

# CHAPTER 1

## INTRODUCTION

*Australia's heritage, shaped by nature and history, is an inheritance passed from one generation to the next. It encompasses many things – the way we live, the traditions we hold dear, our histories, stories, myths, values and places. The diversity of our natural and cultural places helps us to understand our past and our relationship with the Australian landscape. Heritage recognises the indivisible association of culture-nature-country-place-religion for Aboriginal and Torres Strait Islander peoples.<sup>1</sup>*

### **The Committee's inquiry**

1.1 On 7 December 2000 the Senate referred the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 ('the Heritage Bill'), Australian Heritage Council Bill 2000 ('the Council Bill'), and Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 to the Environment, Communications, Information Technology and the Arts References Committee for inquiry and report to the Senate by 28 March 2001. The reporting date was subsequently extended to 8 May 2001.

1.2 The Committee advertised its inquiry in the national press and wrote to a number of concerned organisations and individuals. In response, the Committee received 32 submissions and 3 supplementary submissions which are listed at Appendix 1. In addition, the Committee held 2 public hearings in Canberra on 28 February and 7 March 2001. Witnesses who appeared at public hearings are listed at Appendix 2.

1.3 The Committee thanks all those who assisted in its inquiry by making submissions, providing evidence and appearing at hearings.

### **Background to the bills**

1.4 The bills before the Senate amount to a major reworking of the Commonwealth's laws for the protection of historic, cultural, natural and indigenous heritage. They aim to replace existing legislation – the *Australian Heritage Commission Act 1975* – which at the time of its enactment was a significant first step in the creation of a national legislative regime for heritage protection, but which according to the Government, is limited and out of date.<sup>2</sup> Since that time, there has been a growing interest in heritage, and an associated impetus to create laws and institutions to identify, protect and manage places of heritage interest.

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1 Australian Heritage Places Principles, Preamble, National Heritage Convention Key Outcomes, p 20.

2 Second Reading speech, p 1. The limitations of the AHC Act are explored more fully in the next chapter.

1.5 The immediate impetus for the new bills arose from a meeting of the Council of Australian Governments (COAG) in 1997, which agreed on new Commonwealth and state arrangements for the listing, protection and management of places of heritage significance. The COAG decided that the Commonwealth should focus on places of national significance, while also ensuring Commonwealth compliance with state heritage and planning laws.<sup>3</sup>

1.6 The Committee notes that the current bills reflect over five years of discussions and consultations with stakeholders and the community conducted by the Australian Heritage Commission (AHC) and the Minister for the Environment and Heritage. Key publications include:

- *A Presence for the Past: A report by the Committee of Review – Commonwealth Owned Heritage Properties*, 1996 (the Schofield Report)
- *A National Future for Australia's Heritage*, AHC Discussion Paper, August 1996
- *Australia's National Heritage – options for identifying heritage places on national significance*, AHC February 1997
- *National Heritage Standards*, AHC Discussion Paper, May 1997
- *A National Strategy for Australia's Heritage places – A Commonwealth consultation paper*, Senator the Hon Robert Hill, Commonwealth Minister for the Environment and Heritage, April 1999
- *Reform of Commonwealth Environment Legislation – Consultation paper*, issued by Senator the Hon Robert Hill, Commonwealth Minister for the Environment and Heritage, 1999.

1.7 The AHC also conducted four other consultative exercises:

- a round of eight general workshops and meetings with stakeholder groups throughout Australia between November 1996 and March 1997 in support of the COAG review of Commonwealth/state roles and responsibilities for the environment;
- a 1995 round of consultations with state and territory governments and stakeholders to develop the National Heritage Places Strategy;
- the National Heritage Convention ('HERCON') in Canberra in August 1998, involving over 220 people from around Australia, including heritage officials and professionals, and representatives of indigenous, community and industry groups; and

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3 The 1997 COAG *Heads of Agreement of Commonwealth/state roles and responsibilities for the environment*. See Environment and Heritage Legislation Amendment Bill (No. 2) 2000, Explanatory Memorandum, pp 5-6.

- a major round of briefings and meetings by AHC staff in eleven cities around Australia, addressing the new heritage regime.

1.8 Another significant background element to these Bills was the passing of the Commonwealth's new omnibus environmental protection legislation – the *Environment Protection and Biodiversity Conservation Act 1999* – which implemented the wider aspects of the COAG agreement, and intended to provide a single legislative base for the Commonwealth's environmental responsibilities.

