



ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.

Cultural Heritage

1. Summary

Queensland has legislation to protect non-indigenous cultural and built heritage (the *Queensland Heritage Act*) and indigenous cultural heritage (the *Aboriginal Cultural Heritage Act* and *Torres Strait Cultural Heritage Act*).

The Queensland Heritage Register lists places of non-indigenous cultural heritage significance listed by the Queensland Heritage Council. It is an offence to carry out development on a registered place without approval from the Heritage Council, and stop work orders can be issued by the EPA to halt unlawful activity that may damage the cultural heritage significance of a registered place.

The *Aboriginal Cultural Heritage Act* and *Torres Strait Islander Cultural Heritage Act* protect significant indigenous areas or objects and establish a Cultural Heritage Register. All reasonable and practicable measures must be taken to ensure activities do not harm indigenous cultural heritage, and penalties or a stop work order can be issued. Cultural heritage management plans can be required for certain development or can be initiated voluntarily.

The Commonwealth *Environment Protection and Biodiversity Conservation Act* protects places on the National Heritage List and Commonwealth Heritage List, including those with indigenous cultural values, from unapproved actions that are likely to have a significant impact on their heritage values.

2. Queensland legislation protecting cultural heritage

The *Queensland Heritage Act 1992* (Qld) (“QH Act”) aims to protect the cultural heritage significance of places and objects in Queensland. Cultural heritage includes historical sites, buildings with a distinctive architectural style, or even a rare natural feature such as a rock formation. The QH Act is administered by the EPA.

Aboriginal and Torres Strait Islander cultural heritage is protected under the *Aboriginal Cultural Heritage Act 2003* (Qld) discussed in the next section, not the QH Act.

The QH Act has provisions to:

- establish the Queensland Heritage Council (“QHC”);
- maintain a register of places of significance to Queensland's cultural heritage;

- regulate development of registered places;
- encourage conservation of registered places through heritage agreements;
- protect and conserve submerged objects of significance to Queensland's cultural heritage;
- regulate excavation of sites that contain, or may contain, objects of significance to Queensland's cultural heritage; and
- provide appropriate powers of protection and enforcement.

What is the role of the Queensland Heritage Council?

The QHC is established under the QH Act to advise the EPA Minister on cultural heritage issues and measures necessary to protect heritage-listed places and encourage proper management of such places.

The QHC is also responsible for administering the Queensland Heritage Register. Historic places are protected by being listed in the Register. For a place to be heritage-listed, it must be nominated and then go through an approval process (see next heading).

The 12 members of the QHC are appointed by the Governor in Council for 18 months, including representatives from the Local Government Association, the National Trust of Queensland, property owners, rural industries and others with expertise in heritage conservation.

What can be registered on the Queensland Heritage Register?

To be entered on the heritage register, a “place” must:

- be of cultural heritage significance; and
- satisfy one or more of the eight criteria listed in s 23 of the Act, which include aesthetic significance, contribution to understanding Queensland's history, having a special association with a community or cultural group for social/cultural/spiritual reasons, or demonstrating the evolution or pattern of Queensland's history or rare aspects of Queensland's cultural heritage; and
- have some prospect of conservation of its cultural heritage significance.

A “place” means a defined or readily identifiable area of land, and includes a building or natural feature of heritage significance, and as much of the immediate surroundings as are required for its conservation.

There are currently around 1500 places in the Heritage Register, ranging from houses, rural homesteads and civic buildings to roads, trees and cinemas. Examples include Brisbane's Story Bridge and Burke and Wills' Camp at Normanton.

For the full list of heritage places on the Queensland Heritage Register, see: www.epa.qld.gov.au/cultural_heritage/registers_and_inventories.

How are places registered?

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

If the QHC 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. Written notice of this is given, both to the public and to the owner of the place.

If the QHC gives notice under the QH Act that it proposes to enter a particular place in the heritage register on a *permanent* basis, or to remove a particular place from the heritage register, the owner of the place or any other person may object to the proposal by written notice stating in detail the grounds of the objection. The only allowable grounds of objection to the permanent entry of a place are that it is not of cultural heritage significance or does not satisfy the criteria for entry listed in the QH Act. An objection must be made within 20 business days or such longer time as the Minister may allow. If there are no objections received the Council may permanently enter a place in the register.

If any objections are received, they are assessed by an appointed individual with expertise in a field relevant to heritage conservation (panel of assessors), and reported on to the QHC for their consideration. The assessor must give the council a report on the objection within 40 business days after reference of the objection to the assessor or such longer time as may be allowed by the Minister. The council must, within 20 business days after receiving the assessor's report, consider the report and decide whether to proceed with its proposal and, if so, whether the proposal should be varied in any way in the light of the assessor's report.

Are registered heritage places protected from development?

The QH Act makes it an offence to carry out development on a registered place unless the development has been approved by the QHC. Public submissions must be sought on any application that will have a substantial effect on cultural heritage significance.

