



EDO-NQ FACTSHEET SERIES

INDIGENOUS CULTURAL HERITAGE LAW

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Indigenous Cultural Heritage Law

This factsheet is intended as a plain English guide to a particular area of law. It is not legal advice and is not intended as a comprehensive examination of the legislation. Whilst all care has been taken in its preparation, it is not a substitute for legal advice as 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.

1. Introduction

Both Queensland and Commonwealth governments have made laws on how indigenous cultural heritage (including places and objects) are able to be dealt with by non-indigenous people, including protection and preservation tools.

This factsheet covers the main aspects of the Queensland and Commonwealth legislation which deals directly with indigenous cultural heritage.

2. Queensland legislation

There are two pieces of Queensland legislation which deal directly with indigenous cultural heritage:

1. *Aboriginal Cultural Heritage Act 2003* (Qld) (“ACH Act”), which replaces the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld); and
2. *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (“TSICH Act”).

The provisions of the ACH Act and the TSICH Act are essentially the same as each other, the only real difference being that the ACH Act obviously deals with Aboriginal cultural heritage and the TSICH Act deals with Torres Strait Islander cultural heritage. In this section of this factsheet (dealing with Queensland legislation) we will deal with these two Acts together, and will identify any important differences along the way.

In October 2010, the Department of Environment and Resources Management (DERM) released the Indigenous Cultural Heritage Acts Amendment Bill 2011, which proposes amendments to the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.¹

¹ Available at http://www.derm.qld.gov.au/cultural_heritage/legislation/pdfs/ichar_draft_bill.pdf, last accessed June 2011

Those changes mainly aim to strengthen the existing regulation regarding access to land and mining, petroleum and infrastructure projects.²

Submissions to the Queensland Government regarding the proposed changes closed on 31 January 2011.³

a. Purpose of the ACH Act and TSICH Act

The purpose of these Acts is to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage.⁴

These Acts have five fundamental principles which underlie their main purpose:

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

b. What is Aboriginal and Torres Strait Islander cultural heritage?

Aboriginal cultural heritage is anything that is:

- a significant Aboriginal area in Queensland that is an area of particular significance to Aboriginal people because of Aboriginal tradition or the history of any Aboriginal party for the area⁶
- a significant Aboriginal object because of Aboriginal tradition or history⁷
- evidence of archaeological or historic significance of Aboriginal occupation of an area of Queensland.⁸

² Ibid

³ Ibid

⁴ s.4 of the *ACH Act*; s.4 of the *TSICH Act*

⁵ s.5 of the *ACH Act*; s.5 of the *TSICH Act*

⁶ ss.8(a) and 9 of the *ACH Act*

⁷ ss.8(b) and 10 of the *ACH Act*

Similarly, Torres Strait Islander cultural heritage is anything that is:

- a significant Torres Strait Islander area in Queensland that is an area of particular significance to Torres Strait Islander people because of Island custom or the history of any Torres Strait Islander party for the area⁹
- a significant Torres Strait Islander object because of Torres Strait Islander tradition or history¹⁰
- evidence of archaeological or historic significance of Torres Strait Islander occupation of an area of Queensland.¹¹

To identify a significant Aboriginal or Torres Strait Islander area, there does not need to be physical evidence of Aboriginal or Torres Strait Islander occupation. It can be a ceremonial place, birthing or burial site, or the site of a massacre. As an example, the following are likely to be or include 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

c. Who owns Aboriginal and Torres Strait Islander cultural heritage?

