

AUSTRALIA'S *Commonwealth Heritage*



MAKING A REFERRAL

- What are matters of National Environmental Significance?
- What is an action?
- What is a referral?
- When do agencies have to refer actions to the Minister?
- What is a significant impact?
- How do I identify significant impacts?
- How do I make a referral?
- How long do referrals take?
- Are referrals confidential?
- Can I comment on a referral?
- What is an approval?
- Can agencies make changes to a heritage place?
- What happens if an action is not referred?



MAKING A REFERRAL

INTRODUCTION

UNDER THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (EPBC ACT) APPROVAL IS REQUIRED FOR CERTAIN ACTIONS.

This section provides an overview of matters to consider in relation to referrals and directs managers to key resources and guidelines.

WHAT ARE MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE?

Under the EPBC Act approval for an action is required where the action will or is likely to have a significant impact on matters of National Environmental Significance (NES).

The matters of NES are:

- Listed threatened species and ecological communities;
- Migratory species protected under international agreements;
- Ramsar wetlands of international importance;
- The Commonwealth marine environment;
- World Heritage properties;
- National Heritage places; and
- Nuclear actions

For further information refer to:

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

WHAT IS AN ACTION?

An 'action' is defined broadly in the EPBC Act and includes: a project, a development, an undertaking, an activity or series of activities, or an alteration of any of these things.

An action may have both beneficial and adverse impacts on the environment, however only adverse impacts on matters of NES are relevant when determining whether approval is required under the EPBC Act.

WHAT IS A REFERRAL?

A 'referral' is an application for a decision by the Federal Environment Minister (the Minister) or his delegate on whether an action requires assessment and approval under the EPBC Act. A referral identifies the person proposing to take the action and includes a comprehensive description of the proposal, the project location, any potential impacts and any proposed mitigation measures. Referring of an action involves filling out a referral form and sending it to the Department of the Environment, Water, Heritage and the Arts (the Department) for a decision by the Minister. The EPBC Act referral process is outlined in more detail at the end of these guidelines.

MAKING A REFERRAL

WHEN DO AGENCIES HAVE TO REFER ACTIONS TO THE MINISTER?

If an action will be undertaken by a Commonwealth agency or undertaken on Commonwealth land, the agency, owner, or lessee of the place must refer a proposed action to the Minister for a decision if they consider that the action has, will have or is likely to have a significant impact on the Commonwealth Heritage values of a Commonwealth Heritage place. A proposed action may also have a significant impact on a matter of NES, in which case, the action should be referred. The Department's guideline – *EPBC Act Policy Statement 1.1 – Significant Impact Guidelines – Matters of National and Environmental Significance* has further detail about these matters. You should also refer to *EPBC Act Policy Statement 1.2 Significant Impact Guidelines – Actions on, or impacting upon, Commonwealth land and actions by Commonwealth agencies*.

As outlined in these guidelines approval is also required for:

- An action taken by any person on Commonwealth land that is likely to have a significant impact on the environment - (s26(1) of the EPBC Act);
- An action taken by any person outside of Commonwealth land that is likely to have a significant impact on the environment on Commonwealth land - (s26(2) of the EPBC Act) and
- An action taken by a Commonwealth agency anywhere in the world that is likely to have a significant impact on the environment - (s28 of the EPBC Act).

See:

- www.environment.gov.au/epbc/publications/nes-guidelines.html
- www.environment.gov.au/epbc/publications/commonwealth-guidelines.html

WHAT IS A SIGNIFICANT IMPACT?

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 upon the intensity, duration, magnitude and geographic extent of the impacts. You should consider all of these factors when determining whether an action is likely to have a significant impact on matters of NES.

A place manager may find it useful to seek the advice of a heritage professional in determining significant impacts on heritage values. The Heritage Division of the Department can also provide informal advice about works proposals.

To make a decision as to whether or not to refer an action to the Minister, you should consider the following:

1. Are there any matters of NES located in the area of the proposed action (noting that 'the area of the proposed action' is broader than the immediate location where the action is undertaken; consider also whether there are any matters of NES adjacent to or downstream from the immediate location that may be potentially impacted)?
2. Considering the proposed action at its broadest scope (that is, considering all states and components of the action, and all related activities and infrastructure), is there potential for impacts, including indirect impacts, on matters of NES. For wetlands of international importance as well as World Heritage and National Heritage places, you will need to consider the potential impact on the listed heritage values.
3. Are there any proposed measures to avoid or reduce impacts on matters of NES (and if so, is the effectiveness of these measures certain enough to reduce the level of impact below the significant impact threshold)?
4. Are any impacts of the proposed action on matters of NES likely to be significant impacts?

MAKING A REFERRAL

HOW DO I IDENTIFY SIGNIFICANT IMPACTS?

Understand the Commonwealth and/or 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 Commonwealth and or 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 can assist you in understanding these values.

Act consistently with the Commonwealth and National Heritage management principles

Place managers, or the decision makers, should understand and act consistently with the Commonwealth and if applicable 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 preparation of a management plan and in the assessment of potential impacts on heritage values 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 Commonwealth and or 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 and delegated the responsibility for making the ultimate decision (after receiving relevant information and advice) about the need to refer actions to the Minister.

MAKING A REFERRAL

Determining a significant impact and making a referral

The agency taking the 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 Commonwealth and or National Heritage values of the place (as well as any matters of NES). When dealing with a place that has Indigenous heritage values as part of its Commonwealth and or 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.

An action is likely to have a significant impact on the heritage values if there is a real chance or possibility that it will cause:

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

It is also important to note that actions may indirectly impact or have subsequent effects on Commonwealth and or National Heritage values.

