understood. Therefore, it is important to understand the values for which the place has been included in the National Heritage List and how these values may be represented. These can be searched on the Australian Heritage Database at:

➤ www.environment.gov.au/cgi-bin/ahdb/search.pl

Judgements may be needed to determine how the values are physically or intangibly represented in the place. The Heritage Division of the Department of the Environment, Water, Heritage and the Arts can assist you in understanding these values.

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Act consistently with the National Heritage management principles

Owners, managers, and decision makers, should understand and act consistently with the National Heritage management principles.

Seek appropriate advice

It is advisable to consult an independent heritage professional in relation to proposed actions and referrals, particularly where there is not a recent (within the last five years) management plan in place. A heritage professional can assist in the assessment of the potential impacts on heritage values as a result of proposed actions. A heritage professional should be engaged early, if there is insufficient heritage advice available in-house. Informal advice can also be sought from the Department of the Environment, Water, Heritage and the Arts. It is preferable that such advice be sought early in the design and development stage of a project.

Provide relevant information for relevant people

Decision-makers must be knowledgeable about the obligations and implications of National Heritage listing and the referrals process. People (for example, maintenance staff) that work on a place on a regular basis must be trained to identify potential heritage issues and breaches of the EPBC Act. If there is a management plan for the place, all relevant staff and those involved in the management of the place must be trained in its use and implementation.

Establish appropriate decision-making procedures

An internal management system should be developed as part of, or following the preparation of, a management plan to ensure that proposed actions do not adversely impact on heritage values. This system should make certain that actions are not taken without appropriate prior assessment of potential impacts, and that alternatives to actions that may have a significant impact are identified and assessed. A pro forma, such as an 'action proposal form', should be prepared that walks proponents of an action through the decision-making process, emphasising the imperative to avoid adverse impacts on heritage values. It is desirable that this system be linked to existing maintenance and capital works processes. A clear way of documenting, reporting and monitoring change should be built into the management system.

Ensure clear decision-making for taking actions

A single person or body should be appointed by the owner/manager and delegated the responsibility for making the ultimate decision (after receiving relevant information and advice) about the need to refer actions to the Federal Environment Minister.

Determining a significant impact and making a referral

The person appointed with the responsibility for a proposed action needs to undertake a 'self assessment' to decide whether or not a proposed action is likely to have an adverse or significant impact on the National Heritage values of the place. When dealing with a place that has Indigenous heritage values as part of its National Heritage listing, consultation with traditional owners and other relevant Indigenous people with rights and interests in the place may assist in making this decision. Generally it is considered that a 'significant impact' relates to an action or proposal that will be irreversible and damage, degrade or destroy heritage values. Also, it is important to note that actions may indirectly impact or have subsequent effects on National Heritage values.

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The self assessment should be objective and based on sufficient information. The assessment process should:

- Consult the official heritage values to ensure the proposal is consistent with the values;
- Consult a management plan, if there is one, to ensure the proposal is consistent with the management recommendations and/or conservation policies;
- Consult the National Heritage management principles to be consistent with them;
- Consider the action in the broadest context, including its related activities and infrastructure;
- Look at all possible alternatives to the action or proposal;
- Look at any possible subsequent effects the action may have on other matters of national environmental significance or in the future;
- Select an action that does not, or is not likely to, significantly impact on heritage values;
- Undertake measures which mitigate the impact on National Heritage values;
- Document the decision about taking the action and demonstrating how the action is not likely to have an adverse impact on heritage values; and
- Refer actions that may have a significant impact.

The self assessment should present a clear and concise conclusion on whether or not the proposal is likely to have a significant impact on the National Heritage values of a place. This information should be compiled as supporting information for the proposed action for a referral if one is to be lodged with the Department and as a record of change to the place. The responsible person should make the decision as to whether or not to refer an action to the Federal Environment Minister. If there is still uncertainty about whether or not the action is likely to have a significant impact then a referral should be made. The Minister is obliged to make a decision within 20 business days as to whether or not the proposal requires approval under the EPBC Act.

HOW DO I MAKE A REFERRAL?

Referral forms are provided by the Department of the Environment, Water, Heritage and the Arts and should be submitted to the Approvals and Wildlife Division of the Department. The person making the referral will be required to provide information about the proposal, including the details of exactly what is proposed, where and when, and a description of the likely environmental impacts, particularly in relation to National Heritage values or other matters of NES. A Guide for Format, and Submission of Referrals under Chapter 4 of the EPBC Act, is available online at:

➤ www.environment.gov.au/epbc/assessments/index.html

The referral can be accompanied by supporting documentation.

More information about the referral process can be found in the fact sheets at:

➤ www.environment.gov.au/epbc/publications/pubs/assessment-process.pdf

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HOW LONG DO REFERRALS TAKE?

The EPBC Act requires a decision on the referral to be made within 20 business days from the date the referral is received by the Department. If the Federal Environment Minister, or delegate, believes that not enough information has been provided to make an informed approvals decision, further information may be requested from the proponent. This 'stops the clock' in terms of the time in which the Federal Environment Minister must make a decision until sufficient information is received.

