



EDO - NQ FACTSHEET SERIES

AN INTRODUCTION TO CULTURAL HERITAGE LAW

TABLE OF CONTENTS

1. QUEENSLAND LEGISLATION

- QUEENSLAND HERITAGE ACT 1992 (QLD)..... p. 2
- ABORIGINAL CULTURAL HERITAGE ACT 2003 (QLD)..... p. 5

2. COMMONWEALTH LEGISLATION

- AUSTRALIAN HERITAGE COUNCIL 2003 (CTH) and
ENVIRONMENT PROTECTION AND BIODIVERSITY AND CONSERVATION
ACT 1999 (CTH)..... p. 9
- ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION
ACT 1984 (CTH)..... p. 12

3. FURTHER INFORMATION AND CONTACTS..... p. 13

AN INTRODUCTION TO CULTURAL HERITAGE LAW

This Factsheet is for general information purposes and is not legal advice. Important legal details have been omitted to provide a brief overview of this area of the law. If you require legal advice relating to your particular circumstances you should contact the EDO or your solicitor.

This factsheet provides a short summary of the legislation that governs all aspects of cultural heritage, including indigenous cultural heritage, in Queensland and nationally.

There are many places, objects, buildings and natural features throughout Australia which reflect and represent our natural, Indigenous and cultural heritage. Protection and recognition of this heritage is integral to allow us to appreciate and learn from it today, and ensure that it is preserved for future generations. This factsheet aims to provide an understanding of what recognised and protected under state and federal heritage laws, and how this protection can be achieved.

1. QUEENSLAND LEGISLATION

Queensland Heritage Act 1992 (Qld)

This Act is aimed at protecting generally the cultural heritage significance of places and objects in Queensland.

The *Queensland Heritage Act 1992 (Qld)* ("QHA"):

- establishes the Queensland Heritage Council;
- provides for a register of places of significance to Queensland's cultural heritage;
- regulates development and provides various measures for the conservation and protection of registered places.¹

The State Minister for the Environment is responsible for administration of the QHA.

What can be registered under the QHA?

A "place" includes a building or natural feature of heritage significance, and as much of the immediate surroundings as are required for its conservation.²

To be entered on the heritage register, a place:

- must be of cultural heritage significance; and
- satisfy one or more of the eight listed criteria; and
- have some prospect of conservation of its cultural heritage significance.

The listed criteria include:

- Importance in demonstrating the pattern of Queensland's history of rare, uncommon or endangered aspects of Queensland's cultural heritage;

¹ s. 3 *Queensland Heritage Act 1992 (Qld)*

² s. 4 *ibid*

- Importance because of its aesthetic significance (that is visual merit or interest)
- Having a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- Having a special association with a person, group or organisation of importance in Queensland's history.³

The Act does not apply to a place that has cultural heritage significance solely because of its association with Aboriginal tradition or Island custom without additional association with European or other culture.⁴

Buildings including churches and hotels, railways, bridges and defence facilities have been entered in the heritage register. Local examples include⁵:



Cairns War Memorial



False Cape WWII Defence Facility



Xavier & Sadie Herbert's
Cottage [fmr]

Places on the Queensland heritage register can be viewed at http://www.epa.qld.gov.au/cultural_heritage/registers_and_inventories.

How are places registered?

Any person may make an application to the Queensland Heritage Council for a particular place to be nominated in the heritage register. The Queensland Heritage Council may also on its own initiative consider the nomination of a particular place.⁶

If the Council is of the opinion that a place is of cultural heritage significance and satisfies one or more of the criteria for entry in the heritage register, it may provisionally enter the place in the register. Notice of this is given, both to the public and to the owner of the place.⁷

If there are no objections received the Council may permanently enter a place in the register.⁸

The only allowable ground of objection to the permanent entry of a place is that it is not of cultural heritage significance or does not satisfy the criteria for entry listed in the QHA.⁹

³ s. 23 *Queensland Heritage Act 1992 (Qld)*

⁴ s. 61 *ibid*

⁵ Cairns War Memorial photo found at http://www.deh.gov.au/cgi-bin/heritage/photodb/imageSearch.pl?proc=detail;barcode_no=rt52784