The Minister can also enter into a heritage agreement with the owner of a registered place after obtaining and considering the QHC's advice. The agreement attaches to the land and is binding on all owners and occupiers of the place. 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 the heritage register.

The Minister has the power under the QH Act to make stop work orders to halt any work or activity that may destroy or reduce the cultural heritage significance of a place.

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 meant that no more work could be done on site for 8 weeks, until the owner could show that any work proposed was consistent with the QH Act requirements for registered properties.

3. Queensland legislation protecting indigenous cultural heritage

The *Aboriginal Cultural Heritage Act 2003* (Qld) (ACH Act) replaces the old *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld). There is also a *Torres Strait Islander Cultural Heritage Act 2003* (Qld) which mirrors the ACH Act.

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; and
5. The need to establish timely and effective processes for management of activities that may harm Aboriginal cultural heritage.

What is Aboriginal cultural heritage?

Aboriginal cultural heritage 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 area; or
- a significant Aboriginal object because of Aboriginal tradition or history; or
- evidence of archaeological or historic significance of Aboriginal occupation of an area of Queensland.

To identify a *significant Aboriginal area*, there does not need to be markings or other physical evidence of Aboriginal occupation. It can be a ceremonial place, birthing or burial site, or the site of a massacre. Significant Aboriginal areas are assessed primarily by the Registered Native Title Holder or Claimant, or 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.

Significant Aboriginal objects may be on a significant Aboriginal area or specifically linked to the area.

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

How is Aboriginal cultural heritage recorded?

The ACH Act establishes 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 indigenous cultural heritage in Queensland, and for use in research, policy development, planning, public education and tourism.

Who owns Aboriginal cultural heritage?

The State owns Aboriginal cultural heritage except for:

- Aboriginal human remains and secret or sacred objects, which are owned by Aboriginal people who have traditional or familial links with the objects or remains. Remains or objects that are held by the State must be returned to the owners at their request;
- Aboriginal cultural heritage passing into ownership of an Aboriginal party under the Act;
- Aboriginal cultural heritage owned by a person whose ownership is confirmed under the ACH Act; and
- Aboriginal cultural heritage owned by a person to whom ownership is lawfully transferred.

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

How is Aboriginal cultural heritage protected?

The ACH Act imposes a duty of care to protect Aboriginal cultural heritage, even if it has not been identified or entered onto a database. 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 cultural heritage duty of care”). There are penalties for not complying with the cultural heritage duty of care (see below).

State government *Duty of Care Guidelines* which provide information on interpreting and implementing the cultural heritage duty of care are available from www.nrw.qld.gov.au/cultural_heritage/pdf/duty_of_care_guidelines.pdf. If a person harming Aboriginal cultural heritage has complied with the Guidelines, they will not be guilty of an offence under the ACH Act.

Activities on areas where there has been previous significant ground disturbance and where the activity will not cause any additional harm can proceed without cultural heritage assessments or conditions attached. However, activities which may harm scarred or carved trees or rock art (even though not causing surface or additional disturbance to an area) are not permitted without approval. If it is necessary to excavate or remove any cultural heritage, the relevant 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 there are 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.

The Minister also has power to acquire Aboriginal 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.

Cultural heritage management plans are also required for certain activities (those requiring an EIS under Queensland laws, or activities where the EPA is a concurrence agency and requires such a plan), or may be initiated voluntarily.

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

Breaching the cultural heritage duty of care

It is an offence to breach the cultural heritage duty of care – penalty 1,000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.

Harming, moving or possessing Aboriginal cultural heritage

It is an offence to unlawfully harm, excavate, relocate, take away or possess Aboriginal cultural heritage which a person knows or ought reasonably to have known it is Aboriginal cultural heritage - penalty 1000 penalty units (\$75,000) for individuals, and 10,000 penalty units (\$750,000) for corporations.

Possessing human remains

It is an offence to possessing Aboriginal human remains without the necessary traditional or familial links with the remains, and not to take all reasonable steps to ensure they are given to the EPA Chief Executive – penalty 200 penalty units (\$15,000).

It is an offence to not tell the EPA Chief Executive of the existence and location of Aboriginal human remains if a person knows or suspect the Chief Executive is not aware of them – penalty 100 penalty units (\$7,500).

Disclosing sacred information

It is an offence to disclose secret or sacred information in any document about Aboriginal cultural heritage matters being submitted to the EPA, without the permission of the relevant Aboriginal people - penalty 100 penalty units (\$7,500) for individuals, and penalty 1000 penalty units (\$75,000) for corporations.

Cultural Heritage Management Plans

It is an offence not to take all reasonable steps to advise the EPA Chief Executive of all Aboriginal cultural heritage revealed in the course of implementing a cultural heritage management plan for an activity carried out under the plan - penalty 100 penalty units (\$7,500) for individuals, and penalty 1000 penalty units (\$75,000) for corporations.

Failing to comply with stop order

It is an offence to knowingly contravene a stop order - penalty 17,000 penalty units (\$1,275,000).

