

Planning, Development & Heritage
Commonwealth heritage protection law

Last updated: July 2014



These Fact Sheets are a guide only and are no substitute for legal advice. To request free initial legal advice on an environmental or planning law issue, please [visit our website](#)¹ or call our Environmental Law Advice Line. Your request will be allocated to one of our solicitors who will call you back, usually within a few days of your call.

Sydney: 02 9262 6989
 Northern Rivers: 1800 626 239
 Rest of NSW: 1800 626 239

NSW Bilateral Agreement relating to environmental impact assessment

The Australian and NSW governments have signed a [bilateral assessment agreement](#) which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

In practice, the proponent will refer projects to the Australian Government, who will determine whether the project is a [controlled action](#), and then notify the NSW Government that a referral has been made. The NSW Government will then assess the project, and undertake an [assessment for the Australian Government](#) using its own assessment processes.²

The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.³ [Read EDO NSW's law reform submission on the draft bilateral agreement for more information.](#)⁴

Overview

¹ http://www.edonsw.org.au/legal_advice

² <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

³ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

⁴ http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

It is important to remember that Australian Government approval may be required in addition to any other approvals required under NSW law.

Responsibility for heritage protection in Australia is split between Commonwealth, State and local government.

The Commonwealth is responsible for:

- World Heritage
- National Heritage, and
- Commonwealth Heritage Places.

The main Commonwealth law covering these areas is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

The Commonwealth is also responsible for Indigenous heritage items and places under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

- For more information see our [EPBC Act Fact Sheet](#).
- For information on heritage protection under NSW laws (including the role of local government), see our [NSW Heritage Law Fact Sheet](#).

Key to terms used in this Fact Sheet

Department means the Australian Government Environment Department

Environment Minister means the Australian Government Minister for the Environment

Minister means the Australian Government Minister for the Environment

Australian Heritage Council

Functions of the Australian Heritage Council

The [Australian Heritage Council](#) is an independent body of heritage experts and is the main external body advising the Environment Minister on heritage matters.

Functions of the Australian Heritage Council under the EPBC Act include:

- Preparing proposed priority assessment lists each year for new nominations;⁵
- Nominating places itself for inclusion on the National List⁶ and Commonwealth Heritage lists;⁷

⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 324E – 324JJ, 341E – 341JL.

⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JB(3)(b).

⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JA(3)(b).

- Assessing places on the Finalised Priority Assessment Lists and advising the Environment Minister on the National Heritage List,⁸ and the Commonwealth Heritage List;⁹ and
- Advising the Minister on the List of Overseas Places of Historic Significance to Australia.¹⁰

World Heritage

World Heritage sites in Australia are listed, managed and protected under the EPBC Act.

The EPBC Act gives effect to Australia's international obligations¹¹ under the *Convention for the Protection of the World Cultural and Natural Heritage (1972)* ([World Heritage Convention](#)). The World Heritage Convention protects cultural and natural sites of outstanding universal value.

How are places listed?

Only the Australian Government can nominate places in Australia for entry onto the World Heritage List.¹² The World Heritage Committee, established under the World Heritage Convention,¹³ assesses each nomination and decides whether to enter a place on the World Heritage List.¹⁴ A property cannot be included on the World Heritage List without the consent of the State where the site is located.¹⁵

What is on the World Heritage List?

Sites on the [World Heritage List](#) include the Greater Blue Mountains Area, Fraser Island, the Sydney Opera House, the Ningaloo Coast and the Great Barrier Reef.

To find out whether there is any World Heritage properties in your area of interest conduct an online [Protected Matters Search](#).

How is World Heritage protected in Australia?

Management plans

The EPBC Act requires the Commonwealth to prepare and implement management plans for all properties in Australia which are on the World Heritage List.¹⁶ These plans are reviewable every five years to ensure that the plan is consistent with the [Australian World Heritage management principles](#).¹⁷ The

⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JH.

⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JG.

¹⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 390P, and 390R.

