

chapter nine

# Heritage protection

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## Introduction

Heritage is generally understood as those unique places and objects that are valued by communities for their historic, spiritual, cultural, ecological or evolutionary value. In the ACT, both Commonwealth and ACT legislation cover protection of heritage places and objects. This chapter sets out a brief overview of the key features of those schemes.

## ACT heritage protection

Until 2004, the protection of heritage places was under the *Land (Planning and Environment) Act 1991* (ACT) as part of the Territory Plan and objects were protected under the *Heritage Objects Act 1991* (ACT). The *Heritage Act 2004* (ACT) (Heritage Act) replaced these schemes with a new scheme for the recognition, registration and protection of both places and objects.

The one exception is that provision for the protection of individual trees of heritage significance in built up urban areas is made in the *Tree Protection Act 2005* (ACT) (see Chapter 6).

## *Heritage Register*

The Heritage Register (register), established by Part 4 of the Heritage Act, is the list of recognised heritage places and objects in the ACT. The register also includes provisionally registered places and objects, and places and objects that have been nominated for inclusion on the register. The register is maintained by the ACT Heritage Council (council). It contains information about each registered place or object including:

- its name and location or address
- a statement about its heritage significance
- whether it is permanently or provisionally registered and the date of registration

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- if it is provisionally registered, the period of registration
- requirements for conservation of the place or object
- any heritage guidelines, heritage directions or enforcement orders relating to the place or object.

The register contains natural, Aboriginal and built heritage places, for example, the Jerrabomberra Wetlands, and a geological formation in Deakin known as the Deakin anticline, Aboriginal sites in Bruce, Amaroo, Gunghalin, Kaleen and other suburbs, and built heritage places in Alt Crescent in Ainslie, St Christopher's Cathedral in Forrest and Gorman House in Braddon.

The register is publicly available including on ACT Heritage's website (see Contacts list at the back of this book).

### *Heritage Council*

The Heritage Council (council), established by Part 3 of the Heritage Act, is central to many of the processes under that Act, including registration. Its membership includes the ACT Conservator of Flora and Fauna, the chief planning executive and nine other members, appointed by the minister responsible for heritage. Six of these members are selected for their expertise and three as public representatives. The background and expertise of current members is set out on the council website (See Contacts list at the back of this book.).

As well as identifying, assessing, conserving and promoting places and objects in the ACT with natural and cultural heritage significance, the council's role includes functions such as public education and advising the minister on the management and promotion of heritage (s.18).

### *Criteria for assessing heritage significance*

In order for a place or object to be registered, it must have heritage significance. This means it must satisfy one or more of the criteria set out in s.10 of the Heritage Act. The criteria relate to identification of places or objects that:

- demonstrate a high degree of technical and/or creative achievement
  - exhibit outstanding design or aesthetic qualities
  - evidence a distinctive way of life, taste, tradition, religion, land use, custom, etc.
  - are highly valued for strong or significant associations of a religious, spiritual, cultural, educational or social kind
  - have importance as part of local Aboriginal tradition
  - are a unique or rare example of their kind
  - are a notable example of a kind of place or object
  - have strong or special associations with persons or events that played a significant part in local or national history
  - are significant for understanding the evolution of a natural landscape
  - provide information on the natural or cultural history of the ACT through its use as a research or teaching site or object
- and specifically for places that:

- exhibit unusual richness or diversity of flora, fauna or natural landscapes
- are significant ecological communities, habitats or localities.

### *Heritage registration process*

Part 6 of the Heritage Act sets out the process for heritage registration. Any person can apply to the council to nominate an item for provisional registration on the register. The nomination must be in writing and include a statement of reasons as to the heritage significance of the place or object (s.28). The reasons should refer to the criteria set out above. ACT Heritage, which is part of the Department of Territory and Municipal Services (TAMS), provides heritage advice and the Environmental Defender's Office (ACT) can also provide assistance to people who are seeking to have an item included on the register (see Contacts list at the back of this book).

The council then considers the application against the criteria and decides whether to provisionally register the place or object (s.32). Where a place or object is under imminent threat, or a quick decision is required for other reasons, for example, to avoid delays in a development project, an application can be made for an urgent decision on nomination. In such a case, the council must use its best endeavours to decide, within 20 working days after it receives the application, whether or not to provisionally register the place or object nominated (s.29).