False Cape WWII Defence Facility photo found at <http://www.epa.qld.gov.au/register/p01258cl.pdf>

Xavier and Sadie Herbert's cottage photo found at <http://www.epa.qld.gov.au/register/p01588bi.pdf>

⁶ s. 24 *Queensland Heritage Act 1992(Qld)*

⁷ s. 24 (4) *ibid*

⁸ s. 30 *ibid*

⁹ s. 26 *Queensland Heritage Act 1992 (Qld)*

If any objections are received, they are assessed by an appointed individual with expertise in a field relevant to heritage conservation, and reported on to the Council for their consideration. The Council then decides whether to proceed and permanently enter the place in the register.¹⁰

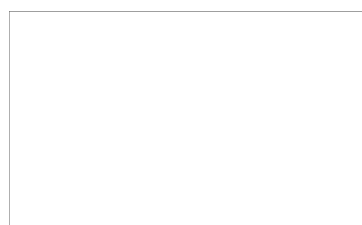
How are registered heritage places protected?

The Act makes it an offence to carry out development in relation to a registered place unless the development has been approved by the Heritage Council. Submissions must be sought on any application that will have substantial effect on cultural heritage significance.¹¹

The Minister can also enter into a heritage agreement with the owner of a registered place after seeking the Council's advice. The agreement attaches to the land and is binding on all owners and occupiers of the place.¹² A heritage agreement may restrict the use of a place or require specified work to be carried out, and is entered on the register of titles and heritage register.¹³

The Minister has the power under the QHA to make stop work orders, requiring the cessation of any work or activity that may destroy or reduce the cultural heritage significance of a place.¹⁴

An emergency stop work order was issued by the Minister in October 2004 halting work on the Old Cairns Courthouse building. The owner had begun work without approval, including replacing the original fence, minor interior alterations and removing a large mature tree. The stop work order prevented further work being conducted for a period of 8 weeks, during which time the owner had to establish the work proposed was consistent with the QHA requirements for registered properties.



Old Cairns Courthouse building¹⁵

What is the role of the Queensland Heritage Council?

The Council is established under the Heritage Act to advise the Minister for Environment on cultural heritage issues and measures necessary to protect it, and encourage proper management of such places. The Council is also responsible for administering the Heritage Register.¹⁶

A review of the *Queensland Heritage Act 1992 (Qld)* is to be undertaken during 2005. The primary objective of the review is to examine the effectiveness of the current model for cultural heritage management in Queensland and to consider improvements to the system.

Aboriginal Cultural Heritage Act 2003 (Qld)

¹⁰ ss. 27, 29 *ibid*

¹¹ s. 33 *ibid*

¹² s. 39 *ibid*

¹³ ss. 40, 41 *ibid*

¹⁴ s. 58 *ibid*

¹⁵ Cairns Courthouse photo found at

http://www.deh.gov.au/cgi-bin/heritage/photodb/imagesearch.pl?proc=detail;barcode_no=rt45043

¹⁶ s. 8 *Queensland Heritage Act*

This Act repeals the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.

The provisions of the *Aboriginal Cultural Heritage Act 2003* (ACH Act) referred to below are replicated in regards to Torres Strait Islander cultural heritage in the *Torres Strait Islander Cultural Heritage Act 2003*.

Purpose

The ACH Act has five fundamental principles:

1. recognition, protection and conservation of Aboriginal cultural heritage based on respect for Aboriginal knowledge culture and practices.
2. recognition of Aboriginal people as primary guardians keepers and knowledge holders of Aboriginal cultural heritage
3. to respect, preserve and maintain knowledge, innovation and practices of Aboriginal community to promote understanding of Aboriginal cultural heritage.
4. recognition, protection and conservation of Aboriginal cultural heritage important to allow Aboriginal people to reaffirm obligation to law and country
5. the need to establish timely and effective processes for management of activities that may harm Aboriginal cultural heritage.¹⁷

What is Aboriginal cultural heritage?