The basic premise of both the ACH Act and the TSICH Act is that Aboriginal and Torres Strait Islander cultural heritage should be protected, and as far as practical, Aboriginal and Torres Strait Islander cultural heritage should be owned and protected by Aboriginal and Torres Strait Islander people with links to that heritage.¹²

Aboriginal and Torres Strait Islander human remains

The ACH Act vests ownership of Aboriginal human remains in Aboriginal people (if it is not already owned by them) who have a traditional or familial link with those remains.¹³ Similarly, the TSICH Act vest ownership of Torres Strait Islander human remains in Torres Strait Islanders (if it is not already owned by them) who have a traditional or familial link with those remains.¹⁴ These provisions apply regardless of who owned the remains before the ACH Act and TSICH Act started.¹⁵

⁸ s. 8(c) of the *ACH Act*

⁹ ss.8(a) and 9 of the *TSICH Act*

¹⁰ ss.8(b) and 10 of the *TSICH Act*

¹¹ s.8(c) of the *TSICH Act*

¹² s.14 of the *ACH Act*; s.14 of the *TSICH Act*

¹³ s.15 of the *ACH Act*

¹⁴ s.15 of the *TSICH Act*

¹⁵ s.15 of the *ACH Act*; s.15 of the *TSICH Act*

Aboriginal and Torres Strait Islander remains that are held by the State must be returned to owners of the remains at their request.¹⁶

Secret or sacred objects

The ACH Act vests ownership of secret or sacred objects held by the State in the Aboriginal people who have traditional or familial links with the object (if it is not already owned by them). Again, the TSICH Act contains similar vesting provisions for Torres Strait Islanders and their secret or sacred objects.

The State must comply with any request by the Aboriginal or Torres Strait Islander people concerned for these objects to be given back.¹⁷

Aboriginal and Torres Strait Islander cultural heritage lawfully taken away from an area

The ACH Act and TSICH Act provide that the State owns Aboriginal and Torres Strait Islander cultural heritage except:

- Aboriginal or Torres Strait Islander human remains and secret or sacred objects owned by Aboriginal or Torres Strait Islander people under divisions 2 or 3 of those Acts;
- Aboriginal or Torres Strait Islander cultural heritage passing into ownership of an Aboriginal or Torres Strait Islander party under these Acts;
- Aboriginal or Torres Strait Islander cultural heritage owned by a person whose ownership is confirmed under these Acts; and
- Aboriginal or Torres Strait Islander cultural heritage owned by a person to whom ownership is lawfully transferred.¹⁸

Importantly however, none of Aboriginal people, Torres Strait Islanders nor the State does obtain ownership of the land upon which Aboriginal cultural heritage items might be located.¹⁹

d. How is Aboriginal and Torres Strait Islander cultural heritage protected?

Protection under the ACH Act and TSICH Act applies whether or not the Aboriginal or Torres Strait Islander cultural heritage has been identified or entered onto a database²⁰

The ACH Act and TSICH Act impose a duty of care to protect Aboriginal and Torres Strait Islander cultural heritage.²¹ A person who carries out an activity must take all reasonable and

¹⁶ s.16 of the *ACH Act*; s.16 of the *TSICH Act*

¹⁷ s.19 of the *ACH Act*; s.19 of the *TSICH Act*

¹⁸ ss.20(1) to (3) of the *ACH Act*; ss.20(1) to (3) of the *TSICH Act*

¹⁹ s.20(4) of the *ACH Act*, s.20(4) of the *TSICH Act*

²⁰ s.24(1)(a)(ii) of the *ACH Act*; s.24(1)(a)(ii) of the *TSICH Act*

practicable measures to ensure the activity does not harm Aboriginal or Torres Strait Islander cultural heritage (“the cultural heritage duty of care”)²². The duty of care provisions are enforced by penalties for non-compliance.²³

ACH Act Duty of Care Guidelines

Duty of Care Guidelines (“the Guidelines”) for Aboriginal cultural heritage have been gazetted by the relevant Minister (“the Minister”) to provide information and advice on interpreting and implementing the ‘duty of care’ sections of the ACH Act.²⁴ They have been published by the Cultural Heritage Coordination Unit of the Department of Environment and Resources Management (“DERM”).²⁵ Most importantly, compliance with the Guidelines results in meeting the duty of care.