The council must give notice of its decision about provisional registration (s.34). A decision not to provisionally register a place or object can be reviewed by the ACT Civil and Administrative Tribunal (ACAT) (s.111 and Schedule 1) (see Chapter 12). The notice also invites public comment on whether the item should be included permanently on the register. Comments must be provided to the council within four weeks (s.37).

The council must then give the minister a report setting out the council's views about registration of the item and identifying issues raised in any public comments (s.38). The minister has 15 working days to direct the council to give further consideration to issues raised in its report (s.39). The council may then carry out final registration of the place or object, provided it is satisfied that it has heritage significance (s.40).

Provisional registration provides immediate protection while further steps, such as public consultation, are being carried out. It lasts five months unless the minister grants an extension (s.35). Final registration of a heritage place or object provides ongoing legal protection.

A wide range of persons have the right to seek review, in the ACAT, of the council's decision to register, or not to register, a place or object, including the owner, occupier, lessee, nominator or any person who made comments during the public consultation period (ss.111 and 114).

Under Part 7 of the Heritage Act, any person can apply, in writing to the council to have the heritage registration of a place or object cancelled. Prior to cancelling a registration, the council is required to go through a similar process to that undertaken to register a place or object, including public consultation. The council can only cancel the registration of a place or object if satisfied, on reasonable grounds, that the place or object no longer has heritage significance (s.47(2)).

### *Effect of registration on development activity*

On most development applications relating to a registered, provisionally registered or nominated place or object the Heritage Council provides advice to the ACT Planning and Land Authority (ACTPLA) about the effect of the development on the heritage significance of that place or object and about ways of avoiding or minimising the impact of the development on the heritage significance of the place or object (s.61). The council may advise that approval of the development should be subject to conditions to assist in the heritage conservation, for example, requiring compliance with an approved conservation management plan.

ACTPLA must consider that advice in approving or refusing the development application and the council generally has the right to apply for review in the ACAT of the authority's decision (see generally Part 10 of the Heritage Act and the *Planning and Development Act 2007* discussed in Chapter 3).

### *Heritage directions*

The minister has the power to give the owner or occupier of a place or object a heritage direction to do, or not to do, something to conserve the heritage significance of the place or object, for example, an order to undertake essential maintenance on a place (s.62). The council must recommend the direction and the minister must be satisfied that there is a serious and imminent threat to the heritage significance of the place or object and immediate protection is necessary.

Contravention of a heritage direction is an offence with a penalty of 1,000 penalty units, currently \$100,000 for an individual and \$500,000 for a corporation (s.65). If the owner or occupier fails to comply with the direction, a person authorised by the ACT government may enter the premises to do the things necessary to comply with the direction (s.66).

### *Heritage orders and offences*

The Heritage Council, or any other person with the Court's leave, may apply to the ACT Supreme Court for a heritage order, which is a civil order similar to an injunction (s.68). The Court can only grant a heritage order if satisfied that a person has contravened, or is likely to contravene, certain offence provisions in the Heritage Act (such as contravening a heritage direction), and that an order is necessary to avoid material harm to the heritage significance of the place or object (s.69).

The Heritage Act also contains significant offence provisions for diminishing the heritage significance of a place or object (s.74). For instance, where a person is reckless as to the consequences of their conduct, the maximum penalty is 1,000 penalty units, currently \$100,000 for an individual and \$500,000 for a corporation. Authorised persons have significant powers under Part 14 of search and seizure to enforce the provisions of the Act.

### *Heritage agreements*

Under Part 15, the minister has the power to enter into heritage agreements with the owner of a place or object, or another person where the owner consents (s.99). The place or object

need not be registered. Heritage agreements are made on the advice of the council and may relate, for example, to:

- conservation of the place or objects
- restrictions on the use of the place or object
- provision of financial, technical or other professional advice or assistance needed for the conservation of the place or object
- availability of the place or object for public inspection (s.100).

Heritage agreements are binding on the parties (s.103) and the council may arrange for the provision of financial, technical or other assistance for the conservation of a place or object subject to a heritage agreement.

### *Protection of Aboriginal heritage places and objects*

An Aboriginal heritage place or object may be registered and deregistered in the same way as any other heritage place or object. The one exception is that the council has specific obligations to consult with each representative Aboriginal organisation, declared by the minister under the Heritage Act (s.14).

There are several Aboriginal heritage places on the register, including rock art paintings, stone arrangements and rock shelters in Namadgi National Park, and Aboriginal scarred trees in a number of Canberra suburbs.

