



Environmental
Defenders Office

**Submission on the Environmental Factor Guidance: Culture
and Heritage under the Environment Protection Act 2019**

8 July 2022

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

About Healthy Environment & Justice Program

EDO's NT Practice falls within EDO's Healthy Environment & Justice Program (**HEJ**). The goal of the HEJ Program is to empower overburdened communities to fight for environmental justice.

Acknowledgement of Country

EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect the environment and cultural heritage through law.

A note on language on 'First Nations'

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purposes of these submissions, we are using the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Islander Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

Submitted to:

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1. Introduction

The Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission on the following environmental impact assessment (**EIA**) guidance document that will support the implementation of the *Environment Protection Act 2019* (NT) (**EP Act**) and Environment Protection Regulations 2020 (NT) (**EP Regulations**):

- NT EPA Environmental factor guidance: culture and heritage (**Guidance**).

In making this submission, EDO acknowledges that it cannot and does not speak on behalf of First Nations peoples. We make the following comments as experts in planning and environmental law. We regularly advise clients in relation to the existing framework for environmental impact assessment (**EIA**) in the Northern Territory and have engaged closely on the development of the EP Act.

This submission focuses on the practical application of this particular Guidance.

2. General Comments

It is our ultimate submission this Guidance should be re-drafted.

It is not clear whether the Guidance was drafted with First Nations peoples in the NT. As the Guidance specifically involves Aboriginal culture and heritage, the EPA should adopt a process of extensive consultation and co-design whereby the Guidance is drafted with First Nations peoples and representative bodies, in accordance with principles of free, prior and informed consent.

The discretionary language used in the Guidance suggests there is room for interpretation of the duties under the EP Act. The Guidance document does not provide clear guidance of the steps a proponent must take to comply with its general duty under section 43 of the EP Act. The lack of clarity could result in varying interpretations which could lead to the destruction of the very thing these Guidance documents are designed to protect.

The Guidance should include a clear process with a step-by-step guide using unambiguous language to reduce the potential for misinterpretation of the requirements a proponent must satisfy.

Discretionary or vague, non-specific language should be removed and not relied upon. The Guidance should be amended to include clear rules and explicit directions for proponents to follow.

3. Defining the environment's cultural aspects

The lack of a clear definition for heritage, culture and values within the EP Act and EP Regulations has been addressed through the inclusion of dictionary definitions of these terms in the Guidance. Although it may be appropriate in some cases to rely on a dictionary definition, where that term is not defined in the particular legislation, the potential for misinterpretation and misapplication by a proponent is problematic.

These terms should be agreed upon through appropriate and widespread consultation, especially with First Nations groups and representative bodies, with reference to other relevant legislation listed in section 3.2 of the Guidance, and clearly defined in the EP Act to provide clarity and remove the potential for misinterpretation.

The interaction of the Guidance and the legislative mechanisms (listed in section 3.2) available to protect “cultural values” in the NT is unclear. The Guidance should be amended to include a clear process a proponent must undertake to comply with the EP Act and EP Regulations, with reference to when a proponent must consider related legislation.

4. Considerations for conducting a cultural impact assessment

EDO are concerned compliance with the Guidance is discretionary. For example, “Proponents are *encouraged* to design proposals to comply with all laws that protect cultural values.” (emphasis added).

Compliance with laws that protect cultural values should be mandatory and proponents should be required to provide a clear proposal outlining the cultural and heritage values at risk by the proposed development and a plan demonstrating how the particular values will be protected and maintained.

In identifying and assessing the cultural values that are relevant to the proposal, the Guidance should require rather than recommend proponents contact (at a minimum) the Aboriginal Areas Protection Authority (**AAPA**) and the Heritage Branch at the Department of Territory Families Housing and Communities (**DTFHC**) to determine if any sites or places of heritage value have been registered on or near the proposed development area.

In assessing the potential for cultural values to be “significantly impacted” as per section 11 of the EP Act, the Guidance should provide guidelines as to what constitutes a significant impact in this context and how to properly assess potential impacts.

In relation to section 4 [4] and [5] of the Guidance, it is not clear when a proponent is required to identify mitigation measures or proposed monitoring and adaptive management strategies. From the use of the phrase “where relevant,” it appears completion of these steps is not mandatory and left to the discretion of the proponent.

The EPA should seek guidance from First Nations peoples during a co-design process regarding whether the Guidance should mandate the development of a cultural heritage management plan (**CHMP**) and particular development criteria (for example, consultation with the Traditional Owners for the area in question). It is noted that currently, if significant cultural impacts are assessed, the proponent *may* be required to complete a CHMP (as recommended in section 4 [6] of the Guidance) that outlines how the identified cultural values will be protected and monitored.

It is noted other jurisdictions require the negotiation and agreement of a CHMP to protect Aboriginal cultural heritage. See for example, sections 87 and 88 of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) which require the development of a CHMP when an environmental impact statement or other environmental assessment is required or section 49

of the *Aboriginal Heritage Act 2006* (Vic) which requires the development of a CHMP when an environmental effects statement is required.

5. Conclusion

We would welcome the opportunity to discuss our submission at any time and look forward to our continued engagement.

Environmental Defenders Office



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