

Chapter 9

Heritage Protection

Introduction

ACT heritage protection

Heritage Register

Heritage registration process

Effect of registration on development activity

Heritage orders and offences

Commonwealth heritage protection

Conclusion





Heritage Protection

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 the protection of heritage places and objects. This chapter sets out a brief overview of the key features of those schemes.

ACT heritage protection

The *Heritage Act 2004* (ACT) (*'Heritage Act'*) provides a comprehensive scheme for the recognition, registration and protection of heritage places and objects.

The one exception is that provision for the protection of individual trees of heritage significance in built up urban areas is provided for in the *Tree Protection Act 2005* (ACT), rather than in the *Heritage Act* (see Chapter 6 in this Handbook for more information on tree protection).

Heritage Register

The Heritage Register ('the register'), established by Part 4 of the *Heritage Act*, is a list of recognised heritage places and objects in the ACT. The register also includes provisionally registered places and objects, as well as places and objects that have been nominated for inclusion. The register is maintained by the ACT Heritage 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
- if it is provisionally registered, the period of registration
- any heritage guidelines, heritage agreements, heritage directions or enforcement orders relating to the place or object (s 20).

Places on the register include, for example, a geological formation in Deakin known as the Deakin anticline, Aboriginal sites in Amaroo, Gunghalin, Kaleen and other suburbs, Alt Crescent in Ainslie, St Christopher's Cathedral, Manning Clark's house in Forrest and Gorman House in Braddon. Objects on the register include the Civic Merry Go Round and Organ, a map of Lanyon (c.1834) and a collection of Aboriginal stone artefacts held by the Canberra Museum and Art Gallery.

The full Heritage Register is publicly available on [ACT Heritage's website](#) (see Contacts list at the back of this book).

ACT Heritage Council

The ACT Heritage Council, established by Part 3 of the *Heritage Act*, is central to many of the processes under that Act, including registration. Its members include 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 are public representatives. The background and expertise of current members are set out on the Heritage Council website.

As well as identifying, assessing, conserving and promoting places and objects in the ACT with natural and cultural heritage significance, the council also performs 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 that the place or object must satisfy one or more of the criteria set out in section 10 of the *Heritage Act*, including:

- importance to the course or pattern of the ACT's cultural or natural history
- status as uncommon, rare or endangered aspects of the ACT's cultural or natural history
- potential to yield information that will contribute to an understanding of the ACT's cultural or natural history
- importance in demonstrating the principal characteristics of a class of cultural or natural places or objects
- importance in exhibiting particular aesthetic characteristics valued by the ACT community or a cultural group in the ACT
- importance in demonstrating a high degree of creative or technical achievement for a particular period
- strong or special association with the ACT community, or a cultural group in the ACT for social, cultural or spiritual reasons
- special association with the life or work of a person, or people, important to the history of the ACT.

Heritage registration process

Part 6 of the *Heritage Act* sets out the process for heritage registration. Any person can apply to the Heritage Council ('the council') to nominate a place or object for provisional registration on the register. The nomination must be in writing and include a statement about why the item has heritage significance (s 28). The reasons should

refer to one or more of the criteria set out above. ACT Heritage, which is part of the Environment and Planning Directorate, provides heritage advice on nominations and the [Heritage Assessment Policy](#), available on its website, is designed to assist community members to prepare nominations. The Environmental Defenders' 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 considers the nomination application against the criteria and decides whether or not to provisionally register the place or object (s 32). An application can be made for an urgent decision in situations where, for example, a place is under imminent threat or developers wish to avoid delays in a development project. In such cases the council must, as far as practicable, decide whether or not to provisionally register the place or object within 20 working days (or 60 working days if the place is a precinct) (s 30).

The council must give notice of its decision about provisional registration (s 34). The notice invites public comment on whether the item should be included permanently on the register. Comments must be provided to the council within 4 weeks (s 37).

Following the public consultation period, the council must give the minister a report setting out the council's views about registration of the item and identifying any issues raised in public comments (s 38). The minister has 15 working days to direct the council to give further consideration to certain issues (s 39). The council must then decide whether the place or object should be subject to final registration (s 40).

The council must give notice of its final decision, which is reviewable by the ACT Civil and Administrative Tribunal (ACAT). Persons that have a right to seek review include the owner, occupier, lessee, nominator or any person who made comments during the public consultation period (ss 13 and 114).

Provisional registration provides immediate protection while further steps, such as public consultation, are being carried out. Provisional registration lasts five months (or nine months for a precinct), but may be extended up to a further three months in some circumstances (s 35). Final registration of a heritage place or object provides ongoing legal protection.

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 process similar 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 49(2)).