4. Commonwealth legislation protecting cultural heritage

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) protects National Heritage, Commonwealth Heritage and Indigenous Cultural Heritage.

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

The National Heritage List (“NHL”) is designed to showcase exceptional natural and cultural places that contribute to Australia’s national identity. As at 30 June 2007 there were 59 places in the National Heritage List.

The federal government can enter into agreements with private owners or state government owners to ensure listed places are protected.

It is an offence for a person to take action that has, will have, or is likely to have a significant impact on the national heritage values of a listed National Heritage place without the approval of the federal Environment Minister under the EPBC Act.

What places may be entered in the National Heritage List?

To be included in the NHL a place must be within the Australian jurisdiction, and the Minister must be satisfied that the place has one or more National Heritage values.

Considerations for listing as National Heritage include a place having outstanding heritage value to the nation because of the places' importance in the pattern or Australia's natural or cultural history; the places' importance in exhibiting aesthetic characteristics valued by a community or cultural group; the places' contribution to understanding Australia's natural or cultural history; the place possessing rare aspects of Australia's natural or cultural history; the places' special association with a community or cultural group for social/cultural/spiritual reasons; or the places' importance as part of indigenous tradition.

How are National Heritage places listed?

Assessments of National Heritage take place over annual assessment periods. The federal Environment and Heritage Minister may first determine heritage themes, and then calls for public nomination of places for inclusion in the National Heritage List. The Minister gives all nominations to the Australian Heritage Council, which prepares a list of places it thinks should be assessed. The Australian Heritage Council is established under the *Australian Heritage Council Act 2003* as an advisory body on heritage matters and is comprised of members with expertise in built, natural, historic and Indigenous heritage.

The Minister finalises the list of places that are to be assessed, then the Australian Heritage Council assesses the places (including seeking public comment) and gives its assessments to the Minister, who decides whether a place should be included in the National Heritage List.

The Minister may include in the National Heritage List a place that may have national heritage values which are under threat.

The Minister can also make an emergency listing for places not on the NHL if the Minister is satisfied that:

- the place has one or more National Heritage values and
- any one or more of those values are under likely and imminent threat of significant adverse impact.

In 2006-2007 the minister received requests to emergency list six places in the National Heritage List. As at 30 June 2007 no places were emergency listed, two had been rejected, and four had been withdrawn or had not proceeded.

What is the Commonwealth Heritage List and how does it protect heritage?

The Commonwealth Heritage List (CHL) contains places which have Commonwealth heritage values and which are on Commonwealth lands and waters or under Australian Government control.

The Federal Environment and Heritage Minister will identify whether a place has these values, with input from the Australian Heritage Council. This may include places connected to defence, communications and customs.

It is an offence for a person to take action that has, will have, or is likely to have a significant impact on the environment of a listed Commonwealth Heritage place without the approval of the federal Environment Minister under the EPBC Act.

Other heritage lists – the Register of the National Estate

The Register of the National Estate lists and provides information about important natural, Indigenous and historic places throughout Australia. The Register lists these places as a way of identifying special sites and areas which have significant heritage values.

The Register is intended to be of value to decision-makers 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 federal 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 federal Environment and Heritage Minister.

The Australian Heritage Council compiles and maintains the Register of the National Estate however, the Register was ‘frozen’ from 19 February 2007 due to high overlap with heritage lists at the national, state and local government levels. After a 5 year transition period to allow governments to consider what places on the Register should receive protection under another statutory list or local government heritage register, the Register’s statutory basis will be removed.

5. Commonwealth legislation protecting indigenous cultural heritage

How are Indigenous Heritage values in National or Commonwealth Heritage places protected?

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

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 EPBC Act protects confidential information provided by Indigenous people as part of this process.

Indigenous heritage places of National and Commonwealth heritage significance are able to be listed, and will therefore be protected under these 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.

What is the Aboriginal and Torres Strait Islander Heritage Protection Act?

The purpose of the 1984 *Aboriginal and Torres Strait Islander Heritage Protection Act* is to preserve and protect from injury or desecration areas and objects in Australia that are of particular significance to Aboriginal people in accordance with Aboriginal tradition.

Under the Act, if the Minister receives an application from an Aboriginal group to protect or preserve an area from injury or desecration, and is satisfied that it is a significant Aboriginal area and under serious or immediate threat of injury or desecration, the Minister may make a declaration.

The Act was intended to be an act of last resort, to fill the gaps in state and territory heritage protection. Of the 200 applications lodged since it started in 1984 only 22 declarations have been made. Since 1996 only one declaration has been made.

6. Further information

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Website: www.epa.qld.gov.au

Qld Department of Natural Resources and Water – for *Aboriginal Cultural Heritage Act*

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Website: www.nrw.qld.gov.au/cultural_heritage

Cth Department of the Environment, Water, Heritage and the Arts – for *EPBC Act*

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Website www.environment.gov.au/index.html