¹¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) replaced the *World Heritage Properties Conservation Act 1983* (Cth).

¹² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 314.

¹³ *World Heritage Convention*, Article 8.

¹⁴ *World Heritage Convention*, Article 11(2).

¹⁵ *World Heritage Convention*, Article 11(3).

¹⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 316 and 322.

¹⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

Environment Protection and Biodiversity Conservation Regulations 2000 (Cth) set out principles for the management of natural heritage and cultural heritage ([the Australian World Heritage management principles](#)).¹⁸

Prohibited actions

A person must not take an action that has, will have, or is likely to have a significant impact on the world heritage values of a declared World Heritage property without approval from the Environment Minister.¹⁹

A 'declared World Heritage property' is one which is already on the World Heritage List, or one which the Environment Minister 'declares' should be treated as World Heritage (eg because it is under threat).²⁰

Each World Heritage property has its own world heritage values.²¹ It is the values, and not the site itself, which are protected. An action is likely to have a "significant impact" if there is a real chance or possibility that it will cause one or more of the World Heritage values to be lost, degraded, damaged or notably altered.²²

Activities outside the World Heritage property which nevertheless affect the World Heritage values may still need approval.

For more information see our [EPBC Act Fact Sheet](#).

Taking action to protect a World Heritage property in danger

If you think a World Heritage property might be in danger, you can:

- [Report a potential breach](#) of the EPBC Act to the Environment Department
- Call EDO NSW for advice on (02) 9262 6989

List of World Heritage in Danger

The World Heritage Committee is required under the World Heritage Convention to keep a "List of World Heritage in Danger".²³ The List can only include properties which are threatened by serious and specific dangers, such as large-

¹⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 323(1); and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 10.01. The principles are set out in *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) Sch 5..

¹⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 12(1).

²⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 13 and 14.

²¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 12(3). The world heritage values for each site are described on the Department of Sustainability, Environment, Water, Population and Communities [website](#).

²² [Significant Impact Guidelines 1.1 - Matters of National Environmental Significance](#) (October 2009), pages 17 - 19.

²³ *World Heritage Convention*, Article 11(4).

scale public or private projects, tourist developments, and changes in water levels.²⁴

National Heritage places

The EPBC Act allows places which are thought to be of outstanding heritage value to the nation to be listed, managed and protected.²⁵

National Heritage List

National Heritage sites and their heritage values are recorded on the National Heritage List.²⁶ A place that is included in the National Heritage List is called a *National Heritage place*.²⁷

Natural, historic and Indigenous sites within Australia can be listed as National Heritage.²⁸

How are places listed?

The Environment Minister ultimately decides whether to include a place on the List, although the Minister must follow the consultation process set out in the EPBC Act.²⁹

The Minister must consult with the public and the Australian Heritage Council before [listing a place](#).³⁰

Under this process, there is an annual 12-month cycle (known as *assessment periods*) in which the listing process works as follows:

- the Minister invites the public to nominate places for inclusion in the National Heritage list,³¹
- the Minister then gives the nominations to the Australian Heritage Council,³² which prepares and gives to the Minister the list of places which it thinks should be assessed (including any nominations by the Council itself),³³
- the Minister finalises the list of places to be assessed,³⁴

²⁴ See the [World Heritage Convention](#), Article 11(4) for other examples of threats that might make a site eligible for the “List of World Heritage in Danger”.

²⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 324A – 324ZC.

²⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324C

²⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324D(2).

²⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324D, and

Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), cl 10.01A.

²⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JJ.

³⁰ *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth), Sch 1, cl 550 – 563;

and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 324E – 324R.

³¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324J.

³² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JA.

³³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JB – 324JD.

³⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JE.

- the Australian Heritage Council invites the public to make comments about the finalised list,³⁵
- the Australian Heritage Council assess the places on the finalised list and advises the Minister,³⁶ and
- the Minister ultimately decides whether a place should be included on the National Heritage List.³⁷

The Minister can make an emergency listing if the Minister believes that a place which is capable of meeting the criteria for National Heritage listing is under threat (and it is not already listed).³⁸

Can I nominate a place for the National Heritage List?

