

Applying section 101(2)(d) of the *Heritage Act 2017*

Purpose

This policy is intended to provide guidance as to the matters that should be considered by the Executive Director of Heritage Victoria in determining a permit application where a public authority is a relevant matter under s101(2)(d) of the *Heritage Act 2017* (**Act**).

This policy is intended to assist:

- Heritage Victoria staff in assessing a permit application in relation to a place or object included in the Victorian Heritage Register.
- The Executive Director in fulfilling their obligations under s101(2)(d) when determining a permit application.
- The Heritage Council of Victoria in determining any review of a permit decision.
- Persons submitting a permit application to the Executive Director or making a submission to the Heritage Council in respect of a decision by the Executive Director in which they wish matters to be considered under s101(2)(d).

Relevant legislation

Section 101(2)(d) of the Act provides:

- 101(2) In determining whether to approve an application for a permit, the Executive Director must consider the following -
- 101(2)(d) if the applicant is a public authority, the extent to which the application, if refused, would unreasonably detrimentally affect the ability of the public authority to perform a statutory duty specified in the application.

What is a public authority?

A public authority is defined in the Act as 'any corporate body or unincorporate established by or under an Act for a public purpose, but does not include a municipal council'.

Public authorities generally include **public entities** and **public service bodies**.

Public entities are the statutory authorities, state-owned corporations, school councils, boards, trusts and advisory committees, established by government legislation to undertake a public purpose. These include professional registration boards, advisory organisations, service providers and industry regulators. Public entities include Parks Victoria, VicRoads, Gordon Institute of TAFE, Melbourne Water, Country Fire Authority, Monash Health, Federation Square Management.

Public service bodies include portfolios, departments, and administrative offices.

What is a statutory duty?

The term 'statutory duty' is not defined in the Act, so the ordinary meaning of those words should be considered.

In general terms, statutory duty are the laws that an organisation must obey. They may be duties that the public authority is bound by statute to do, or actions required by the public authority's statutory office or function.

The meaning of 'statutory duty' in this section of the Act is broad enough to include both possible meanings identified above. Although there are arguments both ways, the better view, when section 101(2)(d) is considered in light of its context and purpose, is that 'statutory duty' should not be given an overly narrow meaning. It should

encompass statutory functions conferred by Parliament upon a public authority, which make that authority responsible to the Government, and ultimately the people of Victoria, for carrying out a particular public service.

Example: Water corporations including **Melbourne Water** are public entities established under s85 of the *Water Act 1989*. Water corporations are body corporates (s85(3)(a)), and their duties are set out in the *Water Act*. Generally this includes the provision of services including water supply, sewage and trade waste disposal and treatment, water delivery for irrigation, domestic and stock purposes, drainage, and salinity mitigation services.

What happens if the public authority has not ‘specified’ a statutory duty in their application?

Even if a public authority has not “specified” a statutory duty in the application, the matter should be a *permissible consideration*.

A decision-maker commits jurisdictional error if, in making its decision, it ignores a matter it is bound to take into account and that matter materially affects its decision. Such an error is an abuse of discretion.

Although in some instances matters raised in an application are not a *mandatory consideration*, there is no warrant for thinking they are a *prohibited consideration*. If it is not mandatory to consider them, nothing is lost by considering them. If it is mandatory, failure to consider them would give rise to a jurisdictional error. Therefore, pragmatism favours properly considering the matters raised as though s101(2)(d) applies. Importantly, a requirement to consider something does not direct the outcome that must be reached.

Is the decision-maker bound to consider the requirements of s101(2)(d) in determining the permit application?

Section 101(2)(d) uses the word “must”. The Executive Director is bound to consider the extent to which the application, if refused, would unreasonably detrimentally affect the public authority’s ability to carry out its statutory duties.

What weight must be given to s101(2)(d)?

The starting point is this:

In the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.

Noting that s101(2)(d) is a mandatory consideration, the words of s101(2)(d) suggest a kind of test for what must be considered, that is, (1) *would the refusal of the permit application have a detrimental effect upon the ability of the public authority to carry out its statutory duty and* (2) *would this detrimental effect be unreasonable?*

If the duties specified are of a broad, abstract or non-specific nature, the Executive Director may find it more difficult to conclude that there would be an unreasonable detrimental effect on the ability to carry them out. On the other hand, if the duties were specific and clearly required the exact course of action contemplated by the permit application, refusal to grant the permit might be thought more likely to thwart the ability of the public authority to perform such a duty.

Ultimately, provided the consideration given to each of the relevant factors in s101(2), and the attempt to balance them, are genuine, the weight given to each and the manner in which they are balanced is a matter for the Executive Director or their delegate. The requirement to consider the matters in s101(2)(d) cannot dictate a certain outcome.