

ABORIGINAL HERITAGE LEGISLATION

AUSTRALIAN INTERJURISDICTIONAL ANALYSIS 2018 (Part 1)

	ACT	NSW	NT Sacred Sites Act	NT Heritage Act	QLD
Act	<i>Heritage Act 2004 (ACT act) and Heritage Regulations 2006.</i>	<i>National Parks and Wildlife Act 1974 (NSW Act) and National Parks and Wildlife Regulation 2009</i>	<i>Northern Territory Aboriginal Sacred Sites Act (NTASSA) 1989 and Northern Territory Aboriginal Sacred Sites Regulations</i>	<i>Heritage Act 2011</i>	<i>Aboriginal Cultural Heritage Act 2003 (QLD Act) and Torres Strait Islander Cultural Heritage Act 2003.</i>
Aspects of Aboriginal Heritage covered	<p>Aboriginal places and objects:</p> <p><i>“Aboriginal object means an object associated with Aboriginal people because of Aboriginal tradition”</i></p> <p><i>“An Aboriginal place means a place associated with Aboriginal people because of Aboriginal tradition.”</i></p> <p><i>“Aboriginal tradition means the customs, rituals, institutions, beliefs or general way of life of Aboriginal people.”</i></p>	<p>Places, objects and features of significance to Aboriginal people” (including biological diversity)</p> <p>Aboriginal Places – the minister may declare any place in the opinion of the minister that is or was or special significance with respect to Aboriginal culture to be an Aboriginal place.</p>	Sacred Land (no archaeological evidence required) and ‘secret information’	Aboriginal or Macassan archaeological heritage places and objects	<ul style="list-style-type: none"> • A significant Aboriginal or Torres Strait Islander area or object • Evidence of archaeological or historic significance of Aboriginal or Torres Strait Islander occupation • Aboriginal human remains • Recognition of intangible heritage values in identifying significant areas (section 12)
Protective Measures	<ul style="list-style-type: none"> • All Aboriginal heritage is protected whether registered or not. 	<ul style="list-style-type: none"> • Due Diligence requirement to establish if heritage is not present or could be directly or indirectly harmed. If ACH is to be harmed directly or indirectly and AHIP application must be done and a cultural heritage assessment conducted. 	<ul style="list-style-type: none"> • All sacred sites protected whether or not on the Register of Sacred Sites 	<ul style="list-style-type: none"> • Declaration of all Aboriginal and Macassan archaeological objects/places as heritage objects/places (ie all such places are automatically protected) – all other places and objects must be assessed as significant before they can be declared as heritage places 	<ul style="list-style-type: none"> • Blanket protection of areas and objects of traditional, customary and archaeological significance • Duty of care satisfied by: <ul style="list-style-type: none"> ○ Following statutory Guidelines ○ Cultural Heritage Management Plan, ○ Fulfilling heritage outcomes in native title agreements ○ Other agreements = cultural heritage agreements