Special provision is made in Part 8 of the Heritage Act for the discovery of unregistered Aboriginal places or objects. A person who discovers a place or object that he or she thinks is an unregistered Aboriginal place or object must report the discovery to the council within five working days, unless that person has a traditional Aboriginal affiliation with the land where it was discovered. The council must arrange consultations with the relevant Aboriginal organisations and decide whether to provisionally register the place or object (s.53).

There are also specific offences relating to the damage of Aboriginal places or objects, irrespective of whether those places or objects have been registered (s.75).

## Commonwealth heritage protection

### *Introduction*

There are a number of different types of heritage protection in Commonwealth legislation including:

- World Heritage
- National Heritage
- Commonwealth Heritage
- Overseas Places of Historic Significance to Australia
- Indigenous heritage
- moveable cultural heritage
- historic shipwrecks.

The first four are implemented in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) EPBC Act), while the others have specific legislation. Lists of heritage places and object in Australia are available on the Commonwealth Department of Environment, Water, Heritage and the Arts website (see Contacts list at the back of this book).

### *World Heritage*

The Convention for the Protection of the World Cultural and Natural Heritage (the convention) provides for the establishment of an international list of places of 'cultural or natural heritage of outstanding universal value' (known as the World Heritage List). Countries which are parties to the convention undertake to take steps to protect World Heritage properties in their countries.

For a place to be included on the World Heritage List it must first be nominated by the country in which it is situated. A decision on whether to list a place is made by the World Heritage Committee (a body composed of elected countries which are parties to the convention), on the advice of a number of bodies including the International Council on Monuments and Sites, the World Conservation Union and the International Centre for the Study of the Preservation and Restoration of Cultural Property. Australia currently has 17 properties on the World Heritage List, including the Greater Blue Mountains area, the Sydney Opera House and the Great Barrier Reef.

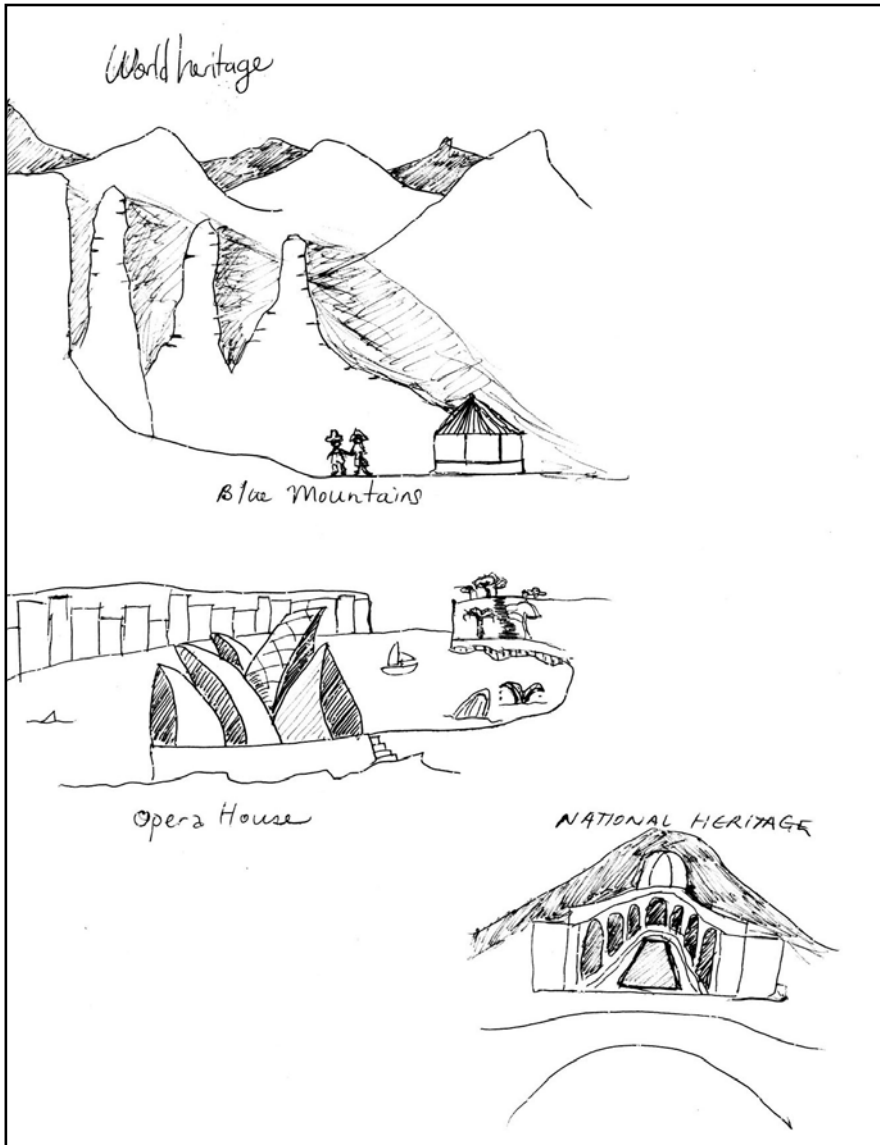
The EPBC Act provides for the implementation of the convention in Australia. In particular, places on the World Heritage List are protected under the EPBC Act as a 'matter of national environmental significance'. This means that an action that will, or is likely to have, a significant impact on the world heritage values of a World Heritage place must be referred the Commonwealth Minister for the Environment, Water, Heritage and the Arts (Commonwealth minister) for assessment (see Chapter 4).