### **Structure of the report**

1.9 The remainder of this chapter provides a general summary of both the three bills and, for reasons of comparison, the existing structures for heritage protection in Australia. The remainder of the report then considers:

- *Chapter 2* – the appropriateness of the proposed legislative regime;
- *Chapter 3* – the roles and membership of the proposed Australian Heritage Council;
- *Chapter 4* – the future of the Register of the National Estate and other transitional arrangements;
- *Chapter 5* – administration of the National Heritage List and the Commonwealth Heritage List;
- *Chapter 6* – enforcement of heritage protection; and
- *Chapter 7* – indigenous heritage issues.

1.10 Conclusions and recommendations are listed at the end of each section.

### **Description of the bills**

#### *Overview*

1.11 The bills provide for the establishment of a new Commonwealth heritage regime including the replacement of the Australian Heritage Commission with the Australian Heritage Council, the repeal of the *Australian Heritage Commission Act 1975* and amendments to the *Environmental Protection and Biodiversity Conservation Act 1999* ('EPBC Act').

1.12 Key changes include the repeal of the Register of the National Estate as a statutory list and the creation of two new lists: the National Heritage List, and the Commonwealth Heritage List. While both lists will not encompass all sites on the RNE, places on both new lists will be afforded stronger legislative protection, including the environmental impact assessment (EIA) of actions which will have an impact on listed places. In accordance with a decision of COAG in 1997, 'national heritage' will be inserted into the EPBC Act as a matter of national environmental significance. This would make national heritage a 'trigger' for government

environmental assessment, in addition to the six existing matters of national environmental significance.

*Environment and Heritage Legislation Amendment Bill (No. 2) 2000*

1.13 This Bill (the Heritage Bill) will insert a heritage protection regime into the existing EPBC Act as a ‘matter of national environmental significance’. This enables the environmental impact assessment provisions in that Act to be triggered; sets out how this would occur; and provides for a referral of assessments to the states and territories in many circumstances. The Bill also creates national and commonwealth heritage lists, and sets out the process by which places can be nominated and placed on those lists, or removed from the lists.

1.14 The role of the new Australian Heritage Council in this listing and delisting process is also set out in the Heritage Bill (the Council would be created by the passage of the Australian Heritage Council Bill 2000). The Heritage Bill also creates provisions setting out a role for the Director of Indigenous Heritage Protection in the assessment of places which might have indigenous heritage value, and provisions for the preparation and implementation of management plans for national heritage places.

The National Heritage List

1.15 Places will not attract the protection of the *Environmental Protection and Biodiversity Conservation Act 1999* unless they are contained on the National or Commonwealth Heritage Lists. This list is likely to be substantially shorter than the current Register of the National Estate, which contains some 13,000 places. As such, the rules which will govern the nomination of places to the list, the assessment of nominated places, and their eventual listing, will be very important.

1.16 Subdivision B of the Heritage Bill deals with the National Heritage List. Section 324B(1) states that the Minister must establish a National Heritage List. Section 324B(2) states that ‘a place may only be included in the National Heritage List if the Minister is satisfied that the place has one or more national heritage values’. Section 324D provides for the definition of ‘national heritage values’. However, the Bill does not itself define natural heritage values, which are to be defined further in regulations.<sup>4</sup>

1.17 The Bill states that any person, including a member of the Australian Heritage Council, may nominate a place to the National Heritage List. The Minister for Environment and Heritage may also invite nominations of places within a specified theme. Within 20 business days the Minister will be required to ask the AHC for an assessment of the place’s national heritage values, or to advise the person who made

the nomination of their decision not to list the place and of the reasons for their decision.<sup>5</sup>

1.18 The Minister has some discretion whether or not to refer the nomination to the AHC. The Minister also has discretion in regards to the assessment by the AHC – although the Minister is required to consider the assessment when making a decision, the decision does not need to be in accord with its recommendations.<sup>6</sup>

1.19 Under section 324G the Minister is required to seek public comment on the proposed listing of a place, within 20 business days after receiving the Australian Heritage Council's advice. Comments must be returned within 40 days after a notice is published or 20 days in the case of an emergency listing. If the AHC recommends that a place NOT be included in the National Heritage List, no public comments are required.<sup>7</sup>

1.20 The Bill also contains provision for the emergency listing of places. Under section 324E, if the Minister feels a place has one or more national heritage values which are 'under imminent threat', they are empowered under the Bill to include a place on the National Heritage List, but must request an assessment from the AHC within 10 business days.<sup>8</sup>