Aboriginal cultural heritage is:

- a significant Aboriginal area in Queensland meaning an area of particular significance to Aboriginal people because of Aboriginal tradition, or the history of any Aboriginal party for the area¹⁸
- a significant Aboriginal object because of Aboriginal tradition or history¹⁹
- evidence of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.²⁰

To identify a significant Aboriginal area, it is not necessary for the area to contain markings or other physical evidence of Aboriginal occupation. Aboriginal areas can be a ceremonial place, birthing or burial site, or the site of a massacre. They can also be derived from significant Aboriginal objects that exist in the area and are specifically linked to the location.²¹

Example: The following are likely to be Aboriginal cultural heritage: ceremonial places, scarred or carved trees, burial sites commonly found in caves, rock shelters, midden deposits and sand dunes, rock art, fish traps and weirs, occupation sites where remains of human occupation are found, quarries and artefact scatters, grinding grooves and rock wells.

Who owns Aboriginal cultural heritage?

¹⁷ s.5 *Aboriginal Cultural Heritage Act 2003 (Qld)*

¹⁸ ss. 8, 9 *ibid*

¹⁹ ss. 8, 10 *ibid*

²⁰ s. 8 *ibid*

²¹ s. 12 *ibid*

The basic premise of the ACH Act is that Aboriginal cultural heritage should be protected, and as far as practical, Aboriginal cultural heritage should be owned and protected by Aboriginal people with links to that heritage.²²

Aboriginal human remains: The ACH Act vests ownership (if it not already) in Aboriginal people who have a traditional or familial link with Aboriginal human remains.²³ This section applies regardless of who owned the remains before the commencement of the Act. Remains that are held by the State must be returned to owners of the remains at their request.²⁴

Secret or sacred objects: The ACH Act vests ownership of secret or sacred objects in the custody of the State in the Aboriginal people who have traditional or familial link with the object (if it is not already). The Aboriginal people concerned can request the return of these objects and the State must comply.²⁵

Aboriginal cultural heritage: The ACH Act provides that the State owns Aboriginal cultural heritage except:

- Aboriginal human remains and secret or sacred objects
- Aboriginal cultural heritage passing into ownership of Aboriginal party under this Act
- Aboriginal cultural heritage owned by a person that is confirmed under this Act;
- Aboriginal cultural heritage that is lawfully transferred.

Importantly, however the State does not obtain ownership of the land upon which Aboriginal cultural heritage items might be located.²⁶

How is Aboriginal cultural heritage protected?

The protection under the ACH Act applies whether or not the Aboriginal cultural heritage has been identified or entered onto a database.

The ACH Act imposes a duty of care to protect Aboriginal cultural heritage.²⁷ A person who carries out an activity must therefore take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage. The duty of care provisions are enforced by penalties for non-compliance.

Duty of Care Guidelines have been published by the Cultural Heritage Coordination Unit of the Department of Natural Resources and Mines and can be located at www.nrm.qld.gov.au. The Guidelines set out practicable measures that can be followed to ensure activities are managed to avoid or minimise harm to Aboriginal cultural heritage. They also provide guidance on identifying features likely to contain or constitute cultural heritage.

The Guidelines recognise it is unlikely that Aboriginal cultural heritage will be harmed where:

- an activity is on an area where there has been previous significant ground disturbance, and

²² s. 14 *Aboriginal Cultural Heritage Act 2003 (Qld)*

²³ s. 15 *ibid*

²⁴ s. 16 *ibid*

²⁵ s. 19 *ibid*

²⁶ s. 20 *ibid*

²⁷ s. 23 *ibid*

- the activity will not cause any additional harm or will impact only on this area.

These activities may proceed without further heritage assessments or conditions attached.

However, the Guidelines do not permit activities which, although causing no surface or additional disturbance to an area, may harm scarred or carved trees or rock art. The Guidelines also recognise that Aboriginal cultural heritage may continue to lie below the surface. If it is necessary to excavate, remove or harm any cultural heritage find the Aboriginal party must be immediately notified and consulted on how best to proceed.

