

Environmental factor guidance: Culture and heritage

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1. Introduction

This document is part of a series of technical guidance documents developed by the Northern Territory Environment Protection Authority (NT EPA) that outline the requirements and considerations in assessing the significance, and impact, of a proposed action on identified environmental factors and objectives¹, under the *Environment Protection Act 2019* (EP Act).

Under the EP Act, a proposed action that has the potential to have a significant impact on the environment must be referred to the NT EPA for assessment. The NT EPA is responsible for deciding whether a proposed action requires environmental impact assessment under the EP Act. A proposed action or strategic proposal assessed by the NT EPA requires an environmental approval from the Minister for Environment (Minister) before it can proceed in the Northern Territory (NT).

The term “environment” is defined under the EP Act to mean “all aspects of the surroundings of humans including physical, biological, economic, cultural and social aspects”². This document provides guidance on the cultural aspects of the environment, to which the NT EPA’s Environmental factor: Culture and heritage, relates.

1.1. Purpose

The purpose of this guidance is to provide an outline of the assessment of the significance of impacts under the NT EPA’s Environmental factor: Culture and heritage, as part of the environmental impact assessment process.

The guideline provides advice on the following:

1. a proponent’s obligations under the EP Act
2. when there is potential for significant impacts to heritage and/or Aboriginal cultural values
3. the assessment of potentially significant impacts to heritage and/or Aboriginal cultural values
4. the requirements of assessment documentation relating to the Environmental factor: Culture and heritage.

The NT EPA addresses other human aspects (social, economic and health) under the environmental factors Community and economy, and Human health (Table 1).

Table 1 NT EPA environmental factors of the People theme

| Theme | Factor | Objective |
|--------|-----------------------------|---|
| PEOPLE | Communities and economy | Enhance communities and the economy for the welfare, amenity and benefit of current and future. |
| | Culture and heritage | Protect culture and heritage. |
| | Human health | Protect the health of the Northern Territory population. |

¹ NT EPA, 2021, NT EPA Environmental factors and objectives. Environmental impact assessment - General technical guidance.

² The NT EPA notes the definition of “environment” under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) also includes “cultural aspects” as discussed in: [EPBC Act Policy Statement - Definition of ‘Environment’ under section 528 of the EPBC Act.](#)

2. Legal context

In developing the Environmental factor: Culture and heritage, and the associated environmental objective the NT EPA has taken into account, among other things:

- the objects of the EP Act, including section 3(e) “to recognise the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes”
- the principles of ecologically sustainable development under Part 2 Division 1 of the EP Act
- the potential for a proposed action to have a significant impact, as defined under section 11 of the EP Act, on cultural values
- the objectives of the NT EPA under section 7 of the *Northern Territory Environment Protection Authority Act 2012*.

2.1. Requirement to refer a proposed action to the NT EPA

The EP Act requires proponents to refer an action that has the potential to have a significant impact on the environment, including on a cultural aspect of the environment. The decision about whether or not to refer a proposed action to the NT EPA should be informed by this guidance and the NT EPA’s guidance on [Referring a proposal to the NT EPA](#), which includes a screening tool to assist proponents to understand when a referral is required.

When referring a proposal to the NT EPA, and during an environmental impact assessment process, proponents must comply with the general duty established by Section 43 of the EP Act. The general duty of a proponent extends broadly to addressing impacts to heritage and/or Aboriginal cultural values in project planning and implementation, including the duty:

- 43(e) to consider the principles of ecologically sustainable development in the design of the proposed action
- 43(f) to apply the environmental decision-making hierarchy in the design of the proposed action
- 43(g) to consider the waste management hierarchy in the design of the proposed action.

The general duty extends to conduct relevant to undertaking any surveys, consultation, engagement and assessments for the Environmental factor: Culture and heritage, including:

- 43(a) to provide communities that may be affected by a proposed action with information and opportunities for consultation to assist each community's understanding of the proposed action and its potential impacts and benefits
- 43(b) to consult with affected communities, including Aboriginal communities, in a culturally appropriate manner
- 43(c) to seek and document community knowledge and understanding (including scientific and traditional knowledge and understanding) of the natural and cultural values of areas that may be impacted by the proposed action
- 43(d) to address Aboriginal values and the rights and interests of Aboriginal communities in relation to areas that may be impacted by the proposed action.

A proponent should ensure that it documents (e.g. in the referral report) how its engagement methods are consistent with the general duty. This will provide the NT EPA with information to inform a decision about whether it considers that a referred action is likely to be acceptable and whether environmental impact assessment is required.

3. Defining the environment's cultural aspects

The EP Act defines 'environment' to include the cultural aspects of the surroundings of humans. For the purposes of environmental impact assessment, the NT EPA defines 'culture' as 'relating to the sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another'³. Key to this definition is the transmission of shared knowledge and understanding about the thing the group hold to be essential and hence its intergenerational nature.