1.21 The AHC is required, under section 324F, to give the Minister a written assessment of a place's national heritage values within 12 months (or 40 business days in the case of an emergency listing). In making its assessment, the AHC must notify the place's owner and occupier; any indigenous person with rights or interests in the place; and must give them an opportunity to provide written comment and a copy of those comments must be included in the assessment. The AHC is prohibited from conducting an assessment without a request from the Minister to do so.<sup>9</sup>

1.22 The Bill empowers the Minister to remove a place from the National Heritage List if: (a) the place does not have any national heritage values; or (b) it is necessary in the interests of Australia's defence and security to do so. An action under part (a) would be a disallowable instrument, and the Minister must first 'obtain and consider' the advice of the AHC. The advice of the AHC would not be sought if the place was removed for national security reasons.<sup>10</sup>

1.23 The National Heritage List must be publicly available, at no charge, either in hard copy form or on the Internet. The Bill requires only a general description of the place, its location and national heritage values to be present in the publicly available

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5 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, pp 14-15.

6 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, section 324H, p 18.

7 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 17.

8 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 15.

9 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 16.

10 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, section 324J, p 19.

list, if the Minister considers a place may be damaged by the disclosure of specific information.<sup>11</sup>

1.24 Under Subdivision H, section 324Z, the Minister must ensure that a review of the National Heritage List is carried out once every 10 years and that the report of the review is tabled in both houses of the Parliament.<sup>12</sup>

#### Management plans for National Heritage Places in Commonwealth areas

1.25 Under section 324Q(1), the Minister is required to ‘make a written plan for managing each national heritage place that is entirely within one or more Commonwealth areas. The Minister must do so within the period specified in the regulations after the place: (a) is included in the National Heritage List; or (b) becomes entirely within one or more Commonwealth areas’.<sup>13</sup>

1.26 The Minister may in writing amend a plan or revoke and replace a plan, and plans ‘must not be inconsistent with the national heritage management principles’. If there is a change to the national heritage management principles so as to make a plan inconsistent, the Minister must amend or replace the original plan.<sup>14</sup>

1.27 The Bill does not specify what ‘national heritage management principles’ are, which are to be made by the Minister and published in the Gazette. Under section 324W, the regulations may prescribe obligations to implement or give effect to the national heritage management principles.<sup>15</sup>

1.28 Under section 324V, if a national heritage place is not entirely within one or more Commonwealth area and is in a state, self-governing territory or ‘on, over or under the seabed vested in a state’, the Commonwealth ‘must use its best endeavours to ensure a plan for managing the place, that is not inconsistent with the national heritage management principles, is prepared and implemented in co-operation with the state or territory’.<sup>16</sup>

#### Commonwealth Heritage List

1.29 A new Division 3A for the EPBC Act will set out provisions for managing Commonwealth Heritage Places. Under section 341B the Minister is required to establish a Commonwealth Heritage List. A place may be placed on the list if it is entirely within a Commonwealth area and the Minister is satisfied that the place has one or more Commonwealth Heritage Values. As with the detailed description of

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11 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, section 324M, p 21.

12 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 26.

13 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 22.

14 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, sections 324Q(2)-(5).

15 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, section 324W, p 25.

16 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 24.

national heritage values, the criteria for Commonwealth Heritage Values has been left to regulations.

1.30 Provisions for the nomination of places to the Commonwealth list, for emergency listing, assessments by the AHC and ministerial decisions are the same as for the National Heritage List.

1.31 Section 341Q specifies that each Commonwealth agency that owns or controls a Commonwealth heritage place must make a written plan for managing the place, which must not be inconsistent with the Commonwealth heritage management principles. In making the plan, the agency must ask the Minister for advice, who must in turn consult the AHC.

#### Reviewing and reporting requirements

1.32 Sections 324Z and 341ZB set out legislative requirements for reporting on and reviewing the two Heritage Lists. At least once every ten years after the lists are established, the Minister must ensure that a review is carried out and that its report is tabled in each house of the Parliament. The Bill does not specify who should carry out the review, or what public comment may be offered in the review process.<sup>17</sup>

1.33 The reports must include details of:

- (a) the number of places included in the lists; and
- (b) any significant damage or threat to the national heritage values of those places; and
- (c) how many plans for managing national heritage places have been made, or are being prepared, and how effectively the plans that have been made are operating; and
- (d) the operation of any conservation agreements under Part 14 that affect national heritage places; and
- (e) any other matters that the Minister considers relevant.<sup>18</sup>

#### *Australian Heritage Council Bill 2000*

1.34 This Bill establishes and defines the role of the Australian Heritage Council (AHC), the new body to replace the Australian Heritage Commission.