Below we will give some brief information about some aspects of the ACH Act Guidelines; we recommend that you refer to those Guidelines themselves for a more complete discussion.

No similar guidelines have been gazetted in relation to Torres Strait Islander cultural heritage under the TSICH Act.

- The ACH Act Guidelines place activities into one of the five following categories.
- Category 1 Activities involving no surface disturbance
 - Category 2 Activities causing no additional surface disturbance
 - Category 3 Activities in developed areas
 - Category 4 Activities in areas previously subject to significant ground disturbance
 - Category 5 Activities causing additional surface disturbance.

For each of categories 1 – 4, there is a statement to the effect that it is generally unlikely that the activity will harm Aboriginal cultural heritage and most importantly that “the activity will comply with these guidelines”.²⁶

For each of categories 1 – 4, there is also a finding that it is reasonable and practicable that the activity proceeds without further cultural heritage assessment. However, if cultural heritage material (known as a “Cultural Heritage Find”) is located, work must cease immediately and the

²¹ s.23 of the ACH Act; s.23 of the TSICH Act

²² ss.23(2)(f) and s23(3)(iv) of the ACH Act; ss.23(2)(f) and 23(3)(iv) of the TSICH Act

²³ s.23 of the ACH Act; s.23 of the TSICH Act

²⁴ s.28 of the ACH Act

²⁵ http://www.nrw.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf

²⁶ For category 1 see paragraph 4.1 of the Guidelines, for category 2 see paragraph 4.4, for category 3 see paragraph 5.1, and for category 4 see paragraph 5.4.

Aboriginal party for the area must be notified and their advice and agreement sought about how best to manage the Aboriginal cultural heritage to avoid or minimise harm.

It is noted that the identification, notification and negotiation with an Aboriginal party that takes place during construction activities may seriously jeopardize a construction timetable.

It is implied in the Guidelines that the duty of care that has been met by complying with the Guidelines is reactivated upon the discovery of a Cultural Heritage Find. For example, paragraph 5.10 dealing with category 4 activities provides that where agreement cannot be reached, a duty of care obligation under s.23 of the ACH Act continues and a person must take all reasonable and practicable steps to ensure the activity does not harm Aboriginal cultural heritage.

It is likely that reliance on the guidelines will not provide sufficient risk management in many circumstances. Having to negotiate an agreement once Aboriginal cultural heritage material has been uncovered may place a developer at a huge disadvantage, as the Aboriginal party may well be in a quite different negotiation frame of mind from that which they may have been in before material was uncovered.

For category 5 activities - those which may cause additional surface disturbance - a cultural heritage assessment involving consideration of the matters set out in s.23(2) of the ACH Act is required. Further, it is necessary to notify the Aboriginal party and seek advice about features likely to have cultural heritage significance. If the Aboriginal party states that the feature does constitute Aboriginal cultural heritage, an agreement is required to comply with paragraph 5.16.

A list of features that are highly likely to have cultural heritage significance is set out in paragraph 6 of the Guidelines and includes descriptions of the following things:

- Ceremonial places
- Sacred or carved trees
- Burials
- Rock art
- Fish traps and weirs
- Occupation sites
- Quarries and artefact scatters
- Grinding grooves
- Contact sites
- Wells.

Further, landscape features including rock outcrops, caves, foreshores and coastal dunes and sand hills as well as natural wetlands, water holes and springs and particular types of native vegetation may also have cultural heritage significance.

The Guidelines support all 'duty of care' provisions in the ACH Act and if it can be established that a person harming Aboriginal cultural heritage has complied with the cultural heritage 'duty of care' Guidelines, he/she will not be guilty of an offence under the ACH Act.²⁷

e. Stop Orders

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

The Minister also has power to acquire (by purchase or gift) Aboriginal and Torres Strait Islander cultural heritage in order to preserve it or cause structures to be erected, and other steps to be taken, that are necessary or desirable to preserve the Aboriginal cultural heritage.²⁹

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

f. What are the penalties for dealing unlawfully with Aboriginal or Torres Strait Islander cultural heritage?