### *National Heritage List*

The National Heritage List is intended to include natural, indigenous and historic places with outstanding heritage value to Australia. There are currently over 80 places on the list, including five sites in the ACT: Old Parliament House; the Australian War Memorial and the Memorial Parade; the High Court and National Gallery precinct; the Australian Academy of Science building; and the Australian Alps National Parks (which include Namadgi National Park and Tidbinbilla Nature Reserve).

To be included on the National Heritage List, a place must have outstanding heritage value to the nation based on one or more of the following:

- importance in the course, or pattern, of Australia's natural or cultural history
- possession of uncommon, rare or endangered aspects of Australia's natural or cultural history
- potential to yield information that will contribute to an understanding of Australia's natural or cultural history
- importance in demonstrating the principal characteristics of Australia's natural or cultural places, or a class of Australia's natural or cultural environments



- importance in exhibiting particular aesthetic characteristics valued by a community or cultural group
- importance in demonstrating a high degree of creative or technical achievement at a particular period
- strong or special association with a particular community for social, cultural or spiritual reasons
- special association with the life or works of persons of importance in Australia's natural or cultural history
- importance as part of Indigenous tradition—see s.324C of the EPBC Act and r.10.01A of the Environment Protection and Biodiversity Conservation Regulations.

Subdivision BA of Part 15 of the EPBC Act sets out the usual process for including places on the National Heritage List. Before each annual assessment period, the Commonwealth minister must invite nominations for places for inclusion on the National Heritage List. Any person may nominate a place. The minister refers that nomination to the Australian Heritage Council for assessment. After that assessment the minister may, but does not have to, invite comments on the proposal and then makes a final decision on whether to list the place. There are provisions for emergency listing by the minister, without reference to the Heritage Council, if the heritage values of a place are under threat (subdivision BB of Part 15).

As for World Heritage, places on the National Heritage List are protected under the EPBC Act as a 'matter of national environmental significance'. This means that an action that will, or is likely to have, a significant impact on the national heritage values of a National Heritage place must be referred to the Commonwealth minister for assessment (see Chapter 4).

### *Commonwealth Heritage List*

The Commonwealth Heritage List also includes natural, Indigenous and historic places. It differs from the National Heritage List in two ways, firstly, the places must be in areas owned or leased by the Commonwealth and, secondly, the places are required to have significant rather than outstanding heritage value (s.341C EPBC Act, r.10.03A EPBC Regulations). Currently there are over 300 places listed on the Commonwealth Heritage List, with over 70 places in the ACT, including the carillon, the redwood plantation in Pialligo and the Mount Stromlo Observatory precinct.

The criteria for inclusion are the same as for the National Heritage List except that only significant, instead of outstanding, heritage value is required. The nomination and listing process is also the same as for the National Heritage List (subdivision BA of Part 15 of the EPBC Act).

Commonwealth heritage places are protected under the EPBC Act in the following way. Actions by any person which have or are likely to have a significant impact on the environment on Commonwealth land, or actions by the Commonwealth government which are likely to have a significant impact on the environment anywhere, require approval by the minister. The term 'environment' is defined to include the heritage values of the place (s.528). Therefore, actions with a significant impact on the heritage values of a Commonwealth heritage place will require assessment and approval.

### *List of Overseas Places of Historic Significance to Australia*

This list was established by amendments to the EPBC Act, with effect from 1 January 2007, to symbolically recognise overseas sites that have a special place in Australia's history (Chapter 5A). The list includes, for example, the Kokoda trail in Papua New Guinea and Anzac Cove at Gallipoli.