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 Commonwealth and 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 NES 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 Commonwealth and or National Heritage values;
- Document the decision about taking the action and demonstrate 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 Commonwealth and or 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 agency should make the decision as to whether or not to refer an action to the 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.

MAKING A REFERRAL

HOW DO I MAKE A REFERRAL?

You can submit the referral electronically or in paper form. 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 Commonwealth and or National Heritage values or other matters of NES. Referral forms and further guidance on submitting a referral is available from the Department's website at:

➤ <http://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

If you have any questions on the referral process, the Referral Business Entry Point, EIA Policy Section can be contacted through the Community Information Unit on:

➤ **1800 803 772** or by emailing epbc.referrals@environment.gov.au

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 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 Minister must make a decision until sufficient information is received.

ARE REFERRALS CONFIDENTIAL?

Referrals are not confidential. The 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 of being published on the Department's website 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

MAKING A REFERRAL

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 (eg on the Commonwealth or 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 Minister decides an action is not likely to have a significant impact, 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. A second referral may be required where changes to the proposed project may have increased the likelihood of potential significant impacts to matters of NES.

Not every activity proposed for a Commonwealth 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 avoid or reduce impacts.

In some cases the 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

CAN AGENCIES MAKE CHANGES TO A HERITAGE PLACE

Listing is not designed to 'freeze the place in time'. Listed places can continue to be used, maintained, sold or leased. All proposed uses of heritage places must be tested against the EPBC Act to ensure that the use does not have a significant impact on heritage values. Some common changes associated with heritage places include:

Adaptive re-use

Adaptive re-use can ensure the survival of heritage values for future generations. Managers planning a new use should ensure that the change of use and necessary physical changes do not have a significant impact on the heritage values.

Maintenance work

Routine maintenance can usually be carried out without the need for a referral. The preparation of a management plan will clarify what works (including maintenance works) can be carried out at a place listed on the Commonwealth Heritage List without going through the referral process.

Items and areas on a listed place which could be removed or altered

Areas and items within the boundaries of the listing will usually embody heritage values, and therefore are also protected as part of that listing. Your management plan should specify areas and items that do not embody heritage values and that could be removed or altered without adverse impacts on the heritage values.

It may be possible to alter or remove areas or items of movable heritage (eg machinery) within a listed place, provided the items or areas do not embody heritage values or are not essential to the understanding of the heritage values of the place.

MAKING A REFERRAL

Building in a listed place

Commonwealth Heritage listing does not preclude new development, provided it does not have a significant impact on the heritage values of the place. New development may enhance the heritage values of a place or item, especially where the heritage significance of a place derives from its continued use. New development must be carefully planned and assessed on an individual basis.

The sale, leasing or other disposal of a listed place or a place yet to be assessed for heritage values

Commonwealth Heritage listing does not prevent an agency from selling, leasing or otherwise disposing of the place. However a Commonwealth agency must take steps to ensure that the place's heritage values are provided with ongoing protection, once the place leaves Commonwealth ownership. The requirement and the process to be followed is set out in s341ZE of the EPBC Act and requires early consultation with the Minister or the Minister's delegate.

The intent of the legislation is to include in the contract of sale or lease, a covenant that travels with the title of the place, or to enter into a conservation agreement with similar conditions that protect the heritage values of the place in the context of its future ownership.

In some cases it is possible for covenants to be extinguished. Where this can occur or where other protection methods are considered more effective, suitable alternative measures will be needed. Where a management plan exists for a place, a contract of sale or lease condition providing for its ongoing implementation by the new owner or lessee would assist in the ongoing protection of the place's heritage values.

Suitable alternative measures to covenants or conservation agreements can include the preparation of a management plan for implementation by the future owner(s) together with the nomination of the place to a state, territory or local government heritage register or list. Such nominations take time to conclude and suitable arrangements in the sale or lease contract conditions may be needed to cater for this process.

Where a place owned or controlled by an agency has not been assessed for heritage values and disposal or leasing is contemplated, it will first be necessary for the agency to identify whether the place has any heritage values. In such circumstances this would merely be a case of giving early priority to the identification and assessment program for the place as set out in the agency's heritage strategy. If the assessment finds that the place does have heritage values, then the process set out under s341ZE should be followed, or the alternative measures as suggested above considered.

In most cases when the sale, lease or other disposal of a place is concerned, agencies will need to seek legal advice. Early informal consultation with the Heritage Division of the Department of the Environment, Water, Heritage and the Arts is also encouraged.

Agencies may also lease the place to another party in whole or part provided this is not incompatible with the place's heritage values. The owner must also ensure that the lessee does not carry out actions that will have a significant impact on heritage values. Subdivision of a Commonwealth Heritage place is also possible, provided it does not result in significant impacts on the heritage values of the place.

MAKING A REFERRAL

WHAT HAPPENS IF AN ACTION IS NOT REFERRED?

The EPBC Act prohibits and provides significant penalties for actions that have a significant impact on a matter of NES which haven't received approval under the EPBC Act. Civil and criminal penalties can apply to both individuals and corporations, including potential individual liability for company directors.

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 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.

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 Minister may request a person to make a referral. If a referral is made by a state or territory Minister or government agency, the 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 Minister, or an interested person or incorporated organisation, may apply to the Federal Court for an injunction to prevent the action from proceeding if that action may constitute an offence or other contravention of the EPBC Act.

Remediation

Where a person contravenes the EPBC Act the person may be required to meet the costs of remedying the damage to the environment or the matter of NES, and prevent 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 Referrals section of the Department of the Environment, Water, Heritage and the Arts.