The ACH Act and the TSICH Act create several offences:

- Those (other than the State) who possess Aboriginal or Torres Strait Islander human remains and do not have necessary traditional or familial links with the remains must take all reasonable steps to ensure the human remains are taken into the custody of the Chief Executive, otherwise they commit an offence – maximum penalty 200 penalty units³¹ (\$15,000).³²
- Any person who has knowledge of the existence and location of Aboriginal or Torres Strait Islander human remains and knows or suspects that the Chief Executive is not aware of them, must bring the remains to the attention of the Chief Executive (advise of

²⁷ s.24(2)(a)(iv) of the *ACH Act*

²⁸ s.32 of the *ACH Act*; s.32 of the *TSICH Act*

²⁹ s.33 of the *ACH Act*; s.33 of the *TSICH Act*

³⁰ Part 7 of the *ACH Act*; Part 7 of the *TSICH Act*

³¹ s.17 of the *ACH Act*; s.17 of the *TSICH Act*

³² One penalty unit is \$75: s.5(1)(b) of the *Penalties and Sentences Act 1992* (Qld)

existence and location) otherwise they commit an offence – maximum penalty 100 penalty units (\$7,500).³³

- Breach of cultural heritage duty of care - maximum penalty 1,000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.³⁴
- Unlawful harm to Aboriginal or Torres Strait Islander cultural heritage if a person knows or ought reasonably to know that it is Aboriginal or Torres Strait Islander cultural heritage - maximum penalty 1,000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.³⁵
- Excavation, relocation or taking away of Aboriginal cultural heritage if the person knows or ought reasonably to have known that it is Aboriginal or Torres Strait Islander cultural heritage - maximum penalty 1,000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.³⁶
- Unlawful possession of Aboriginal or Torres Strait Islander cultural heritage if a person knows or ought reasonably to know that it is Aboriginal Cultural heritage - maximum penalty 1,000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.³⁷
- Disclosing in a report or other document being submitted to the Chief Executive or Minister secret or sacred information without the permission of Aboriginal or Torres Strait Islander people - maximum penalty 100 penalty units (\$7,500) for individuals, and penalty 1,000 penalty units (\$75,000) for corporations.³⁸
- A person who is involved in putting an approved cultural heritage management plan into effect must take all reasonable steps to ensure the Chief Executive is advised about all Aboriginal or Torres Strait Islander cultural heritage revealed to exist because of any activity carried out under the plan– maximum penalty 100 penalty units (\$7,500) for individuals, and penalty 1,000 penalty units (\$75,000) for corporations.³⁹
- Contravention of a stop order –maximum penalty 17,000 penalty units (\$1,275,000).⁴⁰

g. How are significant Aboriginal and Torres Strait Islander areas assessed?

These are assessed primarily by the Aboriginal or Torres Strait Islander parties as relevant, often a Registered Native Title Holder or Claimant, or in cases where there is none, where the

³³ s.18 of the *ACH Act*; s.18 of the *TSICH Act*

³⁴ s.23 of the *ACH Act*; s.23 of the *TSICH Act*

³⁵ s.24 of the *ACH Act*; s.24 of the *TSICH Act*

³⁶ s.25 of the *ACH Act*; s.25 of the *TSICH Act*

³⁷ s.26 of the *ACH Act*; s.26 of the *TSICH Act*

³⁸ s.29 of the *ACH Act*; s.29 of the *TSICH Act*

³⁹ s.30 of the *ACH Act*; s.30 of the *TSICH Act*

⁴⁰ s.32 of the *ACH Act*; s.32 of the *TSICH Act*

persons are recognised in accordance with traditional law as having responsibility for the area or object. The State may then register the results if they are consistent with anthropological, biogeographical, historical or archaeological information.

h. How is Aboriginal and Torres Strait Islander cultural heritage recorded?