Yes. Anyone can [nominate](#) a place which they think has outstanding heritage value to the nation and should be placed on the National Heritage List.³⁹ The nomination must set out how the place meets the National Heritage [criteria](#).⁴⁰ For more information, you can request a [Nomination Kit](#) from the Australian Heritage Council.

What is on the National Heritage List?

The [National Heritage List](#) contains a full list of National Heritage places.

You can find out whether there are any National Heritage places in your area of interest by conducting an online [Protected Matters Search](#).

How is National Heritage protected under the EPBC Act?

Management plans

The Minister must make a management plan to protect each National Heritage place which is within a Commonwealth area.⁴¹ The Minister must use his or her best endeavours to make plans for places that are in State or Territory areas.⁴² Management plans must not be inconsistent with National Heritage Management principles.⁴³

³⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JF – 324JG.

³⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JH.

³⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JJ, and s 324C(2).

³⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324JK – 324JQ.

³⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324J, and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl 10.01B.

⁴⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324D and:

Environment Protection and Biodiversity Conservation Regulations 2000 (Cth), cl 10.01A .

⁴¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324S, *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 10.01C, reg 10.01D and sch 5.

⁴² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324X.

⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 324S(4)(b), and 324X(2). The principles are set out in Sch 5A of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth): cl 10.01C.

Prohibited actions

A person must not take an action that has, will have, or is likely to have a significant impact on the heritage values of a listed National Heritage place without approval.⁴⁴ It is an offence to do so.⁴⁵ Under these provisions, it is the heritage values, rather than the site itself, which are protected.

For more information on how the EPBC Act works to protect national heritage, see our [EPBC Act](#) Fact Sheet.

Taking action to protect National Heritage places

If you think a National Heritage place might be in danger, you can:

- Report a suspected [breach](#) of the EPBC Act to the Environment Department
- Contact the Environmental Defender's Office for advice on (02) 9262 6989, or 1300 369 791 if you are in the Northern Rivers region.

Bilateral (assessment) agreements

The EPBC Act allows for the Commonwealth to enter into bilateral (assessment) agreements with each State for the assessment of activities likely to have an impact on matters of national environmental significance. Both World and National Heritage are listed as matters of national environmental significance under the EPBC Act. Bilateral assessment agreements allow the Commonwealth to accept an environmental assessment done by the State if the assessment was done in accordance with the agreement.⁴⁶ Where this occurs, the assessment under State law replaces the need for separate assessment under the EPBC Act. After assessment, the proposed action still requires approval from the Australian Minister for Environment. The purpose of bilateral agreements is to reduce duplication of environmental assessment between the Commonwealth and States.

NSW Bilateral Agreement relating to environmental impact assessment

The Australian and NSW governments have signed a [bilateral assessment agreement](#) which means that the NSW Government is responsible for assessing projects that will impact on World Heritage or National Heritage and is therefore not required to refer the action to the Australian Government for assessment.⁴⁷ The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.⁴⁸ [Read](#)

⁴⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 15B.

⁴⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 15C.

⁴⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 45 – 65A.

⁴⁷ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

⁴⁸ <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

[EDO NSW's law reform submission on the draft bilateral agreement for more information](#).⁴⁹

Commonwealth Heritage Places

Heritage on Commonwealth land can be listed, managed and protected.⁵⁰ The purpose of this type of listing is to give the Commonwealth greater control over heritage places which are located in areas that the Commonwealth owns or controls.

Commonwealth Heritage listing does not offer as much protection as National Heritage listing because, unlike National Heritage, Commonwealth Heritage is not listed as a *matter of national environmental significance* under the EPBC Act (see our [EPBC Act](#) Fact Sheet for more information on the EPBC Act and matters of national environmental significance).

