



Heritage Protection

An introduction to Heritage Protection

Many people are aware of the importance of protecting 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 creates opportunities to preserve buildings, places and objects of cultural heritage significance for the benefit of future generations.

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

What is a “heritage place”?

For the purposes of the *Heritage of Western Australia Act 1990* (WA), a place can be placed on the Register of Heritage Places if it is of cultural heritage significance or possesses a special interest related to or associated with cultural heritage, and is of value for the present community and future generations.

“Cultural heritage significance” means, in relation to a place, the relative value which that place has in terms of its aesthetic, historic, scientific or social significance for the present community and future generations.

Which bodies protect heritage places?

Heritage places are protected under both State and Commonwealth laws. The Heritage Council of Western Australia (“the Heritage Council”), compiles and administers the Register of Heritage Places. Local governments also protect heritage through the planning scheme system.

The National Trust of Australia (WA) is a non-profit community based organization which was established by the *National Trust of Australia (WA) Act 1964* (WA) and plays an important role in identifying and promoting heritage sites as well as education and advocacy.

The Commonwealth Government is advised on heritage matters by the Australian Heritage Council, which is also the body responsible for the National Heritage List (for places of heritage to the nation) and the Commonwealth Heritage List (places of heritage on Commonwealth owned or leased land).

There are also bodies and laws that relate to heritage protection on maritime sites, Aboriginal sites and for implementing international treaties on heritage protection.

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Western Australian Register of Heritage Places

The *Heritage of Western Australia Act 1990* (WA) ("the Heritage Act") establishes the State Register of Heritage Places ("the Register"). The Register is a list of places in the State that are protected due to their cultural heritage significance. The Register is compiled and maintained by the Heritage Council.

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.

The Heritage Act defines a "place" to mean a readily identifiable area of land, including any works or buildings situated there, their relevant contents and the extent of their immediate surroundings which may be required for their conservation. A "place" can include land that is below low water mark or in the bed of any watercourse, lake or estuary.

The definition is likely sufficient to include indigenous heritage sites, although there is specific legislation dealing with this subject (see below), but will not include places that may be under the Commonwealth jurisdiction.

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

Criteria for entering places on the Register of Heritage Places

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, significant event, discovery, development or cultural phase.
- Whether the place provides a notable example of a particular period or type of place, important for general educational, architectural or archaeological reasons.
- Whether the place has intrinsic merit, and is commonly agreed to be a work of art in itself that enriches the environment or is held in high public esteem or sentiment.

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- 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.

However, a place cannot be excluded from the Register only on the ground that like examples of that place are already included on the Register.

Process for entry onto the Register of Heritage Places

Any person may refer in writing to the Heritage Council any place which is or may be of cultural heritage significance.

Before a place can be permanently entered in the Register, the Heritage Council must, pursuant to a direction given by the Minister for Heritage, advertise the proposal and invite members of the public to make submissions within a period of 6 weeks. 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 steps have been taken, 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 a public advertisement containing the details of the registration.

A place can also be entered in the Register on an "interim" basis. This can occur where:

- a proposal to permanently list the place has been advertised;
- 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).

Once an interim registration has been made, the Heritage Council must take steps to determine whether or not the entry should remain permanently on the register. An interim registration lasts until the place is entered permanently onto the Register or a decision is taken not to register the place.

Controls on activities that may impact upon places in the Register of Heritage Places

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

- It is an offence for a person to damage or despoil the place or remove anything from that place, or to authorise anyone else to do so, without approval from the Heritage Council.
- The Minister, Heritage Council or any person may apply for an injunction to the Supreme Court or the District Court to prevent damage to the place in contravention of the Heritage Act.
- Development approval and building licences cannot be granted without the decision making authority first referring the matter to the Heritage Council for its advice.

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- 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 or licence that would have had to have been referred to the Heritage Council.

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.

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, and due consideration has been given to the public interest, health and safety.

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. Before a Conservation order is made, notice must be given to the owner of the land, explaining the nature and reason for the proposed special protection of the place, and the Heritage Council must publically advertise and invite public submissions on the Conservation order. A Conservation order takes effect upon the publication of a notice in the Government Gazette.

Where a Conservation order is required because of an imminent threat of damage to a place, the Minister for Heritage can issue a "stop work order" to prevent the damage continuing, without a public consultation period. If the order is made with the consent of the owner, it is known as a "consent order".

A stop work order takes effect once it is affixed to a prominent position on the place to which it relates, or when it is served on a person carrying out works on the place. Although it is not required, the Heritage Council may also publish notification of the stop work order in the Government Gazette.

A conservation order ceases to have effect:

- when 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 State Administrative Tribunal).

A conservation order may prohibit (among other things) the entry of persons, vehicles or equipment on to the place, 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.

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Enforcement of conservation orders

There are a range of actions that can be taken to enforce a conservation order. Firstly, a prosecution can be made against the person contravening the order, which carries a maximum penalty of \$10,000 and imprisonment for two years.

A person convicted of an offence can also be ordered to restore the place to the same state it was before the illegal works were carried out (a restoration order). Failure to comply with a restoration order is an offence.

Where a person is convicted of the 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 for up to ten years (a moratorium order). A person who contravenes a moratorium order commits an offence.

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 (including a contravention of a conservation order).

Heritage protection by local government

The Heritage Act requires local governments to prepare an inventory of buildings within its district, which in its opinion are, or may become, of cultural heritage significance. The inventory must be updated annually, and reviewed every four years. In preparing an inventory, a local government should ensure that they have proper public consultation. A copy of the inventory must be provided to the Heritage Council.

