



13. Heritage protection

Awareness of heritage issues has increased markedly over the last few decades. Many people in the community are concerned to protect buildings, places and things from destruction due to their cultural or social significance to a local community, the State, or the nation as a whole. Legislation protecting heritage places offers opportunities to people wishing to preserve buildings, places and objects of cultural heritage significance.

This Fact Sheet looks at the laws protecting cultural heritage in Western Australia, and identifies the bodies responsible for their management.



What is a “heritage place”?

For the purposes of this fact sheet, a “heritage place” means a place or object of historic social or cultural significance to a community or part of a community. It includes historic buildings, ruins, artefacts and locations where historic events may have taken place.

This fact sheet does not consider natural heritage, such as world heritage areas (see [Fact Sheet 6: Commonwealth environmental impact assessment](#)) or areas such as old growth forests in the south west ([Fact Sheet 11: Conservation reserves](#)). Note though that plants, gardens and other areas of natural heritage may be protected under the laws considered in this fact sheet provided they also possess cultural heritage significance.



How are heritage places protected?

Heritage places are protected under both State and Commonwealth laws. The major controls are exercised by the Heritage Council of Western Australia (“the Heritage Council”) and local governments through the planning system. Other controls include those relating to maritime sites, Aboriginal sites and those implementing international laws on heritage protection.



State Register of Heritage Places

What is the State Register of Heritage Places?

The *Heritage of Western Australia Act 1990* (“the *Heritage Act*”) establishes the State Register of Heritage Places. The Register is a list of places in the State that are protected due to their cultural heritage significance.

What places can be entered on the Register?

Places are added to the Register by the Heritage Council on the direction of the Minister for Heritage. The Minister may direct the Heritage Council to add a place to the Register where:

- the place has cultural heritage significance or possesses a special interest related to cultural heritage;
- is of value for the present community and future generations; and
- the protection afforded by the *Heritage Act* is appropriate even though the place may be protected under another written law.

What is a “place”?

The *Heritage Act* defines a “place” to mean a readily identifiable area of land, which can include land that is adjacent to the sea shore or in the bed of any watercourse, wetland or estuary, and any buildings or works situated on the land. On this

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definition, it is unlikely a “place” would include a shipwreck or other maritime historic site that is not on or near the sea shore or on the bed of a watercourse or estuary. Special laws apply to shipwrecks which will be considered briefly below.

The definition is likely sufficient to include indigenous heritage sites, although there is specific legislation dealing with this subject (see below).

Heritage precincts

Where the Minister for Heritage is of the opinion that a group of places form a precinct which is of cultural heritage significance, the Minister may direct the Heritage Council to enter that group of places in the Register as an historic precinct. This entry can be made notwithstanding that each individual place may not have sufficient cultural heritage significance for entry on its own.

What criteria are used for entering places in the Register?

In determining whether a place possesses sufficient significance for entry in the Register, the Minister may have regard to:

- distinctive features or scarcity value;
- the character of the environs of the place, its landscape or townscape value;
- in the case of a building, its beauty and proportions, the degree of unity of its materials, design and scale, and any contribution it makes to the significance of the area;
- any strong association which the place has with any historic figure, event, discovery, development or phase; and
- in the case of places of particular scientific or other special interest, the extent to which the place has contributed, or may be likely to contribute, to knowledge or research.

How are places nominated for entry in the Register?

Any person may refer in writing to the Heritage Council any matter which gives rise to concern as to the conservation of a place which is or may be of cultural heritage significance. This includes nominating a place for entry in the Register (a nomination **form** is available from the Heritage Council). If a place is under imminent threat, a person may also refer the proposal to the Minister for Heritage and request the place be subject to a conservation order (see below).

What is the process for entering a place in the Register?

Permanent registration

Before a place can be permanently entered in the Register, the Heritage Council must advertise the proposal and invite members of the public to make submissions. The Heritage Council is also required to consult with the owner of the place, the local government and any other person with an interest in the place. Note however that the consent of the owner of the place is not required for entry in the Register.

Once these things have been done, the Heritage Council considers the submissions and makes a recommendation to the Minister. The registration takes effect once it is approved by the Minister and the entry is made in the Register. Following an entry to the Register, the Heritage Council is required to publish details in the *Government Gazette*, a local newspaper circulating in the area concerned and in a daily newspaper circulating throughout the State.