The ACH Act establishes an Aboriginal Cultural Heritage Register⁴¹, and the TSICH Act establishes a Torres Strait Islander Cultural Heritage Register. To gain registration on either Cultural Heritage Register, a Cultural Heritage Study must be completed.⁴²

There is also controlled access to existing Aboriginal and Torres Strait Islander Cultural Heritage Databases of approximately 18,000 sites. These hold 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).⁴³

The Cultural Heritage Databases and Registers 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; and
- Provide a useful tool for archaeological and anthropological research and development of planning, policy, public education and tourism.⁴⁴

i. Effect on other rights:

Neither the ACH Act nor the TSICH Act affects any native title rights or interests.⁴⁵

3. Commonwealth legislation

There are three pieces of Commonwealth legislation which deal directly with Aboriginal and Torres Strait Islander cultural heritage:

1. *Australian Heritage Council Act 2003* (Cth) (“AHC Act”);
2. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”); and
3. *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (“ATSIHP Act”).

⁴¹ s.46 of the ACH Act; s.46 of the TSICH Act

⁴² s.47 of the ACH Act; s.47 of the TSICH Act

⁴³ ss.42 to 45 of the ACH Act; ss.42 to 45 of the TSICH Act

⁴⁴ ss.39 and 47 of the ACH Act; ss.39 and 47 of the TSICH Act

⁴⁵ s.13(c) of the ACH Act; s.13(c) of the TSICH Act

a. Australian Heritage Council Act 2003 (Cth) and the Register of the National Estate

The AHC Act established the Australian Heritage Council (“AHC”) as the Australian Government's advisory body on heritage matters.⁴⁶ Amongst other things, the AHC is responsible under the EPBC Act for assessing the heritage values of places for the National Heritage List and the Commonwealth Heritage List.⁴⁷

Amongst other things, the AHC Act requires the AHC to keep a Register of the National Estate, which is a register of heritage places in Australia and its territories, and the heritage values of those places.⁴⁸

A place satisfies the criteria for registration in the Register of the National Estate if the place has a “significant heritage value”⁴⁹ because of one or more of the following⁵⁰:

1. the place's importance in the course, or pattern, of Australia's natural or cultural history;
2. the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
3. the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history;
4. the place's importance in demonstrating the principal characteristics of:
 - a. a class of Australia's natural or cultural places; or
 - b. a class of Australia's natural or cultural environments;
5. the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
6. the place's importance in demonstrating a high degree of creative or technical achievement at a particular period;
7. the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
8. the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history;
9. the place's importance as part of indigenous tradition.

⁴⁶ Part 2 of the *AHC Act*

⁴⁷ s.5 of the *AHC Act*

⁴⁸ s.21 of the *AHC Act*

⁴⁹ The “heritage value” of a place includes the place’s natural and cultural environment which has aesthetic, historic, scientific, social or other significance for current and future generations of Australians: s.528 of the *EPBC Act*

⁵⁰ s.22 of the *AHC Act*

The AHC Act contemplates that places which may be considered for inclusion in, or removal from, the Register of the National Estate may have an indigenous heritage value. If such a place has an indigenous heritage value then the AHC must do the following before considering whether the place meets the registration criterion listed above:

1. take all practicable steps to identify each indigenous person who has rights or interests in all or part of the place;⁵¹
2. take all practicable steps to identify each of those people that the AHC is considering whether to include the place in or remove the place from (as the case may be) the Register of the National Estate;⁵² and
3. give each of those people a reasonable opportunity to comment in writing whether the place should be included in or removed from (as the case may be) the Register of the National Estate.⁵³

It seems that entry of a place in the Register of the National Estate will not guarantee protection of that place, although it may have influence over decisions which may impact on such a place. For example:

- There are no offences created under the AHC Act or the EPBC Act for taking any action which has an adverse impact on such a place.
- While the Commonwealth Environment Minister must consider any information contained in the Register of the National Estate when relevant to a decision which the Minister may be making,⁵⁴ there is no restriction on the Minister making a decision which adversely impacts on a place in the Register just because it is in the Register.
- The Commonwealth is actually working on phasing out the National Estate Register. The register was frozen on 19 February 2007.⁵⁵ By February 2012, all references to it in legislation will be removed after which its only role will be as publicly available archive.⁵⁶

b. *Environment Protection and Biodiversity Conservation Act 1999 (Cth), the National Heritage List and the Commonwealth Heritage List*

The National Heritage List and the Commonwealth Heritage List

Generally speaking, the difference between these two lists is that:

⁵¹ ss.22(1)(a)(ii) and 23(1)(a)(ii) of the *AHC Act*

⁵² ss.22(1)(b) and 23(1)(b) of the *AHC Act*

⁵³ ss.22(1)(c) and 23(1)(c) of the *AHC Act*

⁵⁴ s.391A of the *EPBC Act*

⁵⁵ *Australian Heritage Council Act 2003*, s 24AA

⁵⁶ *Ibid*

1. The National Heritage List is a list of natural and cultural places of *outstanding* heritage value to the nation.⁵⁷
2. The Commonwealth Heritage List is a list of natural and cultural places of *significant* heritage value to the nation, and which are entirely within a Commonwealth area or, if outside Australian jurisdiction, are owned or leased by the Commonwealth.⁵⁸

Although the criteria for inclusion on these lists are different, there are many similarities between them (including the processes for nomination, assessment, inclusion and removal), and the protection that is given to place on those lists. It is easier for us to deal with them at the same time.

The EPBC Act requires that the Commonwealth Minister for Heritage keep both a National Heritage List⁵⁹ and a Commonwealth Heritage List.⁶⁰ Places on the National Heritage List are called National Heritage places,⁶¹ and places on the Commonwealth Heritage List are called Commonwealth Heritage places.⁶²

The values which a place needs in order to be included on the National Heritage List are called National Heritage values,⁶³ and on the Commonwealth Heritage List are called Commonwealth Heritage values.⁶⁴

Both National Heritage values and Commonwealth Heritage values include indigenous heritage values of places.⁶⁵ Indigenous heritage values are defined for the EPBC Act to mean heritage values that are of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history.⁶⁶

Inclusion of a place on either the National Heritage List or the Commonwealth Heritage List provides a significant level of protection:

1. The EPBC Act creates a number of offences for when people or certain companies take actions which will or may have significant impacts on the National Heritage values or the indigenous heritage values of a National Heritage place.⁶⁷

⁵⁷ Part 15, Division 1A, Subdivisions B and C of the *EPBC Act*

⁵⁸ Part 15, Division 3A, Subdivisions B and C of the *EPBC Act*

⁵⁹ s.324C(1) of the *EPBC Act*

⁶⁰ s.341C(1) of the *EPBC Act*

⁶¹ s.324C(3) of the *EPBC Act*

⁶² s.341C(3) of the *EPBC Act*

⁶³ See <http://www.environment.gov.au/heritage/about/national/criteria.html>

⁶⁴ See <http://www.environment.gov.au/heritage/about/commonwealth/criteria.html>

⁶⁵ ss.324D and 341D of the *EPBC Act*

⁶⁶ s.528 of the *EPBC Act*

⁶⁷ s.15C of the *EPBC Act*

2. The EPBC Act also creates a number of offences for when people or certain companies take actions which will or may have significant impacts on the Commonwealth Heritage values or the indigenous heritage values of a Commonwealth Heritage place.⁶⁸
3. The EPBC Act also allows indigenous people to apply to the Federal Court for an injunction preventing someone from engaging in conduct which may be covered by one of those offences.⁶⁹