Effect of registration on development activity

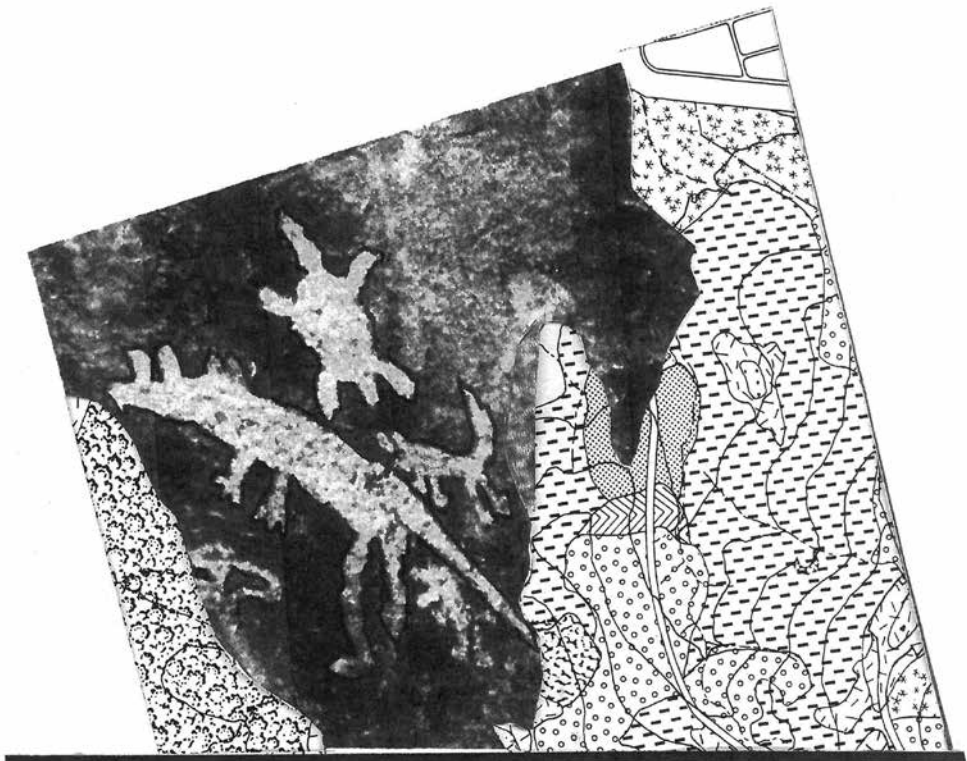
For most development applications relating to a registered or provisionally registered place or object, the Heritage Council provides advice to the ACT Planning and Land Authority (ACTPLA) about the effect of the development on the heritage significance of that place or object and about possible ways of avoiding or minimising the

impact of the development on the heritage significance of the place or object (s 60). The council may also advise about the effect on a nominated place or object but only if, in the council's opinion, it is likely to have heritage significance. The council may also advise that approval of the development should be subject to conditions, for example, requiring compliance with an approved conservation management plan (s 61).

ACTPLA must consider that advice in approving or refusing the development application and the council generally has the right to apply for review in ACAT of the authority's decision (see s 60 of the *Heritage Act* and the *Planning and Development Act 2007* (ACT) which is discussed in further detail in Chapter 3 of this Handbook).

Heritage directions

The Heritage Council has the power to give a heritage direction to the owner or occupier of a place or object or to a person whose work affects the place or object (s 62). The content of the heritage direction may be to do, or not to do, something to conserve the place or object, for example, an order to undertake essential maintenance on a place. A heritage direction may only be issued if the council is satisfied that immediate protection is justified due to a serious and imminent threat to the heritage significance of the place or object or to an Aboriginal place or object (s 62(3)).



Contravention of a heritage direction is an offence with a maximum penalty of 1,000 penalty units (currently \$150,000 for an individual and \$750,000 for a corporation) (s 65 of the *Heritage Act* and s 133 of the *Legislation Act 2001* (ACT)). 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 it is 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).

Section 74 of the *Heritage Act* contains offences for diminishing the heritage significance of a registered place or object. For instance, where a person is reckless as to the consequences of their conduct, the maximum penalty is 1,000 penalty units (currently \$150,000 for an individual and \$750,000 for a corporation). There are a range of exceptions to the offences including where the action is taken in accordance with an excavation permit, conservation management plan or statement of heritage effect approved by the council (s 76 and Pt 10B).

Authorised persons have significant powers under Part 14 of the Act, including search and seizure powers 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 with another person where the owner consents (s 99). The place or object in question need not be registered. Heritage agreements are made on the advice of the Heritage 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 attached to the land where the place or object is located and are binding on the owner. Such agreements must be lodged for registration under the *Land Titles Act 1925* (ACT) (s 103). 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 (s 104).