Interim registration

A place is entered in the Register on an “interim” basis where:

- a proposal to permanently list the place has been advertised (see above);
- the Council publishes advice to the Minister in relation to a place owned by the Crown; or
- the Minister directs the Council that interim registration is necessary to provide immediate protection for a place which is subject to a conservation order (see below).

An interim registration lasts until the place is entered permanently onto the Register or a decision is taken not to register the place.

What controls apply to activities that may impact upon places in the Register?

Once a place is listed in the Register, the place is protected in a number of ways:

- it is an offence for a person to damage or despoil the place without approval from the Heritage Council (penalty is a fine of up to \$5,000 and daily fine of \$500);
- the Minister, Heritage Council or any person may apply for an injunction to prevent unauthorised damage to the place or any other breach of the Act;
- development approval and building licences cannot be granted without first referring the matter to the Heritage Council for its advice;
- any action with respect to development approval and building licences must be consistent with the Heritage Council's advice unless it is not prudent or feasible to impose conditions consistent with that advice.

Registration of a place also operates as a suspension (for interim listings) or cancellation (for permanent listings) of any existing *development* approval that would have had to have been referred to the Heritage Council.

Amendment of laws affecting places on the Register

Where the conservation of a place in the Register is prohibited or impeded by a written law, the Minister for Heritage may declare that the written law shall not apply to that place. The Minister cannot make a declaration unless the consent of the Minister responsible for the other law has first been obtained.



Conservation orders

What are “conservation orders”?

Conservation orders are orders made by the Minister for Heritage which restrict an activity in order to protect or preserve a place of cultural heritage significance. A place can be subject to a conservation order even though the place is not listed in the Register of Heritage Places.

How are conservation orders made?

Urgent cases

Where a conservation order is required by reason of an imminent threat of damage to a place, the Minister can issue a “stop work order” to prevent the work continuing. There is also an opportunity for a “consent order” to be entered into where the owner of the place agrees to the order.

A stop work order takes effect when it is affixed to a prominent position on the place the subject of the order or is served on a person carrying out (or proposing to carry out) works on the place. A consent order takes effect on publication in the *Government Gazette*.

Non-urgent cases

Where a place is not under an imminent threat, a conservation order may be made by the Minister on the recommendation of the Heritage Council after a public consultation period. A conservation order takes effect on publication in the *Government Gazette*.

How long do conservation orders last?

A conservation order ceases to have effect:

- where the place is removed from the Register;
- when the Minister revokes the order;
- in the case of a consent order, in accordance with the terms of the order; or
- in the case of a stop work order, on the expiry of 42 days from the making of the order (unless the term is extended on application to the Town Planning Appeals Tribunal).

What protection is provided by a conservation order?

A conservation order may prohibit (among other things):

- the entry of persons on to the place, other than entry by an owner or authorised occupier;

- any activity which is likely to affect the cultural heritage characteristics or conservation of the place; or
- the demolition, damage or alteration of the place or any portion of the place.

How are conservation orders enforced?

The following action can be taken to enforce the terms of a conservation order:

- *Prosecution* – a person contravening a conservation order commits an offence and is liable to a maximum penalty of \$10,000 and imprisonment for two years.
- *Restoration order* – a person convicted of an offence can be ordered to restore the place to a condition it was before the illegal works were carried out. Failure to comply with a restoration order is an offence and is subject to a maximum fine of \$10,000.
- *Moratorium order* – where a person is convicted of an offence of contravening a conservation order, the Governor, on the advice of the Minister for Heritage, may place restrictions on the use or development of that land or place. Such a moratorium can last for up to 10 years. A person who contravenes a moratorium order commits an offence and is liable to a maximum fine of up to \$10,000 and imprisonment for two years.
- *Injunction* – any person may apply to the District or Supreme Court for an injunction to restrain a person engaging, or threatening to engage, in conduct that constitutes a contravention of the *Heritage Act*.



Local government heritage protection

Municipal inventories of heritage places

What is a “municipal inventory”?

The *Heritage Act* requires local governments to prepare a municipal heritage inventory of heritage places within its district. The municipal heritage inventory must be updated annually and reviewed every four years. In preparing an inventory, a local government may only have regard to cultural heritage values.

What is the process for preparing a municipal inventory?