The EPBC Act also contains a number of provisions regarding the management of National Heritage places and Commonwealth Heritage places.⁷⁰

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

The purpose of the ATSIHP Act is to preserve and protect from injury or desecration areas and objects in Australia that are of particular significance to Aboriginal or Torres Strait Islander people in accordance with Aboriginal and Torres Strait Islander tradition (as relevant).⁷¹

The ATSIHP Act attempts to achieve this purpose by:

1. Giving the Minister and authorised officers power to make certain declarations (including emergency declarations) about areas and objects that are of particular significance to Aboriginal or Torres Strait Islander people in accordance with Aboriginal or Torres Strait Islander tradition (as relevant)⁷² (which, for ease in this factsheet, we will call “significant ATSI” areas and objects);
2. Setting out what must be done if Aboriginal or Torres Strait Islander remains are discovered, or delivered to the Minister; and
3. Creating certain offences.

Declarations (including emergency declarations)

When the Minister receives a written or oral application by an Aboriginal or Torres Strait Islander person to preserve or protect a significant ATSI area or object, then the Minister may make a declaration about that area or object.⁷³

⁶⁸ s.27C of the *EPBC Act*

⁶⁹ s.475 of the *EPBC Act*

⁷⁰ Part 15, Division 1A (National Heritage places) and Division 3A (Commonwealth Heritage places) of the *EPBC Act*

⁷¹ s.4 of the *ATSIHP Act*

⁷² Part II, Divisions 1 & 2 of the *ATSIHP Act*

⁷³ Part II, Division 1 of the *ATSIHP Act*

Unless the declaration is an emergency declaration, the Minister must receive and consider a report from a person nominated by the Minister which deals with the following things *before* making the declaration:⁷⁴

1. the particular significance of the area to Aboriginals;
2. the nature and extent of the threat of injury to, or desecration of, the area;
3. the extent of the area that should be protected;
4. the prohibitions and restrictions to be made with respect to the area;
5. the effects the making of a declaration may have on the proprietary or pecuniary interests of persons other than the Aboriginal or Aboriginals referred to in paragraph (1)(a);
6. the duration of any declaration;
7. the extent to which the area is or may be protected by or under a law of a State or Territory, and the effectiveness of any remedies available under any such law;
8. such other matters (if any) as are prescribed.

Before making any such declaration:

1. interested people must be invited to make representations to the Minister about the content of the report (the person compiling the report must publish this invite in the Government Gazette and any local newspaper circulating in the relevant region); and
2. both person compiling the report and the Minister must consider any representations received (which will be attached to the report referred to above).⁷⁵

Emergency declarations are able to be made in certain circumstances:

Circumstance 1 – emergency declarations by the Minister

The Minister may make an emergency declaration if the Minister:

1. receives a written or oral application by an Aboriginal or Torres Strait Islander person to preserve or protect a significant ATSI area; and
2. is satisfied that the area is under serious and immediate threat of injury or desecration.⁷⁶

Notes:

1. *this power only relates to areas (i.e. it does not apply to objects)*⁷⁷

⁷⁴ s.10 of the *ATSIHP Act*

⁷⁵ ss.10(1)(c) and 10(3) of the *ATSIHP Act*

⁷⁶ s.9 of the *ATSIHP Act*

2. *this emergency declaration may only apply for a maximum period of 30 days*⁷⁸
3. *this emergency declaration may be extended by a further period but only so that the total period of the emergency declaration does not exceed 60 days*⁷⁹

Circumstance 2 – emergency declarations by authorised officers

An authorised officer may make an emergency declaration if:

1. an authorised officer is satisfied that:
 - a. an area(s) or object(s) is a significant ATSI area or object;
 - b. the area(s) or object(s) is under serious and immediate threat of injury or desecration; and
 - c. in the case of an area – the circumstances would justify an emergency declaration by the Minister (referred to above) but the injury or desecration is likely to occur before such a declaration could be made; and
2. an authorised officer has not made an emergency declaration over the area(s) or object(s) within the last three months in relation to threats that are substantially the same as the current threats.⁸⁰