Method/tools	<ul style="list-style-type: none"> • A system integrated with the planning, land and development system to consider proposed development having regard to the heritage significance of place and objects, including Aboriginal places and objects. Including Development Applications (DA), Statement of Heritage Effects (SHE), Excavation Permits (EP), Conservation Management Plans (CMP). • Registration of important Aboriginal places and objects, although all Aboriginal places and objects are protected under the Heritage Act. • Representative Aboriginal Organisations (RAOs) declared by the Minister. RAOs must be consulted about: <ul style="list-style-type: none"> ○ to provisionally register an Aboriginal place or object ○ to cancel the registration of an Aboriginal place or object ○ to restrict 	<ul style="list-style-type: none"> • Aboriginal Heritage Impact Permit; (proponents must notify registered Aboriginal parties as specified by certain bodies in the NPW Reg 2009 in writing and put a notice in the local newspaper of an intention to seek an AHIP) • Gazettal of Declared Aboriginal places • Plans of Management (used for Aboriginal Places to manage ACH) • Conservation Agreements with landowners • Stop work orders • Interim protection orders • Remediation Directions 	<ul style="list-style-type: none"> • Sacred Site avoidance surveys & Authority Certificate required to work on Sacred Sites; standard and non-standard application process • Entry permits 	<ul style="list-style-type: none"> • Heritage agreements • Work Approvals • Stop Work Order (issued by Heritage Officer) • Repair Order 	<ul style="list-style-type: none"> • CHMPs that comply with statutory processes • Mediation of agreement process by Land Court • Recommendation from Land Court to Minister for decision where dispute cannot be resolved • Stop order issued by Minister or an officer appointed under the Act. • Registration of area as a Cultural Heritage Study area pursuant to Part 6 (all areas on the Cultural Heritage Register trigger provisions under the Environmental Protection Regulations 2008 pursuant to the <i>Environment Protection Act 1994</i>)
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	<p>information about an Aboriginal place or object</p> <ul style="list-style-type: none">○ to propose Heritage Guidelines that relate to an Aboriginal place or object.○ any development proposals affecting Aboriginal heritage including a DA, SHE, EP and CMP <ul style="list-style-type: none">• Mandatory reporting of Aboriginal sites to the Heritage Council within 5 days of identification• Mandatory disclosure of heritage places on public authority land to ACT Heritage Council• Power of Heritage Council to declare information on Aboriginal heritage to be restricted• Heritage Agreements between Minister and Owner• The Heritage Act makes it an offence to damage, disturb or destroy any Aboriginal place or				
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	<p>object.</p> <ul style="list-style-type: none"> Heritage Directions (from Heritage Council) Heritage Order from Supreme Court 				
Decisions on heritage values	<p>The ACT Heritage Council is an independent, statutory body responsible for a range of provisions under the Heritage Act 2004</p> <p>The Council comprises the Chief Planning Executive and Conservator of Flora and Fauna as <i>ex-officio</i> members and nine members appointed by the Minister. Three of these appointments are public representatives, including a representative from each of the ACT community, the Aboriginal community and the property ownership, management and development sector. The remaining six appointed members are experts in one or more of the following disciplines: Aboriginal culture, Aboriginal history, archaeology, architecture, engineering, history, landscape architecture, nature conservation, object conservation, town planning and urban design</p>	<p>Aboriginal Cultural Heritage Advisory Committee –13 members – all Aboriginal individuals or representative of an Aboriginal organisation, with exception of a rep from the Heritage council of NSW and a non-voting ex-officio role for the DG of the Office of Environment and heritage.</p> <p>Minister forms an opinion 'special significance' of Declared Aboriginal Places after nomination has been prepared by OEH and the Aboriginal community as well as consultation with ACHAC</p> <p>AHIPs are approved by a delegate of the Director General</p>	<p>Aboriginal Areas Protection Authority – Board is all Aboriginal & gender balanced.</p>	<p>Heritage Council – when appointing members, the Minister must, as far as practicable, ensure at least two members are of Aboriginal descent</p>	<p>Aboriginal or Torres Strait Islander party/ies for an area - comprises Native Title party or a person/family/group recognised as having customary knowledge about the area.</p>
Who must be consulted	<ul style="list-style-type: none"> RAOs (currently 4) appointed by the 	<p>Aboriginal community – those who then become</p>	<p>AAPA conducts consultations with</p>	<p>Traditional Owners must be told of intent to carry out</p>	<ul style="list-style-type: none"> Cultural Heritage Body, which identifies the correct Aboriginal