Commonwealth Heritage List

Commonwealth heritage sites and their heritage values are recorded on the Commonwealth Heritage List.⁵¹ A place that is on the Commonwealth Heritage List is called a *Commonwealth Heritage place*.⁵²

Natural, historic and Indigenous sites within Australia can be listed if they meet the criteria for listing and are in an area controlled by the Commonwealth.⁵³

What areas are controlled by the Commonwealth?

A place can only be included on the Commonwealth Heritage List if it is.⁵⁴

- on land owned or leased by the Commonwealth (or a Commonwealth agency),
- on land in an external Territory (including Antarctica, Christmas Island and Norfolk Island) or the Jervis Bay Territory,
- in Commonwealth waters,⁵⁵ or
- outside Australia, but owned or leased by the Commonwealth.

⁴⁹ http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167

⁵⁰ *Environment and Heritage Legislation Amendment Act (No 1) 2006*, Sch 1; and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 341A - 341ZH.

⁵¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341C(1).

⁵² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341C(3).

⁵³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341D, and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl 10.03 A(2) set out the criteria.

⁵⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341C(2); and s 525 defines a "Commonwealth area".

⁵⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 525(3): note that coastal waters of States (territorial waters) are not Commonwealth waters.

How are places listed?

The Environment Minister ultimately decides whether to include a place on the Commonwealth Heritage List, although the Minister must follow the consultation process set out in the EPBC Act.⁵⁶

The Minister must consult with the public and the Australian Heritage Council before listing a place.⁵⁷

Under this process, there is an annual 12-month cycle (known as *assessment periods*) in which the listing process works as follows:

- the Minister invites the public to nominate places for inclusion in the Commonwealth Heritage list,⁵⁸
- the Minister then gives the nominations to the Australian Heritage Council,⁵⁹ which then prepares and gives to the Minister the list of places which it thinks should be assessed (including any nominations by the Council itself),⁶⁰
- the Minister finalises the list of places to be assessed,⁶¹
- the Australian Heritage Council invites the public to make comments about the finalised list,⁶²
- the Australian Heritage Council assess the places on the finalised list and advises the Minister,⁶³ and
- the Minister ultimately decides whether a place should be included on the Commonwealth Heritage List.⁶⁴

Click [here](#) to see the Current Priority Assessment Lists

The Minister can make an emergency listing if the Minister believes that a place which is capable of meeting the criteria for Commonwealth Heritage listing is under threat (and it is not already listed).⁶⁵

Can I nominate a place for the Commonwealth Heritage List?

Yes. Anyone can [nominate a place](#) which they think is of national heritage value and should be placed on the Commonwealth Heritage List.⁶⁶ The nomination

⁵⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JI.

⁵⁷ *Environment and Heritage Legislation Amendment Act (No 1) 2006*, Sch 1; and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 341E – 341R.

⁵⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341H.

⁵⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341J.

⁶⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JA – 341JC.

⁶¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JD and 341JE.

⁶² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JF.

⁶³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JG.

⁶⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JI, and s 341C(2).

⁶⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341JJ – 341JP.

⁶⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341H, and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl 10.03 AB.

must set out how the place meets the Commonwealth Heritage criteria.⁶⁷ For more information, you can request a [Nomination Kit](#) from the Australian Heritage Council.

What is on the Commonwealth Heritage List?

There are hundreds of places on the [Commonwealth Heritage List](#). These places are often connected to defence, communications, customs and other government activities that reflect Australia's development as a nation.

You can find out whether there are any Commonwealth Heritage places in your area of interest by conducting an online [Protected Matters Search](#).

How is Commonwealth Heritage protected?

