

7 March 2019

Invasive Species Council
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Legal Opinion

Relocation of feral horses in Kosciuszko National Park

Introduction

1. The Invasive Species Council has instructed us to provide a legal opinion as to what kinds of activities constitute an “action” for the purposes of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and in particular, whether the relocation of feral horses within the Kosciuszko National Park (**KNP**) is an “action” for the purposes of the EPBC Act.
2. The definition of “action” under the EPBC Act is likely to encompass only “positive” activities, as opposed to omissions or failures to act. As the relocation of feral horses within the Kosciuszko National Park (**KNP**) is a “positive” activity it is likely to be an “action” for the purposes of the EPBC Act. If an action, including the relocation of feral horses, is likely to significantly impact the heritage values of the KNP (or any other matter of national environmental significance (**MNES**) protected by the EPBC Act) it should be referred to the Minister for the Environment for determination as to whether or not it is a “controlled action” (that is, whether or not it requires assessment under the EPBC Act). We discuss our opinion below.

How is an “action” defined for the purposes of the EPBC Act?

3. The EPBC Act applies to “actions” as defined by s 528 of the EPBC Act. If the Minister determines that an action is likely to have a significant impact on an MNES it is characterised as a “controlled action.” The Minister must approve any controlled action before it can be lawfully carried out.

Statutory meaning of ‘action’

4. The dictionary to the EPBC Act states that the term “action” is defined by ss 523-524A of the EPBC Act.¹ “Action” is defined by s 523(1) of the EPBC Act to include:
 - (a) a project;

¹ EPBC Act s 528.

- (b) a development;
 - (c) an undertaking;
 - (d) an activity or series of activities; and
 - (e) an alteration of any of the things mentioned in paragraph (a), (b) or (d).
5. Where there is no ambiguity, the words in a statute are interpreted by their ordinary meaning. The word action is defined in the Macquarie Dictionary to mean ‘the process or state of acting’, ‘conduct’ and ‘something done’.² Further, the EPBC Act specifies that the term “controlled action” is an action that a person “proposes to take” (see s 67).

Guidelines

6. The Federal Department of Environment and Energy (**DoEE**) has released guidelines which provide information about the kinds of activities that it considers fall within the definition of “action” under the EPBC Act. The guidelines are not legally binding however they provide some indication of the likely interpretation of the definition of an “action”. The guidelines suggest that an “action” includes, but is not limited to:

“construction, expansion, alteration or demolition of buildings, structures, infrastructure or facilities; industrial processes; mineral and petroleum resource exploration and extraction; storage or transport of hazardous materials; waste disposal; earthworks; impoundment, extraction and diversion of water; agricultural activities; aquaculture; research activities; vegetation clearance; culling of animals; and dealings with land.”³

7. The guidelines conclude that a person must propose to do something for an activity to meet the definition of “action”, on the basis that the list of actions in s 523(1) of the EPBC Act (see above) all refer to something that is done.⁴
8. On the other hand, according to the guidelines, a failure to act does not constitute an “action”. For example, a failure to take steps to control an increasing feral horse population within KNP would not constitute an “action” under the EPBC Act.⁵
9. In addition, the Courts have found that a governmental authorisation alone,⁶ or the creation of,⁷ or a decision to amend,⁸ a strategic plan created under a piece of legislation, enabling the carrying out of an activity, are not “actions” for the purposes of the EPBC Act. Therefore, the creation of legislation or

² Macquarie University NSW, *The Macquarie Dictionary* (Macquarie Library Pty Ltd, revised edition, 1985), 62.

³ EPBC Act Significant Impact Guidelines 1.1 - Matters of National Environmental Significance (October 2009), 2.

⁴ EPBC Act Policy Statement - Definition of ‘action’: Section 523, section 524, and section 524A of the EPBC Act, 3.

⁵ EPBC Act Policy Statement - Definition of ‘action’: Section 523, section 524, and section 524A of the EPBC Act, 4.

⁶ *Secretary, Department of Primary Industries, Parks, Water and Environment v Tasmanian Aboriginal Centre Incorporated* [2016] FCAFC 129.

⁷ *Esposito v Commonwealth* (2016) 328 ALR 600

⁸ *Save the Ridge Inc v Commonwealth* [2005] FCAFC 203

policies by the NSW Government relating to the management of feral horses within KNP are not, of themselves, likely to be “actions” within the meaning of the EPBC Act.

Is the relocation of feral horses within KNP an “action”?


10. The ordinary meaning of the words in the EPBC Act suggest that the physical activity of relocating feral horses within the KNP is likely to be an “action” for the purposes of the EPBC Act. This is supported by the case law.
11. In the case of *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2012] FCAFC 59, the removal of a colony of grey-headed flying foxes from the Royal Botanic Gardens, Sydney, was accepted by the Court to be a “controlled action”. In that case, the impact of the removal on the flying foxes was the issue considered by the Court. There was no contest as to whether the removal constituted an “action”.
12. In the case of *Secretary, DSE (Vic) v MNR for SEWPC (Cth)* [2013] FCA 1, the introduction of cattle to certain sites within the Alpine National Park was accepted by the Court to be a “controlled action”. In that case, as above, the impact of the action on the Alpine National Park was the issue considered by the Court, rather than whether the introduction of the cattle constituted an “action.”
13. The above cases show that the physical activities of introducing or removing animals from a site are “actions” for the purposes of the EPBC Act. Accordingly, the physical activity of relocating feral horses within the KNP, which involves the removal of animals from one area and their introduction into another area, is likely to be an “action” for the purposes of the EPBC Act.
14. Other specific “positive” activities in respect to the management of feral horses could also constitute “actions” under the EPBC Act, for example, restricting horses to certain areas of the KNP by constructing fencing.

Is the relocation of feral horses within KNP a “controlled action”?

15. Under the EPBC Act, an “action” will be determined to be a “controlled action” only if the Minister considers that it is likely to have a significant impact on a MNES. “Likely” has been found to mean a real or not remote chance or possibility. Significant impact has been found to be an impact that is important, notable or of consequence, having regard to its context or intensity.
16. The KNP forms part of the Australian Alps National Parks and Reserves National Heritage place. The National Heritage values of a National Heritage place are one of the MNESs listed in the EPBC Act. Therefore an “action” that is likely to have a significant impact on the heritage values of the KNP would need to be referred to the Minister for a “controlled action” decision under the EPBC Act.

17. There are also a significant number of other MNESs in and around the KNP that may be impacted by activities within the KNP, including listed threatened species, Ramsar wetlands, listed threatened ecological communities and listed migratory species (for further details see the EPBC Act Protected Matters Report, in respect to the KNP, generated by the Department of Environment and Energy protected matters search tool, **enclosed**).
18. If any of the above MNESs are likely to be significantly impacted by the relocation of feral horses, or any other "action" in the KNP, those "actions" may be "controlled actions" under the EPBC Act.
19. Scientific evidence from a relevantly qualified expert would be required to ascertain whether the relocation of feral horses is likely to have a significant impact on the national heritage values of KNP (or some other MNES), and therefore whether it should be subject to assessment and approval by the Minister under the EPBC Act.

EDO NSW



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Enclosure: Listing of EPBC MNES re Kosci NP approx. 9 Feb 2018.pdf