	<p>Minister</p> <ul style="list-style-type: none"> Other interested parties as defined under the Heritage Act 	Registered Aboriginal Parties (people or organisations who have registered an interest in being consulted) as a part of the consultation process under section 80c of the National Parks and Wildlife Regulation 2009	custodians	archaeological survey (Policy)	<p>or Torres Strait Islander party for an area</p> <ul style="list-style-type: none"> Aboriginal or Torres Strait Islander party for an area
Approving land use proposals	<p>Heritage Council may approve:</p> <ul style="list-style-type: none"> Excavation Permit Conservation Management Plan Statement of Heritage Effect <p>Heritage Council provide advice to the Planning and Land Authority on:</p> <ul style="list-style-type: none"> Development Approvals 	AHIPs approved by OEH	<p>Authority Certificate required to work on Sacred land; may be granted by AAPA if agreement between applicant and custodians or if AAPA satisfied no substantial interference with Sacred land.</p> <p>Minister Certificate</p>	Proposed work is classified into three categories: exempt work, where no formal application is required; minor work, where the heritage council is the decision-maker; and major work, where the Minister is the decision-maker.	<ul style="list-style-type: none"> Certain projects require Environmental Impact Statements to be developed which require proponents to develop an Indigenous Land Use Agreement or a mandatory CHMP (whether a project requires an EIS is determined by other agencies responsible for administering the <i>Environmental Protection Act 1994</i> or the <i>State Development and Public Works Organisation Act 1971</i>) CHMPs are subject to approval of Dept's CEO. Minister may approve CHMP on recommendation from the Land Court where parties cannot agree.
Minister's role	<ul style="list-style-type: none"> Appointing the Heritage Council; Declaring criteria for Representative Aboriginal Organisations (RAOs); Declaring Representative Aboriginal Organisations; Ensuring the Council has addressed issues raised during public 	<ul style="list-style-type: none"> Declaring Aboriginal Places 	<ul style="list-style-type: none"> Minister can review AAPA decision on application. Minister can issue a Minister's Certificate to allow a site to be disturbed. Hear appeals on application process 	<ul style="list-style-type: none"> May issue a Repair Order 	<ul style="list-style-type: none"> Record or refuse to record findings of a cultural heritage study in the register. (Minister precluded from assessing the level of significance of an area) Approve a CHMP that has previously not approved by the CEO, having regard to the Land Court's recommendation Issue stop orders (all delegated to relevant officers in accordance with Instrument of Delegation) Acquire/ gift or take other steps as necessary and

	<p>consultation, or any other issues related to its function, on provisional registration, cancellation of registration, or when making Heritage Guidelines;</p> <ul style="list-style-type: none"> • Granting extensions for the provisional registration or Heritage Guidelines period; • Declaring a repository for Aboriginal objects; • Making Heritage Agreements; • Direct a public authority to prepare a conservation management plan; • Approve forms for the Heritage Act; and • Determine fees for the Heritage Act. 				<p>desirable to preserve Aboriginal cultural heritage</p>
<p>Penalties</p>	<ul style="list-style-type: none"> • 1,000 PUs for reckless conduct that causes damage to an Aboriginal place or object. • 500 PUs for negligent conduct that causes damage to an Aboriginal place or object • 100 PUs strict liability offence – engages in conduct that causes damage to an Aboriginal place or object. 	<p>For aggravated offences:</p> <ul style="list-style-type: none"> • Corporate - 10,000 PUs (\$1.1 million) • Individual - 5,000 PUs (\$550,000); • And/or 2 yrs imprisonment <p>For strict liability offences:</p> <ul style="list-style-type: none"> • Normal – 500 PUs • Aggravated – 1000 PUs • Corporate – 2000 PUs 	<p>Unauthorised entry onto a site/ breach of site avoidance conditions:</p> <ul style="list-style-type: none"> • Natural person – 200 PUs or 12 months imprisonment • Corporate – 1,000 PUs <p>Desecration/Work on a sacred site without a Certificate:</p> <ul style="list-style-type: none"> • Natural person – 400 PUs or 2yrs imprisonment • Corporate – 2000 PUs <p>Breach of secrecy</p> <ul style="list-style-type: none"> • 400 PUs or 2yrs imprisonment 	<p>Breach of Stop Work Order/Repair Order:</p> <ul style="list-style-type: none"> • 200 PUs or 12 months imprisonment <p>Knowingly damages a place/object:</p> <ul style="list-style-type: none"> • 400 PUs or 2 yrs Imprisonment • Strict liability offence – 100 PUs <p>Fails to report a place:</p> <ul style="list-style-type: none"> • 20 PUs 	<ul style="list-style-type: none"> • Corporations - \$1,305,000 • Individuals - \$130,500 for failure to comply with the cultural heritage duty of care, harming cultural heritage or prohibited excavation, relocation or taking away cultural heritage • And/or 2 yrs imprisonment (for harming areas or object recorded on the Cultural Heritage Register • \$2,219,350 for knowingly contravening a stop order given to a person under section 32