Management plans

A Commonwealth agency must make a management plan to protect and manage the Commonwealth Heritage values of a Commonwealth Heritage place it owns or controls.⁶⁸ The plan must address the matters set out in the Regulations,⁶⁹ and must not be inconsistent with the Commonwealth Heritage Management principles.⁷⁰ The plans are binding on the Commonwealth.⁷¹

Usual approval and offence provisions do not apply

Commonwealth Heritage is not included as a *matter of national environmental significance* under the EPBC Act. Thus, the usual approval and offence provisions which protect matters of national environmental significance under the EPBC Act do not apply. For more information see our [EPBC Act](#) Fact Sheet.

However, a Commonwealth agency must not take an action that has, will have, or is likely to have an adverse impact on the Commonwealth Heritage values of a Commonwealth Heritage place unless there is no feasible and prudent alternative and action is taken to mitigate the impacts.⁷²

If an area is sold or leased which contains a Commonwealth Heritage place, then the contract for sale or lease must include provisions which protect the heritage values of the site.⁷³

⁶⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), 341D requires the criteria for listing to be prescribed by the Regulations: see *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), reg 10.03A.

⁶⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341S.

⁶⁹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341S(4)(a), and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl 10.03B, Sch 7A.

⁷⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341 S(4)(b), 341 Y; and *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth), cl 10.03D, Sch 7B.

⁷¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341V.

⁷² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341ZC.

⁷³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 341ZE.

Overseas places of historic significance to Australia

Places can be listed which are overseas if they have historic significance to Australia.⁷⁴

This list is symbolic in nature only: there are no enforcement provisions attached to the List.

List of Overseas Places of Historic Significance to Australia

The Environment Minister can decide to list a place on the List of Overseas Places of Historic Significance to Australia if the place is:

- outside Australia, and
- the Minister believes that it has outstanding historic significance to Australia.⁷⁵

No public nominations or public consultation required

There are no provisions in the EPBC Act which allow the public to nominate a place to the List, nor is the Environment Minister required to consult with the public before making a listing (although other Ministers must be informed).⁷⁶

Before listing a place, the Environment Minister can seek advice from the Australian Heritage Council if the Minister so wishes.⁷⁷

What is on the List of Overseas Places?

There are currently three sites on the List of [Overseas Places](#):

- Anzac Cove, Gallipoli
- Kokoda Track, Papua New Guinea
- Howard Floreys Laboratory, United Kingdom (where penicillin was developed).

Indigenous heritage protection

For information on the protection of Indigenous heritage under NSW law, see our [NSW heritage law](#) Fact Sheet.

EPBC Act heritage protection

Indigenous heritage sites can be protected under the EPBC Act as World Heritage, National Heritage or Commonwealth Heritage if the site concerned meets the criteria for the relevant list (see this Fact Sheet for further information).

⁷⁴ See *Environment and Heritage Legislation Amendment Act (No 1) 2006* (Cth), Sch 1, which inserted Chapter 5A, Part 15A, ss 390K – 390R into the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

⁷⁵ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 390L.

⁷⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 390N.

⁷⁷ *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 390P.

Aboriginal and Torres Strait Islander Heritage Protection Act 1984

Objects (artifacts and Aboriginal remains) and areas which are of particular significance to Aboriginal peoples and traditions are protected from injury or desecration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (**ATSIHP Act**).⁷⁸

To activate protection under the ATSIHP Act there must be a declaration in place protecting a particular area (a *significant Aboriginal area*) or object.

Declarations in relation to areas and objects

An Aboriginal person or Torres Strait Islander can ask the Environment Minister to make a declaration protecting an Aboriginal area or object (including Aboriginal remains) from injury or desecration.⁷⁹

Before making a declaration regarding an area, the Environment Minister must obtain a report advising the Minister of the need for, and impacts of, making such a declaration.⁸⁰ The report must be published in the Gazette and a local newspaper inviting interested persons to make submissions.⁸¹

All declarations must be published in the Gazette and in a local newspaper in the region,⁸² and the Minister must give written notice of the declaration to people likely to be substantially affected (although failure to do so will not invalidate a declaration).⁸³

Declarations (including emergency declarations) are legally enforceable.⁸⁴ If it appears that a declaration might be breached, the Federal Court can issue an injunction to restrain the activity.⁸⁵

Emergency declarations

If there is a serious and immediate threat of injury or desecration to an Aboriginal area, an Aboriginal or Torres Strait Islander can ask the Environment Minister to make an *emergency declaration* which lasts for 30 days (which can be extended to 60 days).⁸⁶

Officers authorised by the Minister under the ATSIHP Act can also make emergency declarations regarding areas or objects lasting up to 48 hours.⁸⁷

⁷⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 4 (Purposes of Act).