1.35 The Bill defines the functions of the AHC as:

- (a) to make assessments requested by the Minister under the *Environment Protection and Biodiversity Conservation Act 1999*;

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17 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 26.

18 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, section 324Z(2), p 26.

- (b) to advise the Minister, on request, on conserving and protecting places included, or being considered for inclusion, in the National Heritage List or Commonwealth Heritage List;
- (c) to advise the Minister, on request, on matters relating to heritage including the following:
  - (i) promotional, research, training or educational activities;
  - (ii) national policies;
  - (iii) grants or other financial assistance;
  - (iv) the monitoring of the condition of places included in the National Heritage List or Commonwealth Heritage List;
  - (v) the Commonwealth's responsibilities for historic shipwrecks;
- (d) to nominate places for inclusion in the National Heritage List or Commonwealth Heritage List;
- (e) to perform any other functions conferred on the Council by the *Environment Protection and Biodiversity Conservation Act 1999*.<sup>19</sup>

1.36 The AHC will consist of a Chair and six other members, who are to be appointed by the Minister for Environment and Heritage. The Chair must have 'experience or expertise concerning heritage'; and of the other members, at least two must have 'experience or expertise concerning natural heritage'; two 'experience or expertise concerning historic heritage' and two 'experience or expertise concerning indigenous heritage, one of whom represents the interests of indigenous people'.<sup>20</sup>

1.37 Members of the AHC will be part-time and hold office for a period no longer than three years. A member cannot be appointed twice. Members are prohibited from 'engaging in paid employment, or any other activity, that the Minister is satisfied conflicts or may conflict with the proper performance of the member's duties'. Members must also disclose any direct or indirect pecuniary interest in a matter that is being considered, or about to be considered, by the Council. Section 19 states that such an interest must be disclosed 'as soon as possible after the relevant facts have come to the member's knowledge' and 'unless the Council otherwise determines, the member must not be present during any deliberation by the Council on the matter and must not take part in any decision of the Council on the matter'.<sup>21</sup>

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19 Australian Heritage Council Bill 2000, p 3.

20 Australian Heritage Council Bill 2000, p 4.

21 Australian Heritage Council Bill 2000, pp 5, 8.



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*Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000*

1.38 This Bill repeals the *Australian Heritage Commission Act 1975*, and as the name implies, effects various administrative provisions covering such matters as references to the Commission; assets and liabilities of the Commission; and legal proceedings. Section 9 requires a final report on the operations of the Commission.

**The current heritage regime<sup>22</sup>**

1.39 Current heritage protection in Australia is the joint responsibility of both Commonwealth and state/territory governments. The primary source of Commonwealth law is the *Australian Heritage Commission Act 1975* which has been amended by the *Australian Heritage Commission Amendment Act 1976*, and the *Australian Heritage Commission Amendment Act 1990*.

1.40 Other elements in the national heritage protection regime are the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*,<sup>23</sup> and specific acts to provide protection for movable cultural heritage (*Protection of Movable Cultural Heritage Act 1986*) and underwater cultural heritage (*Historic Shipwrecks Act 1976*).

*Australian Heritage Commission*

1.41 The AHC Act creates the Australian Heritage Commission ('the AHC') which is an independent statutory authority administered as part of the Commonwealth Government's Environment and Heritage portfolio. The functions of the AHC are listed at section 7, and includes giving advice to the Minister on matters relating to the national estate; encouraging public interest in the national estate; identifying places for inclusion in the national Register of the National Estate; furnishing advice and reports, and administering the National Estate Grants Program.

1.42 The principal legal protection offered by the AHC Act is section 30, by which 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 the taking of that action and that all measures that can reasonably be taken to minimise the adverse effect will be taken [...]'. Importantly though, 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.

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22 The following is drawn principally from the Environment Australia website:  
<http://www.environment.gov.au/heritage/protection/aust.html> (17 February 2001).

23 It is proposed that this Act be replaced by the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998. For a detailed consideration of the provisions of this Bill, see the March 1999 report of the Senate Legal and Constitutional Legislation Committee.

1.43 The Register of the National Estate now comprises a total of 13,194 listed places, of which 420 places are on the Interim list. These fall within the following categories:<sup>24</sup>

- Natural 2345 (2035 Registered + 310 Interim Listed)
- Indigenous 914 (896 Registered + 18 Interim Listed)
- Historic 9935 (9843 Registered + 92 Interim Listed).