Protection of Aboriginal heritage places and objects

All Aboriginal places and objects are protected in the ACT, regardless of whether they meet the heritage significance criteria in section 10 or are included on the register. That is, all places and objects associated with Aboriginal people because of Aboriginal tradition are protected. There are specific offences relating to the damage of Aboriginal places or objects, which are similar to the offences relating to registered places and objects (s 75).

An Aboriginal heritage place or object may also be included on the register in the same way as any other heritage place or object. These places impose specific obligations on the Heritage Council to consult with each representative Aboriginal organisation, as defined under section 14 of the *Heritage Act*, prior to making a decision on registration (s 31).

Special provision is made under Part 8 of the *Heritage Act* for the discovery of Aboriginal places or objects. A person who discovers a place or object that he or she thinks is an Aboriginal place or object must report the discovery to the council within 5 working days (s 51). This reporting obligation does not apply if the item is registered or if the person has a traditional Aboriginal affiliation with the land where it was discovered (s 52). The council must then arrange consultations with the relevant Aboriginal organisations and decide whether to provisionally register the place or object (s 53).

Commonwealth heritage protection

Introduction

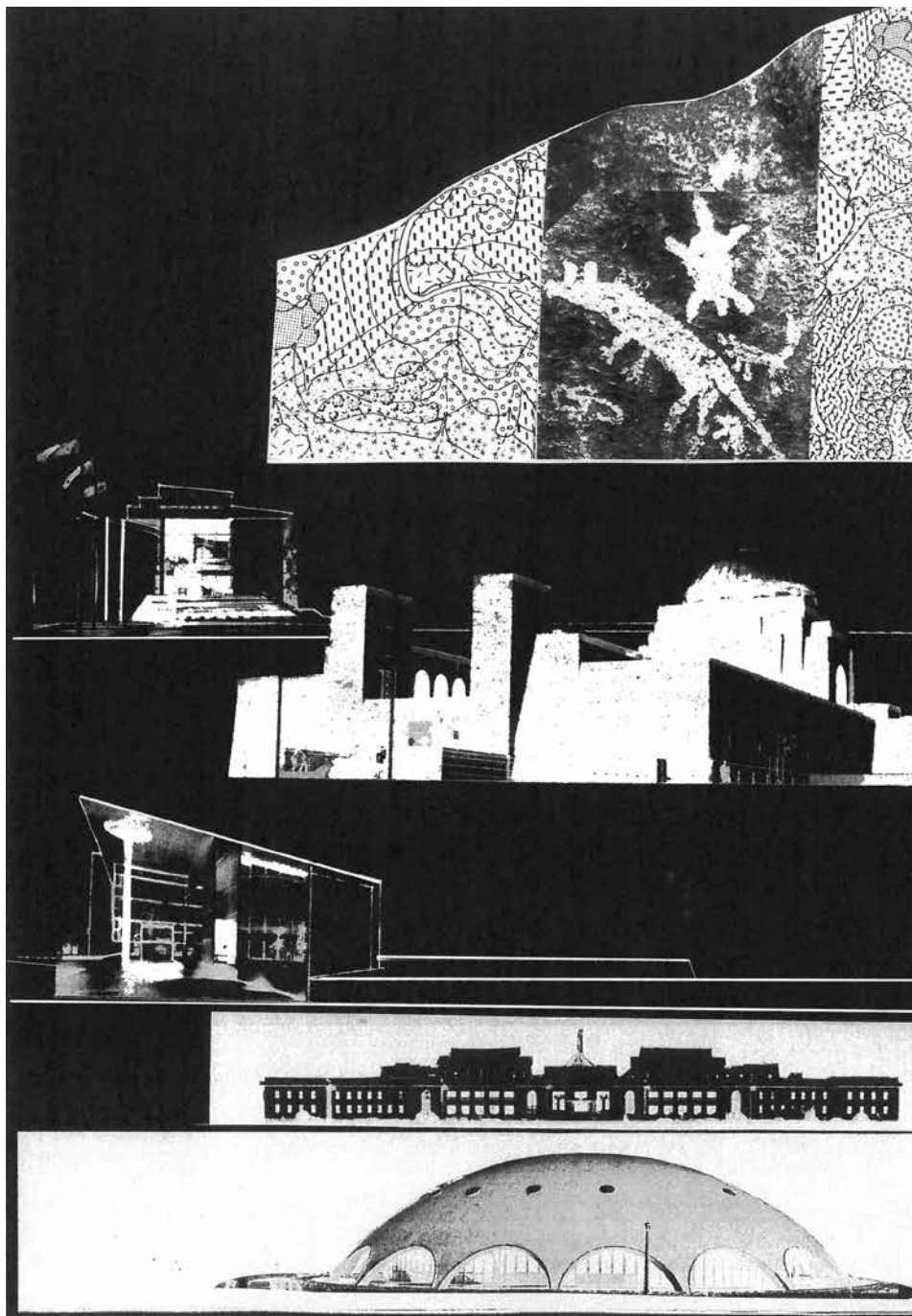
There are a number of different types of heritage protection in Commonwealth legislation relating to:

- 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 by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'), while the others have specific legislation.