⁷⁹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 10 (Declarations in relation to areas), and s 12 (Declarations in relation to objects).

⁸⁰ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 10.

⁸¹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 10(3).

⁸² *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 14(1), and s 14(2)(a).

⁸³ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 14(3).

⁸⁴ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), ss 22, 23 and 25.

⁸⁵ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 26.

⁸⁶ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 9.

⁸⁷ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 17 and s 18.

Protection under State or Territory law must be ineffective

If the Aboriginal area or object is located in a State or Territory (and not on Commonwealth land), the Environment Minister must only make a declaration if the Environment Minister has consulted the relevant State Minister and is satisfied that State or Territory law does not effectively protect the area or object.⁸⁸

How is an application made?

Applications for a declaration can be made orally or in writing. They can be made by an individual or a group (but they must be Aboriginal or Torres Strait Islander). Applicants can apply for legal and financial assistance under the ATSIHP Act.⁸⁹

Movable cultural heritage

Movable cultural heritage includes things such as artifacts and artwork, fossils, books, stamps and military medals, and even aircraft. Movable cultural heritage is often traded between nations.

Protection of Movable Cultural Heritage Act 1986

In Australia, this trade is regulated under the *Protection of Movable Cultural Heritage Act 1986* (Cth) (**PMCH Act**).⁹⁰ The legislation does not affect a person's right to own or sell movable cultural heritage within Australia.

The PMCH Act implements Australia's obligations under the UNESCO *Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property*.

It is unlawful to export a "protected object" without a certificate or permit from the Environment Minister.⁹¹ Unlawful exporting may mean the object is forfeited and can attract a maximum penalty for an individual of \$170,000 or 5 years imprisonment, or for a corporation, a fine of up to \$340,000.⁹²

An object is taken to be exported at the time that it is placed on board a ship or aircraft with the intention that it be taken out of Australia, or when it is delivered to Australia Post.⁹³

National Cultural Heritage Control List

"Protected objects" which are subject to export control are listed in the *National Cultural Heritage Control List* in Schedule 1 of the *Protection of Movable Cultural Heritage Regulations 1987* (Cth).⁹⁴

⁸⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 13.

⁸⁹ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), s 30.

⁹⁰ Also see the *Protection of Movable Cultural Heritage Regulations 1987* (Cth).

⁹¹ *Protection of Movable Cultural Heritage Act 1986* (Cth), s 9.

⁹² *Protection of Movable Cultural Heritage Act 1986* (Cth), s.9(3B)

⁹³ *Protection of Movable Cultural Heritage Act 1986* (Cth), s 9(4).

The following nine categories of objects make up the Control List:

- objects of Australian Aboriginal and Torres Strait Islander Heritage (including sacred and secret objects, and human remains)
- archaeological objects (such as objects from shipwrecks)
- natural science objects (such as gold nuggets, gemstones and meteorites)
- objects of applied science or technology (such as tools, weapons, machines and aircraft)
- objects of fine or decorative art (such as musical instruments and paintings)
- objects of documentary heritage (such as books, letters and films)
- numismatic objects (such as Victoria Cross medals)
- philatelic objects (stamps)
- objects of historical significance (such as Ned Kelly's armour).

The Regulations (Schedule 1) contain a detailed description of the objects covered by each category.

⁹⁴ *Protection of Movable Cultural Heritage Act 1986* (Cth), s 8, and *Protection of Movable Cultural Heritage Regulations 1987* (Cth) , sch 1..