CHAPTER 2

THE APPROPRIATENESS OF THE NEW HERITAGE PROTECTION LEGISLATION

Australia's heritage embraces natural, indigenous and historic values. Through its support for the identification and conservation of the National Estate, the Commonwealth Government is committed to the ideal that Australia's heritage is a gift to every citizen.[1]

Introduction

2.1 As discussed in Chapter 1, the new heritage protection legislation, if passed, will substantially change the national heritage protection regime and by implication, the protection of heritage sites in Australia.

2.2 This chapter explores the appropriateness of the new regime and the degree to which it will strengthen the protection of Australia's heritage. The chapter begins by looking at the need for reforms, and the perceived strengths and weaknesses of the existing regime. It then considers the suitability of the new roles for Federal and state governments proposed in the bills (particularly in relation to the COAG agreement) and the appropriateness of including heritage protection within the EPBC Act. The chapter concludes with a brief discussion of the coverage of the bills.

Need for and basis of reforms

2.3 Most submissions generally agreed with the need to strengthen heritage protection in Australia and review the legislative basis of Commonwealth heritage protection. Professor Lennon states:

> Senator Hill is to be congratulated for at last introducing legislation to address the long standing and well known deficiencies in the existing Commonwealth legislation which has very limited protective mechanisms and, at most, an alerting role of the heritage values of listed places. After a quarter of a century it is surely time to review it and make heritage protection a certainty as heritage is now clearly recognised as both a cultural and economic asset to this nation.[2]

2.4 Similarly, the Australian Heritage Commissioners comment:

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1 Principle 1, A National Future for Australia's Heritage, Discussion Paper, Aug 96, p 10.

2 Professor Lennon, Submission 11, p 1. See also Ms Sullivan, Submission 14, p 1; Mr Worboys, Submission 19, p 1; ACNT, Submission 4, p 1; AMEC, Submission 9, p 9; Dr Mosley, *Proof Committee Hansard*, Canberra, 28 February 2001, p 10.

> The Australian Heritage Commission (AHC) considers that the Bills represent a long overdue reform of heritage protection and management at the national level.[3]

2.5 But while there is general agreement about the need to strengthen the Commonwealth's heritage protection regime, there is considerable disagreement about whether the proposed reforms will actually achieve this and the shape these reforms should take. Some submissions argued that it would be preferable to start with the existing Australian Heritage Commission Act as a means to strengthen Australia's heritage protection regime given the success of the current regime and the 25 years experience associated with its operation. Others suggested that the EPBC framework could be used effectively, if a number of amendments are made to the bills. Humane Society International in its submission, for example, stated:

> …[W]e welcome the possible benefits of the proposed new heritage scheme and recognise the need for better protection of Australia's heritage and reform of outdated laws. We believe the proposed scheme has the potential to mean that all the advantages of the EPBC Act could now apply to national and Commonwealth heritage. However, there are a number of issues that need to be resolved and improvements that need to be made to the proposed new heritage regime before we would be convinced that the Bills will better conserve heritage.[4]

2.6 A large number of submissions consequently argued quite forcefully that the bills should not be passed in their current form.[5]

Strengths of the existing regime

2.7 Many submissions, particularly from conservation groups, highlighted the strengths of the current national heritage regime which include:

- the Commonwealth's comprehensive approach to national heritage protection as characterised by the Register of the National Estate which lists all sites of heritage significance:
- the integrity of the RNE due to the listing of sites based solely on the technical merits of each application;
- the independence of the Commission, its wide-ranging powers and its role in providing national leadership in heritage protection; and
- the significance of the RNE to Australian people, particularly given its 25 year operation.

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3 AHC, Submission 8, p 1.

4 WWF, Submission 12, p 2.

5 For example: ANZMEC, Submission 24, p 3, ATSIC, Submission 25, p 22; Tasmanian government, Submission 28, p 1, WWF, Submission 12, p 2, Australia ICOMOS, Submission 17, p 1.

2.8 There is consequently much concern about the shift away from this model.

> Australia ICOMOS has raised concerns about the shift from a comprehensive approach to heritage, characterised by the concept of the National Estate, to an approach based on national heritage significance. Australia ICOMOS still believes that the integrated concept of the National Estate is a powerful, important and world-leading concept.[6]

2.9 Australia ICOMOS further stated that:

> The amendment Bill, together with the repealing of the AHC Act 1975 will bring about this narrowing of focus, and Australia ICOMOS is concerned that this step:
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> - moves away from the good practice of the past;
> - reflects a unintegrated approach to heritage; and
> - is not adequately replaced by a mixture of the new Commonwealth regime and activities of State, territory and local government levels.[7]

2.10 The Australian Conservation Foundation's submission also hightlighted the strengths of the current regime, and in particular the importance of the RNE:

> The RNE has, and continues, to play an important role in defining Australia's heritage. The Commonwealth, if it wants to know when an action it is proposing may impact on heritage places, needs to maintain and update the RNE as a national heritage list, ie a list prepared, with uniform criteria, of Australia's heritage – rather than a heritage list of places significant at some, as yet undefined, national level (ie a subset of the former list).[8]