There are no formal procedures for applying to have a place included in the municipal inventory, other than the requirement that the local government undertakes “proper public consultation”. Generally any person may refer a place to a local government and request that it be considered for inclusion in the inventory. We recommend that you check with your local government to see whether they have adopted a particular form for such applications.

What controls apply to places on a municipal inventory?

There are no legal consequences attached to listing on the municipal inventory. As such, it has little effect beyond requiring the local government to acknowledge the heritage value of a place. However, a municipal inventory may be given legal effect through incorporation into a town planning scheme (see following section).

Protection under town planning schemes

A local government may (but is not required to) protect heritage places under its town planning scheme. This is usually through requiring a person to obtain approval for any development which affects a place listed on the municipal inventory of heritage places (or on another heritage list prepared by the local government).

Where a town planning scheme protects heritage places, approval is usually required for the following types of development:

- alterations to the inside of buildings;
- certain advertisements; and
- demolition.

Heritage listing may also require developers to provide additional information with their development application. For example, the developer may be required to provide a detailed account of ‘finishes’, that is, the colours, materials and style of the development as well as the finishes of the surrounding developments.

Failure to obtain development approval under a town planning scheme is an offence, and is subject to a maximum fine of \$50,000 (see [Fact Sheet 4: Development controls](#) for more information).



Voluntary heritage agreements

What is a “heritage agreement”?

A heritage agreement is a voluntary agreement under which a land owner undertakes to manage and preserve the heritage values of a place they own.

Who can enter into a heritage agreement?

With the approval of the Minister for Heritage, a heritage agreement can be entered into by:

- the landowner; and
- the Heritage Council, a public authority or a body corporate.

What can be included in a heritage agreement?

Heritage agreements may make provision for:

- assistance to the owner;
- charges and fees for maintenance or other activities done at the behest of the Council (including fees for public access to the property);
- standards for any work done on the property; and
- prohibition or restriction of any additional building or works and upon any alteration to existing structures.

They can include any terms that are considered necessary for the conservation of the place.

Beyond the development restrictions more specific provisions can be imposed on the owner or occupier of the property, and their successors, by way of a “covenant”. These covenants can require the owner or occupier to take positive steps regarding the maintenance and protection of the property. They can also require the owner or occupier to refrain from any activity that might harm the property’s heritage value.

Who is bound by a heritage agreement?

A heritage agreement is binding on the Crown, the owner and occupier of the land and any successor in title of the owner. Covenants ‘run with the land’. That is, they are enforceable by or against any person who has, later acquires, or previously had any interest in the property that is subject to the agreement.

How long does a heritage agreement last?

A heritage agreement may apply for a specified period or permanently.

A heritage agreement cannot be changed or terminated unless the Minister for Heritage allows time for the Heritage Council to make inquiries and consider any submissions about the proposal. The Minister must consider the advice of the Council in making a decision. Due to the more restrictive nature of covenants under a heritage agreement, the Minister may require that the creation, alteration or termination of a covenant be advertised for public comment. Where a covenant has been advertised the Minister must approve any relevant change to the covenant before he or she can approve a change to the agreement.

What happens if a heritage agreement is contravened?

Where a person bound by a heritage agreement fails to comply with a term or terms of that agreement, the Heritage Council can enforce the agreement against that person. This may include seeking an injunction to restrain the contravention.

Agreements with the National Trust of Australia

The National Trust of Australia (WA) may enter into agreements with an owner of land to restrict the use or development of land either permanently or for a specified period. These agreements are registered on the title to the land as a covenant and can be used to protect the heritage values of the land in question.



Other relevant laws

Commonwealth heritage laws

The Commonwealth government maintains the Register of the National Estate. This list identifies places of cultural heritage significance across the country. The Commonwealth government is constrained from taking any action which adversely affects a place in the Register, unless there is no feasible and prudent alternative to this action.

The entry of a place in the Register of the National Estate does not place any direct legal constraints or controls over the actions of State or local government or private owners.

Proposed changes to the *Environmental Protection and Biodiversity Conservation Act 1999* will establish the National Heritage List and the Commonwealth Heritage List. The changes will mean that proposals having an impact on places in the National Heritage List be formally assessed by the Commonwealth Environment Minister. These laws passed the Senate in late August 2003 and are expected to become law in late 2003. See **Fact Sheet 6: Commonwealth environmental impact assessment**.