Notes:

1. *this power relates to both areas and objects)*
2. *this emergency declaration may only apply for a maximum period of 48 hours*⁸¹

Obligations if remains are discovered or delivered to the Minister

If someone discovers anything which they have reasonable grounds to think may be Aboriginal or Torres Strait Islander remains then they must report the discovery to the Minister by giving the Minister details of the remains and where they are.⁸² Failure to do so is an offence punishable on conviction by a fine not exceeding \$500.⁸³

If the Minister is satisfied that such a report relates to Aboriginal or Torres Strait Islander remains then the Minister must take reasonable steps to consult with any Aboriginal or Torres Strait Islander person who may have an interest in those remains, to try and work out what the proper action is to take in relation to them.⁸⁴

⁷⁷ s.9(1) of the *ATSIHP Act*

⁷⁸ s.9(2) of the *ATSIHP Act*

⁷⁹ s.9(3) of the *ATSIHP Act*

⁸⁰ s.18 of the *ATSIHP Act*

⁸¹ s.18(2)(b) of the *ATSIHP Act*

⁸² s.20(1) of the *ATSIHP Act*

⁸³ s.22(4) of the *ATSIHP Act*

⁸⁴ s.20(2) of the *ATSIHP Act*

The Minister has certain obligations if Aboriginal or Torres Strait Islander remains are delivered to him/her; in those circumstances the Minister must do the following.⁸⁵

1. return the remains to any Aboriginal or Torres Strait Islander people entitled to, and willing to accept possession, custody or control of those remains in accordance with Aboriginal or Torres Strait Islander tradition;
2. if those Aboriginal or Torres Strait Islander people are not willing to accept possession, custody or control of the remains in accordance with Aboriginal or Torres Strait Islander tradition, then deal with the remains in accordance with any of their reasonable directions;
3. if there is or are no such Aboriginal or Torres Strait Islander people — transfer the remains to a prescribed authority for safekeeping.

Offences

The ATSIHP Act makes it an offence to:

1. engage in conduct which contravenes a declaration referred to above in relation to significant ATSI areas and objects,⁸⁶
2. fail to report to the Minister the discovery of remains which a person who discovered them suspects on reasonable grounds may be Aboriginal or Torres Strait Islander remains.⁸⁷

In addition under the ATSIHP Act, the Minister may apply to the Federal Court for an injunction against a person that has engaged, or is proposing to engage, in any conduct which would:

1. contravene a declaration made under the ATSIHP Act;
2. be an attempt to contravene such a declaration;
3. help, encourage or procure someone to contravene such a declaration;
4. induce or attempt to induce someone to contravene such a declaration;
5. constitute being (either directly or indirectly) knowingly concerned in, or a party to, a contravention of such a declaration; or
6. constitute conspiring with others to contravene such a declaration.⁸⁸

⁸⁵ s.21(1) of the *ATSIHP Act*

⁸⁶ ss.22(1) & 22(2) of the *ATSIHP Act*

⁸⁷ s.22(4) of the *ATSIHP Act*

⁸⁸ s.26 of the *ATSIHP Act*

4. Further information

If you have any further questions or concerns about any of these matters, then please contact us on the details below. While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office.

5. Useful Contacts

EDO-NQ

Suite 1, Level 1
96-98 Lake Street
CAIRNS QLD 4870
Ph : 07 4031 4766; Fax: 07 4041 4535
Email: edonq@edo.org.au

EDO (Qld)

30 Hardgrave Road,
WEST END QLD 4101
Ph: 07 3211-4466; Fax: 07 3211-4655
Email: edoqld@edo.org.au

To become a member of the Environmental Defenders' Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edonq@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edonq