World heritage

The *Convention for the Protection of the World Cultural and Natural Heritage* ("the Convention") establishes 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 are obligated to take steps to protect and preserve World Heritage properties within 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. Whether a place is included in the List is decided by the World Heritage Committee (an elected body of 21 countries which are also parties to the Convention), on the advice of the International Council on Monuments and Sites (ICOMOS) and/or the International Union for Conservation of Nature (IUCN). Australia currently has 20 properties on the World Heritage List, including the Greater Blue Mountains area, the Sydney Opera House and the Great Barrier Reef. There are currently none within the ACT.

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 to the Commonwealth Minister for the Environment ('the minister') for assessment (see Chapter 4 in this Handbook for more information on Commonwealth environmental assessment).

National heritage list

The National Heritage List contains natural, indigenous and historic places with outstanding heritage value to Australia. There are currently over 100 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 includes Namadgi National Park and Tidbinbilla Nature Reserve).

To be included on the National Heritage List, a place must have outstanding heritage value to the Australian 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 section 324D of the *EPBC Act* and reg 10.01A of the *Environment Protection and Biodiversity Conservation Regulations 2000*.

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 minister must invite nominations for places for inclusion on the National Heritage List. Any person may nominate a place. The minister then refers that nomination to the Australian Heritage Council for assessment. As part of this process, the council prepares a 'finalised priority assessment list' for that year and invites public comments. The minister then receives an assessment of each place from the council and makes a final decision on whether to list the place. There are provisions for emergency listing by the minister without reference to the council if the heritage values of a place are under threat (sub-div BB of Pt 15).

Similarly to World Heritage, places on the National Heritage List are protected under the *EPBC Act* as a 'matter of national environmental significance'. This means that in most cases, 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 minister for assessment (see ss 15B and 15C, *EPBC Act* and discussion in Chapter 4 of this Handbook).

Commonwealth heritage list

The Commonwealth Heritage List also includes natural, indigenous and historic places. However, these places must be in areas owned or leased by the Commonwealth. Currently there are nearly 600 places on the Commonwealth Heritage List, with over 100 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 those for the National Heritage List except that only significant, instead of outstanding, heritage value is required (s 341D and r 10.03A). The nomination and listing process is essentially the same as for the National Heritage List (sub-div BA of Pt 15).

Commonwealth Heritage places are protected under the *EPBC Act*. 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, all require approval by the minister. Since the term 'environment' is defined to include the heritage values of the place (s 528), actions with a significant impact on the heritage values of a Commonwealth Heritage place will also require assessment and approval.

List of overseas places of historic significance to Australia

The List of Overseas Places of Historic Significance to Australia is also established under the *EPBC Act* to symbolically recognise overseas sites that have a special place in Australia's history (Ch 5A). Three places currently listed include the Kokoda trail in Papua New Guinea, Anzac Cove at Gallipoli, and the Howard Floreys Laboratory at the Sir William Dunn School of Pathology in the UK.

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 Minister for the Environment 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 or the Commonwealth Heritage List under the *EPBC Act*. For example, a place that is of outstanding heritage value for its importance as part of Indigenous tradition would meet 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 prohibited unless it occurs under a permit or certificate granted under the Act (s 9).

The Act gives effect to Australia's international obligations under the *Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property*. As a consequence, the Act also deals with the import of moveable cultural heritage objects into Australia that have been illegally exported from their country of origin.

Historic shipwrecks

The Commonwealth also has the *Historic Shipwrecks Act 1976* (Cth), which provides some protection to thousands of historic shipwrecks in Commonwealth waters, which extends from below the low water mark to the edge of the continental shelf. The Act 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 may be prohibited or restricted (ss 7 and 14).

Australian Heritage Council

The Australian Heritage Council, established under the *Australian Heritage Council Act 2003* (Cth), is an expert advisory body to the Minister for the Environment. Its members include a chair and six other 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, and at least one of the two should represent the interests of Indigenous people (s 7).

The council's 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, on 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
- promoting the identification, assessment, conservation and monitoring of heritage (s 5).

The former Register of the National Estate was established in 1975 as a national inventory of places of natural and cultural heritage significance. However, the provisions requiring the Australian Heritage Council to administer the Register, together with references to the Register in the *EPBC Act*, were repealed with effect from 19 February 2012. Information about places on the Register is archived and is available on the [Australian Heritage database](#).

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

Conclusion

As this brief overview shows, both territory and Commonwealth heritage schemes apply in the ACT. There is legislation governing heritage places and objects at both the ACT and the Commonwealth level, and special provision is made for protection of Indigenous 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 object for heritage listing.