Under the ACH Act the Minister can also issue a stop order if he has reasonable grounds for concluding that a person is carrying or is about to carry out activity that will harm Aboriginal cultural heritage or have a significant adverse impact on it.²⁸

The Minister also has power to acquire Aboriginal cultural heritage in order to preserve it.²⁹

Cultural management plans are also required for high level impact activities, or may be initiated voluntarily.³⁰

What are the penalties for dealing unlawfully with Aboriginal cultural heritage?

The Act creates several offences:

- Those (other than State) who hold Aboriginal human remains must take all reasonable steps to ensure the human remains are taken into the custody of the CEO, otherwise they commit an offence - penalty \$15,000³¹
- Any person who has knowledge about Aboriginal human remains and knows the CEO is not aware of them, must bring the remains to the attention of the CEO otherwise they commit an offence - penalty \$7,500³²
- Breach of cultural heritage duty of care - penalty \$75,000 for individuals, and \$750,000 for corporations³³
- Unlawful harm to Aboriginal cultural heritage if a person knows or ought reasonably to know that it is Aboriginal Cultural heritage - penalty \$75,000 for individuals, and \$750,000 for corporations³⁴
- Excavation, relocation or taking away of Aboriginal cultural heritage- penalty \$75,000 for individuals, and \$750,000 for corporations³⁵
- Unlawful possession of Aboriginal cultural heritage - penalty \$75,000 for individuals, and \$750,000 for corporations³⁶
- Disclosing in a report or other document secret or sacred information without the permission of Aboriginal people - penalty \$7,500 for individuals, and \$75,000 for corporations³⁷

²⁸ s. 32 *Aboriginal Cultural Heritage Act 2003 (Qld)*

²⁹ s. 33 *ibid*

³⁰ Part 7 *ibid*

³¹ s. 17 *ibid*

³² s. 18 *ibid*

³³ s. 23 *ibid*

³⁴ s. 24 *ibid*

³⁵ s. 25 *ibid*

³⁶ s. 26 *ibid*

³⁷ s. 29 *Aboriginal Cultural Heritage Act 2003 (Qld)*

- Those responsible for cultural heritage management plans must take all reasonable steps to advise CEO about all Aboriginal cultural heritage revealed to exist because of plans -penalty \$7,500 for individuals, and \$75,000 for corporations³⁸
- Contravention of a stop order -penalty \$1,275,000.³⁹

How are significant Aboriginal areas assessed?

These are assessed primarily by the Registered Native Title Holder or Claimant, or in cases where there is none, where the persons are recognised in accordance with traditional law as having responsibility for the area or object. The State can then register the results if they are consistent with anthropological, biogeographical, historical or archaeological information.

How is Aboriginal cultural heritage recorded?

The ACH Act also established a Cultural Heritage Register. To gain registration on the Cultural Heritage Register, a Cultural Heritage Study must be completed.

There is also controlled access to an existing Database of approximately 18 000 sites. This holds information on physical and non-physical elements of Aboriginal and Torres Strait Islander cultural heritage (e.g. location, attributes, environment, conditions and recommendations for future management).

The Database and Register are maintained to help cultural heritage officers and other interested parties make management decisions for protecting Aboriginal and Torres Strait Islander cultural heritage in Queensland. The information they contain also provides a useful tool for archaeological and anthropological research and development of planning, policy, public education and tourism.

Effect on other rights:

The Act not does affect any native title rights or interests.

3. COMMONWEALTH LEGISLATION

³⁸ s. 30 *ibid*

³⁹ s. 32 *ibid*

Australian Heritage Council 2003 (Cth) AND Environment Protection and Biodiversity Conservation Act 1999 (Cth)

The Commonwealth introduced new heritage laws on 1 January 2004 that affect the way natural, Indigenous and historic heritage places is protected on a national level.

The Australian Heritage Council has been established under these laws.

What is the National Heritage list and how does it protect heritage?

The National Heritage list is designed to showcase exceptional natural and cultural places that contribute to Australia's national identity.