### *Indigenous heritage*

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is intended to preserve and protect areas and objects that are of particular significance to Indigenous

Australians. The Commonwealth minister can make declarations to protect significant Aboriginal areas or objects if they are under threat of injury or desecration (ss.9 and 12). Contravention of such a declaration is an offence (ss.22 and 23).

Places of heritage significance to Indigenous people can also be listed on the National Heritage List, the Commonwealth Heritage List or may previously have been listed on the Register of the National Estate. For example, a place that is of outstanding heritage value for its importance as part of Indigenous tradition meets the criteria for the National Heritage List.

### *Moveable cultural heritage*

Under the *Protection of Moveable Cultural Heritage Act 1986* (Cth) there is a National Cultural Heritage Control List that sets out categories of objects that constitute the moveable cultural heritage of Australia (s.8). Moveable cultural heritage can be of ethnological, archaeological, historical, literary, artistic, scientific or technological significance (s.7). The export of objects on the control list is either prohibited, or can only occur if a permit is granted under the Act (s.9).

The Act gives effect to Australia's international obligations under the United Nations Educational, Scientific and Cultural Organisation's Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property. As a consequence, the Act also includes provisions for the return of moveable cultural heritage objects in Australia that have been illegally exported from their country of origin.

### *Historic shipwrecks*

The Commonwealth also has the *Historic Shipwrecks Act 1976*, which provides some protection to Australia's 6,500 historic shipwrecks. In particular it provides for a Register of Historic Shipwrecks (s.12), creates offences for destroying, damaging, interfering with, or moving a historic shipwreck (s.13), and provides for the creation of protected zones around historic shipwrecks where activities such as diving, trawling or mooring boats can be prohibited or restricted (ss.7 and 14). The register is on the Contacts list at the back of this book.

### *Register of the National Estate*

The Register of the National Estate (register) was established in 1975 as a national inventory of places of natural and cultural heritage significance (see Part 5 of the *Australian Heritage Council Act 2003* (AHC Act)). Listing on the register does not provide legal protection, rather it is a means of identifying and providing information on heritage places. The EPBC Act does, however, currently include a requirement that the minister have regard to the information contained in the register when making decisions under that Act (s.391 EPBC Act).

Since 1 January 2007 no further changes have been permitted to the register (s.24AA AHC Act). Further, on 29 February 2012, the provisions which require the Australian Heritage Council to keep the Register of the National Estate will be repealed. At that point the register will cease to have any statutory status but will still be available as an information source.

Over 200 places in the ACT are listed on the register. These include obvious places such as Old Parliament House, the National Gallery, and the High Court. It also includes the Aboriginal tent embassy site, Ainslie Primary School, the Cotter Pumping Station, the Duntroon dairy, the Northern Brindabellas, and Yarralumla Nursery. A significant number of indigenous sites in the ACT are listed, including thirteen Murumbeeja scarred eucalyptus trees.

### *Australian Heritage Council*

The Australian Heritage Council, established under the *Australian Heritage Council Act 2003*, replaced the former Australian Heritage Commission. Its members include a chair and six members all of whom must have appropriate experience or expertise in heritage. Two members must have expertise in the natural heritage arena and two must have historic heritage expertise. Two of the members must be Indigenous with experience or expertise in Indigenous heritage, at least one of whom should represent the interests of Indigenous people (s.7).

The council is an advisory body to the Commonwealth minister and its roles include:

- assessing whether a place meets the National Heritage or Commonwealth Heritage criteria, including through inviting public comment
- advising the minister on conserving and protecting places included, or being considered for inclusion, in the National Heritage or Commonwealth Heritage list
- advising the minister in relation to the inclusion of places on the List of Overseas Places of Historic Significance to Australia
- maintaining the Register of the National Estate
- promoting the identification, assessment, conservation and monitoring of heritage (s.5).

More information about Commonwealth heritage protection, including the places on the different heritage lists, is available from the heritage website of Commonwealth Department of the Environment, Water, Heritage and the Arts (see Contacts list at the back of this book).

## Conclusion

As this brief overview shows, there are both territory and Commonwealth heritage schemes that apply in the ACT. At both the ACT and the Commonwealth level, there is legislation governing heritage places and objects, and special provision is made for protection of Aboriginal heritage. Both schemes allow individuals and community groups to nominate heritage places for protection. The level of protection varies greatly based on the type of heritage listing and it is wise to carefully weigh up the different options if you are considering nominating a place or item for heritage listing.