Maritime heritage

Shipwrecks and other maritime relics off the West Australian coast are protected under specific State and Commonwealth legislation.

The Commonwealth *Historic Shipwrecks Act 1976* protects:

- all shipwrecks that are over 75 years old; and
- shipwrecks that are less than 75 years old, but which are declared by the Commonwealth Minister for the Environment to be protected.

The Commonwealth Act applies to waters from the low water mark to the continental shelf. The Western Australian *Maritime Archaeology Act 1973* applies to shipwrecks in Western Australian waters (being bays, harbours and rivers).

Both these Acts impose restrictions on taking relics from the vicinity of the wreck. Some sites are in protected areas, where entry is restricted or prohibited.

For more information on the restrictions that apply to shipwrecks in Western Australia, contact the Federal **Department of the Environment and Heritage** and the **Western Australian Maritime Museum**.

Aboriginal heritage sites

The *Aboriginal Heritage Act 1972* automatically applies to places, sites or objects which are of importance or significance to Aboriginal culture.

Any person who has knowledge of the existence of any item or place of Aboriginal heritage significance is required to report its existence to the Registrar of Aboriginal Sites or to a police officer. It is an offence for a person to damage an Aboriginal site without approval.

Aboriginal heritage is also protected under the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This Act applies concurrently with State legislation. Under the Act, the Minister for Aboriginal Affairs may declare an area or object is subject to the Act. It is an offence for a person to take action contrary to the terms of a declaration. For further information on the restrictions that apply to Aboriginal heritage sites and objects, contact the **Department of Indigenous Affairs** (WA) or the Commonwealth **Department of Immigration and Multicultural and Indigenous Affairs**.

Protection of movable cultural heritage

Australia has ratified the *Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property* through the *Protection of Movable Cultural Heritage Act 1986*.

The Act implements a system of export permits for heritage objects listed in the National Cultural Heritage Control List. The **Control List** is located in the Regulations to the Act and divides Australian protected objects into two classes:

- Class A objects which may not be exported
- Class B objects which may be exported if granted a permit under the Act.

For more information on these laws, contact Movable Cultural Heritage Unit in **Environment Australia**.

How can you become involved?

There are a number of things a group or individual may do to encourage heritage preservation in their area:

- 1 nominate places of cultural heritage significance for entry onto to the heritage list of your local government or State Register of Heritage Places administered by the Heritage Council;
- 2 seek to have the place added to the National Heritage List under proposed changes to the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth);
- 3 if a place that has cultural heritage significance is in imminent threat of damage, request that the Minister for Heritage places a stop work order on the property;
- 4 report possibly illegal work being undertaken on a place on the State Register of Heritage Places to the Heritage Council;
- 5 encourage your local government to include heritage protection measures into its town planning scheme, for example, by requiring development approval for any activities that might damage a place of heritage significance;
- 6 if you own a place that has heritage value, enter into a voluntary conservation agreement with the Heritage Council or National Trust of Australia to protect the values of the place;
- 7 encourage other owners of heritage places to have their property listed or subject to a voluntary conservation order;
- 8 monitor local government meeting agendas for prior notice of development applications that may impact on a place of heritage significance and make representations to the local government on the proposal.

Contacts and further information

Heritage Council of Western Australia, East Perth

Tel: (08) 9221 4177

National Trust of Australia (WA), West Perth

Tel: (08) 9321 6088

Department of the Environment and Heritage, Heritage Division, Canberra

Tel: (02) 6274 2121

For copies of legislation considered in this fact sheet visit:

State Law Publisher (WA legislation)

Tel: (08) 9321 7688

Australian Legal Information Institute (Commonwealth legislation)

The Environmental Defender's Office WA (Inc)

The Environmental Defender's Office WA (EDO) is a community legal centre specialising in public interest environmental law.

The objects of the EDO include:

- ◆ to provide community groups and individuals with legal advice and representation to help protect the environment;
- ◆ to promote law reform that improves environmental protection; and
- ◆ to provide community education about environmental law.

The EDO is a non-profit, non-government organisation. The EDO receives its principal funding from the Federal Attorney-General's Department. However, these funds are limited and donations from the public provide a vital source of funds for many of our activities. Donations over \$2 are fully tax deductible. The EDO also welcomes people with a commitment to the environment to join as members.

If you require legal advice on an environmental issue or wish to find out more about the EDO, please contact us at the following address:

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