1.44 Further statistics relating to the Register of the National Estate are at Appendix 6.

#### *State and territory regimes*

1.45 In addition, each state and territory has enacted its own legislation covering heritage protection. Importantly though, most of these Acts separate historic, cultural, natural and indigenous heritage. Thus, although each state and territory maintains a heritage register, only the Australian Capital Territory Heritage Places Register lists the three categories of historic, cultural and indigenous heritage. In all other jurisdictions, the lists are confined to historic and cultural heritage. Natural heritage places are principally recognised by listing as a National Park, or conservation park or reserve, while both South Australia and Western Australia maintain separate registers of Aboriginal sites.

1.46 Listed below is the key legislation and registers for each state and territory together with the agencies responsible for administration.<sup>25</sup>

#### Australian Capital Territory

- *Land (Planning and Environment) Act 1991*
- *Heritage Objects Act 1991*
- ACT Heritage Council
- Environment ACT
- Australian Capital Territory Heritage Places Register

#### New South Wales

- *Heritage Act 1977*
- *Heritage Amendment Act 1996 Schedule 1*
- *National Parks and Wildlife Act 1974*

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24 Figures provided by the Department of Environment and Heritage and accurate as of 7 March 2001.

25 This list was compiled from the Australian Heritage Commission website: <http://www.heritage.gov.au> as at 2 March 2001.

- Heritage Council of NSW
- National Parks and Wildlife Service
- Environment Protection Authority
- NSW Heritage Office
- NSW State Heritage Inventory

#### Northern Territory

- *Heritage Conservation Act 1991*
- *Heritage Conservation Act 1996*
- *Northern Territory Aboriginal Sacred Sites Act 1989*
- Heritage Advisory Council
- Aboriginal Areas Protection Authority
- Museums and Art Galleries of the Northern Territory
- Parks and Wildlife Commission of the Northern Territory
- NT Heritage List

#### Queensland

- *Queensland Heritage Act 1992*
- *The Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*
- Environment Protection Agency
- Queensland Heritage Council
- Queensland Heritage Register

#### South Australia

- *Heritage Act 1993*
- *Historic Shipwrecks Act 1981*
- Heritage South Australia
- Parks and Wildlife
- Aboriginal Affairs
- South Australian Register of Aboriginal sites
- SA State Heritage Register
- SA Register of Historic Shipwrecks, Historic relics and protected zones

### Tasmania

- *Historic Cultural Heritage Act 1995*
- *Historic Cultural Heritage Amendment Act 1997*
- Tasmanian Heritage Council
- Department of Primary Industries, Water and Environment
- Tasmanian Heritage List

### Victoria

- *Heritage Act 1995*
- *Archaeological and Aboriginal Relics Preservation Act 1972*
- Heritage Victoria
- Natural Resources and Environment
- Aboriginal Affairs Victoria
- Victorian Heritage List

### Western Australia

- *Heritage of Western Australia Act 1990*
- *Aboriginal Heritage Act 1972-80*
- Heritage Council of Western Australia
- Aboriginal Affairs Department
- Aboriginal Sites Department, WA Museum
- Department of Conservation and Land Management
- Department of Contract and Management Services
- Department of Environment Protection
- Western Australian Register of Heritage Places
- WA Register of Aboriginal sites.

### *Other elements*

1.47 An important role is also played by the National Trust organisations, which are independently constituted community based organisations in each state and territory, with a national coordinating body, the Australian Council of National Trusts. Each state Trust (except South Australia) maintains a list or register, principally of historic heritage, however, listing by the National Trust does not provide any legislative protection.

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*Environment Protection and Biodiversity Conservation Act 1999*

1.48 The bills aim to incorporate Commonwealth heritage protection into the general framework of the EPBC Act. As such, it is worth providing a general outline of the operation of this Act.

1.49 The EPBC Act provides that certain actions – in particular, actions which are likely to have a significant impact on a matter of ‘national environmental significance’ – are subject to a clearly defined assessment and approval process. Matters of national environmental significance identified in the EPBC Act that provide triggers for Commonwealth assessment and approval process are:

- World Heritage properties;
- Ramsar wetlands;
- nationally threatened species and ecological communities;
- migratory species;
- Commonwealth marine areas; and
- nuclear actions (including uranium mining).

1.50 The Act also provides for a series of offences. Division 2 sets out prohibitions against individuals, Commonwealth agencies or corporations on taking certain actions that have, will have or are likely to have a significant impact on the environment.

1.51 In addition, the EPBC Act places Commonwealth decisions on environmental issues with the Environment Minister (rather than the action Minister); provides for up-front approval processes, and a system for the accreditation of state and territory processes and decisions through the establishment of bilateral agreements.<sup>26</sup>

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26 ACF, Submission 16, pp 4-5.