This guidance uses the term 'heritage' to mean 'the culture, traditions and national assets preserved from one generation to another'⁴. Heritage also refers to the specific categories of heritage protected under NT and Commonwealth laws.

3.1. Cultural values

An environmental impact assessment may consider the potential impact of a proposed action on cultural values, including Aboriginal cultural values and the Territory's natural and built heritage.

The term 'values' in this guidance means 'the things of social life towards which the relevant community have an affective regard'⁵. The term 'cultural values' includes Aboriginal cultural values and the Territory's natural and built heritage. Accordingly, the term 'Aboriginal cultural values' used in this guidance covers the things of social life towards which Aboriginal people have an affective regard that are recognised in Common Law and protected under Northern Territory and Commonwealth legislation⁶.

The general duty under section 43 of the EP Act, broadly establishes the requirement for a proponent of an action to seek and document community (including traditional) knowledge and understanding of the cultural values of areas that may be affected by the action. It also requires that a proponent address Aboriginal values and the rights and interests Aboriginal communities in relation to potentially affected areas.

The laws and regulatory regimes that recognise and protect cultural values, including the Territory's natural and built heritage, and Aboriginal cultural values, rights, interests, and places and objects of Aboriginal cultural significance have, among other things, the effect of protecting the cultural aspects of the environment and hence the cultural values of an area that could be affected by an action (as relevant to the scope of the EP Act).

The NT EPA will accept and be guided by determinations made under these laws (refer to section 3.2 below) when making decisions or recommendations about the potential significant impact of a proposal including:

- risk of damage to, or interference with
- significance

³ Macquarie definition of 'culture'.

⁴ Macquarie definition of 'heritage'.

⁵ See Macquarie sociological definition of 'value' (plural).

⁶ Specifically: ALRNT Act, NT Act, UCH Act, NTASS Act and Heritage Act.

- location and area affected
- regimes for protection of culture and/or heritage made under the relevant legislation.

Where public consultation elicits concerns that a proposed action may result in a significant impact on heritage and/or cultural aspects of the environment, the assessment process will consider:

- scrutiny of compliance with the existing laws and policies that give effect to the protection of heritage and Aboriginal cultural values
- the quality of the engagement with the local community by the proponent to understand, document and protect heritage and Aboriginal cultural values on or in the vicinity of the proposed action.

3.2. Legislative mechanisms to protect cultural values

In the Northern Territory the relevant laws are: the *Aboriginal Land Rights (NT) Act 1976* (Cth) (ALRNT Act) and the *Native Title Act 1993* (Cth) along with complementary NT legislation; the *Northern Territory Aboriginal Sacred Sites Act 1989* (NTASS Act) and the *Heritage Act 2011* (Heritage Act). Together these laws create a system for recognising and protecting the cultural values of an area, including Aboriginal traditional land rights and interests and cultural values, sacred sites and places and objects of heritage significance to the general community.

The following sections summarise these laws and the frameworks that they establish for agreeing, negotiating and protecting rights and values.

Native Title Act 1993 (Cth)

The *Native Title Act 1993* establishes the framework for an agreement between a proponent and the native title holders (Indigenous Land Use Agreement)⁷ about the use and management of areas of land and/or waters.

The courts have determined that native title rights are communal, perpetual and extensive and may not be extinguished without the owners of the native title being fully compensated on just terms. Native title rights comprise the following non-exclusive rights, in accordance with traditional laws and customs:

1. the right to travel over, move about and to have access to the application area;
2. the right to hunt, fish and forage on the application area;
3. the right to gather and to use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;
4. the right to have access to and use the natural water of the determination area;
5. the right to live on the land, to camp, to erect shelters and other structures;
6. the right to:
 - a) engage in cultural activities
 - b) conduct ceremonies
 - c) hold meetings

⁷ <<https://www.austrade.gov.au/land-tenure/native-title/indigenous-land-use-agreements>>

- d) teach the physical and spiritual attributes of places and areas of importance on or in the land and waters
- e) participate in cultural practices relating to birth and death, including burial rights;
7. the right to have access to, maintain and protect sites of significance on the application area; and
8. the right to share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes).⁸

For NT pastoral leasehold land, proponents should be aware that native title co-exists with pastoral leases, regardless of whether a determination of native title has been made under the *Native Title Act 1993*. Any change to the terms of the lease that are likely to affect native title require the statutory process in the *Native Title Act 1993* to be followed, which includes a requirement to notify the affected native title owning group.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)

The ALRNT Act sets the parameters of sacred site laws in the Northern Territory. As a consequence, sacred sites are more broadly defined and more explicitly protected than in any other jurisdiction.