The heritage values of places recorded on the Natural Heritage List will be protected to the full extent of the Commonwealth government's powers. This means a person cannot take action that is or will be likely to have a significant effect on the national heritage values of a listed place without the approval of the Minister for Environment and Heritage.⁴⁰

The government will enter into agreements with private and state and territory government owners to ensure listed places are protected.

The Minister can also make an emergency listing in relation to places not on the National heritage list if the Minister is satisfied that the place has one or more National Heritage values and that any one or more of those values are under threat.⁴¹

The Alpine National Park in Victoria was included on the National Heritage List in June 2005 under the emergency listing provisions of the EPBC Act. The Minister, Senator Ian Campbell stated he believed that the Alpine National Park has or may have both natural and historic heritage values that may be of outstanding heritage value to the nation. The perceived threat to these historic heritage values was the Victorian Government's decision to ban grazing in the Park. Under the emergency listing process, the Minister requested that the Australian Heritage Council conduct an assessment of the Park against the National Heritage criteria and provide this to the Minister within 40 business days. The Minister then has to decide whether to permanently include the Park on the National Heritage List⁴²
Alpine NP⁴³



Guy's Hut,

What places may be entered in the National Heritage List?

⁴⁰ s. 15B *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

⁴¹ s. 324F *ibid*

⁴² <http://www.deh.gov.au/minister/env/2005/mr10jun05.html>

⁴³ http://www.parkweb.vic.gov.au/1process_details.cfm?place=192&Historic=true

To be included in the National Heritage List a place must be of outstanding heritage value to the nation as a whole.

The criteria for a place with outstanding national heritage values to be included in the National Heritage List include:

- 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;
- special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history; or
- importance as part of Indigenous tradition.

The criteria are listed at www.deh.gov.au/heritage/publications/factsheets/fact17.html#cri



Memorial - Eureka Stockade Gardens⁴⁴

Examples: The Port Arthur Historic site (Tasmania), Brewarrina Aboriginal Fish Traps (NSW), Eureka Stockade Gardens (Victoria) and Mawson's Hut (Antartica) have been included on the National Heritage List.



Mawson's Hut⁴⁵

How are National Heritage places listed?

A place may be nominated to the National Heritage List by anyone, including the Commonwealth Minister for Environment and Heritage and the Australian Heritage Council.⁴⁶

The Australian Heritage Council assesses whether a nominated place has heritage values against the relevant criteria. The Council must consult with the owner or occupier, as well as, where appropriate, the Indigenous people with rights or interests in the place. The Council then makes a recommendation to the Minister for Environment and Heritage.⁴⁷

The Minister may publish a notice inviting comments from the public in relation to a proposed listing. The Minister will consult with all relevant Ministers prior to a decision to list and will make the final decision on listing.⁴⁸

Other heritage lists

⁴⁴ <http://www.deh.gov.au/heritage/national/sites/eureka-factsheet.html>

⁴⁵ <http://www.deh.gov.au/heritage/national/sites/mawsons-factsheet.html>

⁴⁶ s 324E

⁴⁷ s. 324G

⁴⁸ s 324J, 324H

The Register of the National Estate

This is a statutory Register which lists and provides information about important natural, Indigenous and historic places throughout Australia. Places in the Register will have 'significant' heritage values.⁴⁹

The Register lists these places as a way of identifying special sites and areas, and publicly confirming that they are worth preserving for the future. This information is intended to be of value to planners, decision-makers, researchers and scientists when decisions are being made that may have an impact on heritage values.

Entry in the Register does not place any direct legal constraints on the actions of private, State and Local Government owners of the place, or affect their rights to manage, maintain or dispose of their property. Only actions taken on Commonwealth land or by the Australian government which are likely to have a significant impact on the heritage values of places in the Register of National Estate will be affected. These actions will require the approval of the Minister for Environment and Heritage.⁵⁰

The Australian Heritage Council compiles and maintains the Register of the National Estate.⁵¹

Commonwealth Heritage List

Places which have Commonwealth heritage values and are on Commonwealth lands and waters or under Australian Government control will be contained on this List.⁵² The Minister for Environment and Heritage will identify whether a place has these values.⁵³ This may include places connected to defence, communications and customs.