Additional protection for areas of outstanding cultural heritage value?	No mechanism	An 'Aboriginal Area' may be reserved by the Minister. Effect of reservation allows management for a range of purposes including: conservation; use by Aboriginal people; research & monitoring; sustainable tourism	<ul style="list-style-type: none"> Reservation and acquisition by the Administrator 	No, all heritage places have equal status	<ul style="list-style-type: none"> Cultural Heritage Study (CHS) Areas Designated Landscape Areas (these areas were transitioned over from previous legislation; long term strategy is to assess areas for conversion to Cultural Heritage Studies under Part 6 where appropriate)
Appeals	ACT Civil and Administrative Tribunal: <ul style="list-style-type: none"> Registration/cancellation Publication of restricted info Approve, or not approve, the publication of restricted information make, or not make, a heritage direction Revoke, or not revoke, a heritage direction give an information discovery order 	Land and Environment Court	AAPA decision can be reviewed by Minister, If Minister decides to issue a Minister's Certificate, no appeal	To Civil and Administrative Tribunal for Stop Work Orders	Sponsors may object to Land Court CHMP after unsuccessful mediation or where a CHMP has not been approved by the CEO Sponsors may object to Land Court CHS after unsuccessful mediation or where a CHS has not been approved by the CEO
Consultants regulated?	List of consultants and contact details provided on gov't website. No endorsement.	List of consultants and contact details provided on gov't website. No endorsement. Code of practice requires those who submit a ACHAR to have 2 years of Aboriginal Heritage experience and a Bachelor with Honours of higher or equivalent work experience.	No	No: Archaeology consultants 'should follow the policies of the Australian Association of Consulting Archaeologists.	No
Wardens or Inspectors	Authorised Persons, power to apply for search warrant and seize	Honorary Rangers OEH have compliance section that has investigators as well as archaeologists who determine if a breach of the Act has occurred such as		Heritage Officers with powers of search & seizure	Authorised Officers have powers of search and seizure and are responsible for undertaking investigations into activities that may not be compliant with the cultural heritage duty of care

		through not following AHIP conditions			
Status of Register	<p>Listing on the Heritage Register means the place or object is:</p> <ul style="list-style-type: none"> • is of heritage significance to the ACT and enriches our understanding of history and identity i.e. meets the heritage significance criteria. • is legally protected under the provisions of the Act (noting, however, that <i>all</i> Aboriginal places and objects are legally protected, whether or not they are registered) • requires advice by the Council on development issues to ensure good conservation outcomes • requires Heritage Act approvals • is eligible for free development and architectural advice and funding from the ACT Heritage Grants Program 	<p>AHIMS – Aboriginal Heritage Information Management System all known Aboriginal objects (sites) and Aboriginal Places in NSW are recorded on the system as per legislative requirements.</p> <p>Listing on AHIMS means the object or place is legally protected under the Act.</p> <p>Some Aboriginal Places are registered on the State Heritage Register as well due to their significance historically. Those that are on the SHR are done so under the Heritage Act 1977</p>	<p>Register of Sacred Sites affords protection to sacred sites; Land owners must apply for an authority certificate in order to conduct activity on their land if there is a Registered Sacred Site on it.</p>	<p>Some Aboriginal places are on the NT Heritage Register, and with a few exceptions, details of these places are available online, including their location. The main source of information about Aboriginal sites is the Archaeological Database, which is a GIS-based system managed by the Heritage Branch. Information about sites is only given out on an 'as needed' basis.</p>	<p>Information repository & planning tool – publically available. Cultural Heritage database, not publically available, but may be accessed by the relevant heritage owners, or land users needing to satisfy their duty of care.</p>