On all land tenures, any site that is “significant according to Aboriginal tradition”⁹ is defined in the ALRNT Act as a “sacred site” and is protected automatically.

Further, the ALRNT Act limits the powers of the Northern Territory Legislative Assembly with respect to Aboriginal sacred sites. Sacred sites must be protected. The ALRNT Act allows no scope for either an administrative or political process to determine the priority for protection based on the degree of significance of a sacred site or on consideration of other interests (section 73 ALRNT Act).

The ALRNT Act also gives Land Councils the function:

“to assist Aboriginals in the taking of measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal Land) in the area of the Land Council” (ALRNT Act section 23(1)(ba)).

Underwater Cultural Heritage Act 2018 (Cth)

The *Underwater Cultural Heritage Act 2018* (UCH Act) protects Australia’s underwater cultural heritage including shipwrecks and their associated relics, sunken aircraft and other underwater heritage. In the NT, the UCH Act is administered by the Heritage Branch of the Department of Territory Families, Housing and Communities (DTFHC). There is some regulatory overlap between the UCH Act and the Heritage Act, in that some underwater heritage is protected under both Acts.

Northern Territory Aboriginal Sacred Sites Act 1989 (NT)

The NTASS Act establishes the Aboriginal Areas Protection Authority (AAPA) with the purpose of protecting sacred sites by:

- Consulting with the Aboriginal custodians of sacred sites “on or in the vicinity of land where use or works is proposed” to ensure that sacred sites are protected.

⁸ GRIFFITHS J [2019] HCA 7 <<https://eresources.hcourt.gov.au/downloadPdf/2019/HCA/7>>

⁹ This definition is also used in the NTASS Act, the Commonwealth *Aboriginal & Torres Strait Islander Heritage Protection Act (1984)* and in the list of Native Title rights determined under the Native Title Act.

- Determining the nature of the risk to any sacred site created by a particular land use proposal referred under Division 1A of NTASS Act.
- In accordance with the wishes of the Aboriginal custodians, and subject to the proposed work or use of land not damaging or interfering with any sacred site on or in the vicinity, AAPA may issue an approval – termed an Authority Certificate (section 22 NTASS Act).

This process ensures that Aboriginal custodians inform the implications of the existence of a sacred site on a particular land use proposal on a case by case basis. To enable this to occur regardless of the underlying land tenure the NTASS Act establishes a process whereby Aboriginal custodians may apply for a site(s) to be Registered and further, the Act establishes the right of entry onto any land reasonably necessary to protect sacred sites – and makes it unlawful to obstruct a person exercising this right (sections 46 & 47 NTASS Act).

Heritage Act 2011 (NT)

The Heritage Act protects places and objects of heritage significance, including natural and built heritage, and archaeological places and objects relating to past human occupation of the Territory. There may be an overlap between areas protected under the Heritage Act and the NTASS Act.

The Heritage Act gives presumptive protection for all Aboriginal or Macassan archaeological places (by making them ‘heritage places’). These are defined as places that ‘relate to the past occupation of the Territory by Aboriginal or Macassan people’ and include rock art, deposits left by past occupation and burial remains.

In addition to archaeological places, the Heritage Act also presumptively protects Aboriginal and Macassan archaeological objects: ‘relics that relate to the past occupation of the Territory by Aboriginal or Macassan people’. The definition of ‘relic’ includes artefacts, human remains and rock or wood carving. The Heritage Act makes it unlawful to ‘damage, remove or interfere with’ Aboriginal human remains. Failure to report the discovery of Aboriginal human remains is also an offence (Heritage Act sections 111-114).

Both the NTASS Act and Heritage Act establish processes for Aboriginal groups to have areas ‘of significance according to Aboriginal tradition’ and other places of cultural significance officially recognised and protected (Division 2, NTASS Act & Chapter 2 Heritage Act).

4. Considerations for conducting a cultural impact assessment

The assessment of impacts on cultural values must be undertaken using engagement and consultation methods that are consistent with the proponent’s general duty (EP Act section 43) (see below) and the NT EPA’s guidance on [Stakeholder consultation and engagement](#).

Proponents are encouraged to design proposals to comply with all laws that protect cultural values. This includes designing proposals to avoid sacred sites and to consult early with AAPA with a view to obtaining an Authority Certificate should AAPA determine there are grounds to justify providing one. The NT EPA will place significant weight on an AAPA Authority Certificate given the comprehensive regulatory regime in the NTASS Act.

The general process for undertaking an environmental impact assessment for the ‘Culture and heritage’ factor is outlined below.

1. Identify and document the cultural values (including Aboriginal cultural values, and the Territory’s natural and built heritage values) that are relevant to the proposal.

It is recommended that professional expertise be sought for assessments related to the Territory’s natural and built heritage commensurate with the likely complexity of the environment.