Listed places are protected under the Act, which means that the approval of the Minister is required for actions which are likely to have a significant impact on the environment of a listed place, including its heritage values. It is an offence not to comply with this legislation.⁵⁴

How are Indigenous Heritage values protected?

The Indigenous heritage values of a place are defined in the Commonwealth legislation as the heritage value that is of significance to indigenous persons in accordance with practices, observances, customs, traditions, beliefs or history.⁵⁵

When a place that may have Indigenous heritage values is nominated to the National or Commonwealth Heritage Lists, the Australian Heritage Council must seek the views of Indigenous persons with rights or interests in the place as part of their assessment. The Council must put all Indigenous views to the Minister for his consideration prior to making a decision to list the place.⁵⁶ The legislation also protects confidential information provided by Indigenous people as part of this process.⁵⁷

⁴⁹ s. 22 *Australian Heritage Council Act 2003 (Cth)*

⁵⁰ s. 28 *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

⁵¹ s.21 *Australian Heritage Council Act 2003 (Cth)*

⁵² s. 341C, 341D *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

⁵³ s. 341J *ibid*

⁵⁴ s. 26 *ibid*

⁵⁵ s. 528 *ibid*

⁵⁶ s. 324G, 341G *ibid*

⁵⁷ s. 324Q, 341Q *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Indigenous heritage places of national and Commonwealth heritage significance are able to be listed, and will therefore be protected under the new laws. Penalties apply to actions which result in a significant impact on national heritage values, to the extent they are Indigenous heritage values, of a place. The laws also enable Indigenous people to seek Federal Court injunctions against any activities that have a significant impact on the national Indigenous heritage values of a listed place.

Indigenous people will be involved in developing management plans for places with Indigenous heritage significance on the National or Commonwealth Heritage List. National heritage places on Indigenous land will be managed through conservation agreements.

Effect on other rights

Entry on the National or Commonwealth Heritage Lists will not affect Native Title rights.

Who are the Australian Heritage Council?

The Australian Heritage Council consists of a Chair and six members, including two Indigenous persons with appropriate heritage expertise. At present, the Indigenous members are Dr Gaye Sculthorpe and Dr Richard Walley.

Members of the Council are experts in natural, historic and Indigenous heritage.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia that are of particular significance to Aboriginal people in accordance with Aboriginal tradition.

If the Minister receives an application from an Aboriginal group to protect or preserve area from injury or desecration, and they are satisfied it is a significant Aboriginal area and under serious or immediate threat of injury or desecration, they may make a declaration. The maximum time a declaration applies is 60 days. Otherwise it is necessary to undergo a public notification process to make the declaration more permanent.⁵⁸ A declaration will clearly identify the area, and contain provisions for its protection and preservation.⁵⁹

A new Aboriginal and Torres Strait Islander Heritage Protection Bill is scheduled to come before the Commonwealth Parliament during 2005.

3. FURTHER INFORMATION AND CONTACTS

⁵⁸ s. 9 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*

⁵⁹ s. 10 *ibid*

Queensland

Department of Natural Resources and Mines - responsible for Aboriginal Cultural Heritage Act:

www.nrm.qld.gov.au/cultural_heritage

Environment Protection Agency - responsible for Heritage Act:

www.epa.qld.gov.au

Commonwealth

Department of Environment and Heritage - Heritage Division

Department of Environment and Heritage

GPO Box 787,

Canberra ACT 2601.

Ph. (02) 6274 1111, Fax (02) 6274 2095,

email: heritage@deh.gov.au

website at www.deh.gov.au/heritage

Relevant legislation

To be found at <http://www.austlii.edu.au>

- Queensland Heritage Act 1992 (Qld)
- Aboriginal Cultural Heritage Act 2002 (Qld)
- Queensland Heritage Regulation 1992 (Qld)
- Australian Heritage Council Act 2003 (Cth)
- Environment Protection and Biodiversity Conservation Act 1999 (Cth)

International law

Convention Concerning the Protection of World Cultural and Natural Heritage 1972

USEFUL CONTACTS	
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