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

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 local government inventory of heritage places.

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

- Alterations to the inside of buildings.
- Construction of and certain additions to houses.
- Demolition.

Developers of heritage listed properties may also be required 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. (See [Fact Sheet 4: Development controls](#) for more information).

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Voluntary heritage agreements

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. A heritage agreement can be entered into between a landowner and the Heritage Council or other public authority on the State's behalf, subject to the approval of the Minister for Heritage.

Heritage agreements may make provision for things such as assistance to the owner, charges and fees for maintenance or any other activities done at the behest of the Heritage Council, standards for any work done on the property, the restriction of any building or works, and other provisions that are considered necessary for the conservation of the place.

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.

A heritage agreement is a contract binding on the Crown, the owner and occupier of the land and any successor in title of the owner. If the parties also agree to a covenant, this will be entered on the title of the land. The covenant is for the benefit of the Crown and therefore enforceable by the Heritage Council on behalf of the Crown against any person who has, later acquires, or previously had any interest in the property that is the subject of the covenant.

A heritage agreement may apply for a specified period or permanently. A heritage agreement cannot be entered into, 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 Heritage 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. Where a person bound by a heritage agreement fails to comply with a term of that agreement, the Heritage Council, on behalf of the Crown, 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 willing to restrict the use or development of the land either permanently or for a specified period. These agreements are registered on the land title as a covenant, and can be used to protect the heritage values of the land in question.

Commonwealth heritage laws

Changes to the Commonwealth system of registering Heritage Places occurred in 2007 with an amendment to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("EPBC Act"). As a result, heritage places are no longer being added to the Register of the National Estate.

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This register has been replaced by the National Heritage List, which registers places of outstanding heritage value to the nation, and the Commonwealth Heritage List, which lists places with heritage value that are within a Commonwealth owned or leased area. These lists are maintained by the Australian Heritage Council.

The Commonwealth must make management plans for places on the National Heritage List, and places on the Commonwealth Heritage List which are within the Commonwealth's jurisdiction.

It is an offence to take an action that will or is likely to have an effect on the National Heritage Values of a place that has been included on the National Heritage List. The EPBC Act also prohibits a Commonwealth agency from taking action that is likely to have an adverse impact on the National Heritage Values or Commonwealth Heritage Values of a place on either list respectively, unless there is no feasible and prudent alternative to taking the action and all measures that can reasonably be taken to mitigate the impact of the action on those values are taken.

Maritime heritage

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

Under the Commonwealth *Historic Shipwrecks Act 1976* (Cth), shipwrecks, relics and shipwreck articles that are more than 75 years old and in Australian waters can be declared to be historic shipwrecks or historic relics, and are thereby protected. Areas where historic shipwrecks or relics are situated can also be declared to be a protected zone.

The Commonwealth Act applies to Commonwealth coastal waters adjacent to Western Australia by agreement.

The Western Australian *Maritime Archaeology Act 1973* (WA) also places controls on ships that were wrecked, abandoned or stranded in Western Australian coastal waters (such as bays, harbors and rivers) and sites on land associated with a shipwreck before 1900.

Aboriginal heritage sites

The *Aboriginal Heritage Act 1972* (WA) 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* (Cth). This Act applies concurrently with State legislation. It is an offence for a person to take action contrary to the terms of a declaration that a particular area or object is protected under this Act. Indigenous heritage sites can also be included in the National Heritage List or the Commonwealth Heritage List.

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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* (Cth).

The Act implements a system of export certificates and permits for heritage objects listed in the National Cultural Heritage Control List, which is located in the *Protection of Movable Cultural Heritage Regulations 1987* (Cth).

Opportunities for public involvement

There are a number of ways that you can be involved in the process of protecting Australia's cultural heritage. These include:

- If you think a place is not heritage listed, but should be, you can nominate it to the Heritage Council for inclusion on the State Register of Heritage Places, or to your local government for inclusion on their inventory.
- If you think that a place that has been listed in the Register of Heritage Places is threatened with damage, you can contact the Heritage Council, or seek legal advice on applying for an injunction.
- If you want to protect the heritage values on your own property permanently, you can contact the Heritage Council or the National Trust of Australia (WA) about entering into a heritage agreement.

Contacts and further information

For Heritage Council, Tel: (08) 9221 4177, www.heritage.wa.gov.au

National Trust of Australia (WA), Tel: (08) 9321 6088, www.ntwa.com.au

Department of Planning, Tel: (08) 9264 7777, www.planning.wa.gov.au

Department of Sustainability, Environment, Water, Population and Communities, Tel: 1800 803 772, www.environment.gov.au/heritage/index.html

Australian Heritage Council, Tel: (02) 6274 1111, www.environment.gov.au/heritage/ahc/index.html

For copies of legislation, contact the State Law Publisher (Western Australian legislation), Tel: (08) 9426 0000, www.slp.wa.gov.au, or Comlaw (Commonwealth legislation), www.comlaw.gov.au

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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 and State Attorney-General's Departments.

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:

Environmental Defender's Office WA (Inc)

Suite 4, 544 Hay Street, Perth WA 6000

Tel: (08) 9221 3030

Fax: (08) 9221 3070

Freecall: 1800 175 542 (for WA callers outside the Perth metropolitan region)

Email: edowa@edowa.org.au

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