ARE REFERRALS CONFIDENTIAL?

Referrals are not confidential. The Federal Environment Minister is required to invite public comment with respect to referrals through publication on the Department's website.

CAN I COMMENT ON A REFERRAL?

Comments can be provided within 10 business days and must be submitted in writing. Referrals open for public comment can be viewed at:

➤ www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl

by selecting Invitations to Comment from the menu bar. It is not possible to view comments from others using the database. Once the referral has been assessed by the Department it is possible to identify if public comments were received for the referral by selecting the Public Notifications relating to referrals at:

➤ www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl

WHAT IS AN APPROVAL?

After receiving a referral, the Federal Environment Minister (or delegate) determines whether the action is likely to have a significant impact on the matter protected (e.g. on the National Heritage values). If the Minister decides that significant impacts are likely, the action will require approval under the EPBC Act (it is made a 'controlled action').

If, after receiving a referral, the Federal Environment Minister decides an action is not likely to have a significant impact on a matter of NES (on the National Heritage values), then the action does not require approval under the EPBC Act (it is not a controlled action). In this case, there are no further requirements or obligations under the EPBC Act. The proposal may proceed in the form that it was referred, subject to any other approvals such as those required by a state or territory government or local council.

Not every activity proposed for a National Heritage place will necessarily have a significant impact. It is important to provide all the information available to help decide whether or not significant impacts are likely and whether EPBC Act approval is required. This should include information about any measures being taken to reduce impacts.

In some cases the Federal Environment Minister may decide that approval is not required because it is proposed to take the action in a way that avoids impacts on the protected matter. In this case, the proponent may be able to proceed without further assessment and approval, on the condition that the action is taken in accordance with a particular manner that has been specified in the referral.

A guideline on application of 'Particular Manner' in decision-making under the EPBC Act is available online at:

➤ www.environment.gov.au/epbc/publications/manner.html

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WHAT HAPPENS IF I DO NOT REFER AN ACTION?

If an action has, will have, or is likely to have, a significant impact on any matter of NES, including National Heritage values, and the owner or manager of the place or the proponent of the action decides not to refer the action for the approval of the Federal Environment Minister, there are a number of possible outcomes.

Penalties

Civil and criminal penalties may apply when there are breaches of the legislation in relation to matters of NES. Individual civil penalties are the equivalent of 5,000 penalty units, and for a Body Corporate it is 50,000 penalty units.

For an individual, a conviction under the EPBC Act could result in imprisonment for a period of up to seven years, a fine of up to 420 penalty units, or both. A body corporate could be subject to a fine of up to 2,100 penalty units (1 penalty unit currently equals \$110).

A director (or other executive officer) of a company could be held individually liable (for either criminal offences or civil penalties) where the company breaches the legislation in relation to matters of NES.

In the case of National Heritage values, these penalties can be applied to:

- The actions of Commonwealth agencies;
- The actions of constitutional corporations;
- Actions by a person on Commonwealth land;
- Actions by a person taken outside Commonwealth land which affect Commonwealth land;
- Actions by a person for the purpose of trade or commerce between the states and territories or internationally;
- Actions by a person which have a significant impact on Indigenous National Heritage values; or
- Actions by a person which are in breach of Australia's obligations under Article 8 of the Biodiversity Convention.

If a member of the public believes that an action breaches the EPBC Act, they may contact the Department of the Environment, Water, Heritage and the Arts or write to the Federal Environment Minister to report the action. When reporting information on a possible breach of the legislation, a person can choose to remain anonymous.

The Department of the Environment, Water, Heritage and the Arts takes compliance with the EPBC Act seriously and investigates alleged breaches.

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Minister's decision

A state, territory or Australian Government Minister, or any government agency that is aware of a proposed action, can make a referral if that Minister or agency has administrative responsibilities relating to the action. The Federal Environment Minister may request a person to make a referral. If a referral is made by a state or territory Minister or government agency, the Federal Environment Minister will inform the person proposing to take the action and invite them to provide further information.

The Federal Environment Minister can request a person to make a referral. If that person fails to comply with the Minister's request, the Minister can determine that the EPBC Act has effect as if a referral had been made. Following a determination, the Minister will then proceed to make a decision on whether the action is a controlled action. The making of this decision will be undertaken in accordance with the existing processes relating to whether approval is required under the EPBC Act.

Federal Court order

Without the benefit of an approval under the EPBC Act, the Federal Environment Minister, or an interested person or incorporated organisation, may apply to the Federal Court for an injunction to prevent the action from proceeding.

Remediation

Where a person contravenes the EPBC Act by taking an action that has, will have, or is likely to have, a significant impact on any matter of NES, including National Heritage values, the person may be required to meet the costs of remedying the damage to the environment or the matter of NES, and preventing future damage.

The information provided above is intended to provide indicative advice and does not replace, nor should it be used in place of, advice provided by the Approvals and Wildlife Division section of the Department.

The information provided above is intended to provide indicative advice and does not replace, nor should it be used in place of, advice provided by the Referrals section of the Department.