For Aboriginal cultural values, it is recommended that:

- the AAPA be contacted with a view to:
 - determine if there are any sites of significance according to Aboriginal tradition (sacred sites) in the vicinity of the proposal
 - making an application for the issue of an Authority Certificate to determine any conditions (arising from the existence of such sites) that would apply to the proposal.
- The Heritage Branch of DTFHC be contacted to determine:
 - whether there are any known or likely heritage places or objects in the area that could be affected by a proposal
 - whether archaeological survey is required to identify if there are any heritage places or objects in the area that could be affected by a proposal.

While many places of cultural value in the Northern Territory have been identified, and in some cases protected by legislation, many areas have not been subject to archaeological and/or sacred site surveys. Consultation and surveys may result in the discovery of previously unknown cultural values, including heritage places or objects, sacred sites, or natural or built heritage of the Territory.

Aboriginal heritage places and objects, and sacred sites are protected by law regardless of whether they have been previously identified. Hence it is imperative to contact and seek advice from the Heritage Branch of DTFHC, and the AAPA.

The scope of any archaeological surveys must be consistent with advice (and to the satisfaction of) the Heritage Branch of DTFHC.

2. Identify cultural values and assess the potential for those values to be significantly impacted by the proposed action. This can be considered in the context of section 11 of the EP Act¹⁰.

It should be noted that for sacred sites and significant heritage places or objects, any impact may be considered highly significant.

3. Provide an assessment of the extent of impacts on all cultural values. This should include impacts from the planning, design, construction, operation, rehabilitation and closure of the action and the residual impacts that will persist at the end of life of the action. The assessment should consider indirect and cumulative impacts. The impact assessment must include sufficient detail and analysis to provide a clear understanding of the potential impacts of the action on the identified cultural values. Where impacts will be avoided, detail the reasons for this and the avoidance measures that would be implemented.
4. Where relevant, identify any mitigation measures required to meet the NT EPA's objective of protecting culture and heritage. Measures may include:
 - the issue of an AAPA Authority Certificate which specifies the conditions under which works, on or in the vicinity of a sacred site, may take place and any protective measures that must be implemented.

¹⁰ 'A significant impact of an action is an impact of major consequence having regard to:

(a) the context and intensity of the impact; and

(b) the sensitivity, value and quality of the environment impacted on and the duration, magnitude and geographic extent of the impact.'

- management controls to prevent the proposal having a significant impact on cultural values in an area that could be affected by the action, either by avoiding impact or mitigating impact to an acceptable level
 - measures recommended by, or authorisation required from, the Heritage Branch of DTFHC in relation to heritage places or objects
 - measures to ensure that required access to land will be maintained (e.g. as agreed through an Indigenous Land Use Agreement).
5. Where relevant, identify proposed monitoring and reporting activities and adaptive management strategies to demonstrate that important cultural and heritage values are protected.
 6. Where significant cultural impacts are assessed under the EP Act, the NT EPA may require the measures proposed to manage, monitor and report on cultural impacts to be presented in a cultural heritage management plan.

5. Environmental approval

The Minister is responsible for granting or refusing to grant an environmental approval.

At the conclusion of the environmental impact assessment process the NT EPA provides its assessment report to the Minister and advises on the acceptability of an action. The NT EPA advises the Minister to grant or refuse to grant an environmental approval, including recommended conditions of approval when the advice recommends an environmental approval be granted. The Minister is not bound by the NT EPA's advice.

In its assessment report, the NT EPA will advise the Minister as to the environmental acceptability of an action with respect to its Culture and heritage factor objective. The NT EPA may recommend to the Minister that an environmental approval impose conditions to avoid, mitigate or manage impacts on cultural values, such as through requiring implementation of measures, monitoring, reporting, and ongoing engagement with stakeholders and the community.

The Department of Environment, Parks and Water Security (DEPWS) is responsible for monitoring the compliance of an action with its environmental approval. An action is legally required to comply with the requirements of the EP Act and the conditions of the environmental approval, and may be subject to enforcement action in the event of a non-compliance.

6. Review

This guidance will be finalised, taking into account comments received through consultation. A review of this guidance will be undertaken within three years to ensure it remains contemporary within the policy and regulatory environment at that time.

7. Further information

This guidance should be read in conjunction with the NT EPA's guidance on [Referring a proposed action to the NT EPA](#).

For specific advice about conducting heritage surveys for places and object protected under the Heritage Act, please contact Heritage Branch of DTFHC: Heritage.Branch@nt.gov.au.

To apply for an Authority Certificate or conduct sacred sites surveys, please contact the AAPA at: Enquiries.AAPA@nt.gov.au

If you require assistance in applying this guidance to your circumstances please contact the Environment Division of the Department of Environment, Parks and Water Security:

Email: eia.ntepa@nt.gov.au Tel: 08 8924 4218.

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