2.11 The future role of the Register of the National Estate is discussed in Chapter 4.

Weaknesses of the existing regime

2.12 According to the Minister for the Environment and Heritage, Senator the Hon Robert Hill:

> The Commonwealth's existing heritage conservation regime, based on the *Australian Heritage Commission Act 1975*, is now seriously outdated and subject to significant limitations. In 1975 the AHC Act represented best

6 Australia ICOMOS, Submission 17, p 3.

7 Australia ICOMOS, Submission 17, p 3

8 ACF, Submission 16, p 9.

> practice, and its enactment was an important step in demonstrating Commonwealth leadership in relation to heritage conservation.[9]

2.13 The Australian Heritage Commission expressed a similar view about the AHC Act:

> Whilst the *Australian Heritage Commission Act 1975* was a major national heritage protection initiative in its day, the practical reality is that listing under that Act on the Register of the National Estate (RNE) confers limited effective protection. RNE listings are duplicated in state, territory and local government heritage lists. Now that all states and territories have heritage protection legislation, the Commission considers it timely for the national government to concentrate on the identification and effective protection of national heritage.[10]

2.14 The Minister and some submissions argued that there are four main limitations of the AHC Act: it does not include adequate enforcement provisions; it involves considerable duplication with other heritage protection systems; it is slow; and it does not provide the basis for a good national model.

Ineffective protection

2.15 As was described in Chapter 1,[11] the current AHC Act creates no enforceable obligations for private owners of listed properties, and limited procedural obligations for Commonwealth properties under section 30. The Minister states in the Second Reading speech:

> [T]he AHC Act provides no substantive protection for heritage places of national significance. The limited procedural safeguards in the AHC Act fall well short of contemporary best practice in heritage conservation.[12]

2.16 This view accorded with that of several witnesses. Dr Geoff Mosley, an environmental and heritage consultant, commented on the largely symbolic protection measures of the current Act:

> The existing system was basically a device which alerted the public and the authorities to the existence and nature of the values. … It did result in widespread public awareness and its main usefulness was probably in public education. RNE status was often used by environment groups as a lever to improve the conservation status by such means as acquisition and reservation. The section 30 provision of the present Act is also essentially

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9 Minister for the Environment and Heritage, Senator the Hon. Robert Hill, Second Reading Speech, p 1.

10 AHC, Submission 8, p 1.

11 see chapter 1, para 1.42 – description of the current heritage regime.

12 Minister for the Environment and Heritage, Senator the Hon Robert Hill, Second Reading speech, p 1.

> an alerting/information device. In my experience it has often not worked well.[13]

2.17 Similarly, Mr Peter King, Chair of the Australian Heritage Commission (AHC), points to the unenforceable nature of the Commission's powers:

> At the end of the day the only power the commission has is under section 30, which is a referral power. The Commonwealth ministers, if they are minded to comply with their obligations under section 30, and we cannot force them to do it, must refer any decision that affects a Commonwealth or other heritage property for advice from us. The first thing is, frequently they do not do it. … But even then, once we give advice there is no requirement for the Commonwealth, or anyone else, to comply with our advice – and that is a real weakness of the present situation.[14]

2.18 It is generally accepted therefore, that there is a need to enhance the protection afforded to heritage places that are determined to be the responsibility of the Commonwealth. There is also an important argument about the need to strengthen the protection afforded to all sites on the RNE. This is further discussed in Chapter 4.

Duplication

2.19 The duplication in the application of Federal and state/territory heritage protection regimes is an issue that is often cited as a fundamental problem with the existing heritage regime. An AHC discussion paper identifies the possibility of repetitive nominations, and the associated uncertainty as to which heritage protection regime applies to a particular place, and how the regimes interact:

> The factors can lead to difficulties in deciding what activities are permitted and what management practices are most appropriate.[15]

2.20 The discussion paper also notes community concerns, particularly from private property owners of listed properties, including confusion over heritage obligations and the implications of listing, concerns over the impact of listing upon the economic viability of their businesses and properties, and the perceived infringements of private property rights implied by listing.[16] This mixing of Commonwealth and state roles, and the attendant duplication and uncertainty are discussed by Mr King of the AHC:

> It might be Babsworth House ... which probably is of no greater significance than local. There will be disputes about that, but that is probably its correct standard. Then you might find a place of original state significance, such as the Macquarie Lighthouse, which is also in the same area; then you will find

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13 Dr Mosley, Submission 5, p 3.

14 Mr King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 107.

15 A National Future for Australia's Heritage, Discussion Paper, Aug 96, p 7.

16 A National Future for Australia's Heritage, Discussion Paper, Aug 96, p 9.

> a place of national significance, such as Sydney Harbour foreshores. All of those are on the national estate without distinction. You will find that each of the several authorities, such as local governments, regional authorities and state authorities are all duplicating the same process. … It is creating confusion amongst environmentalists, amongst owners, amongst developers, amongst anyone interested in identifying the heritage significance of the particular place.[17]

2.21 The Committee appreciates, however, that the Register of the National Estate was designed as a register of places with heritage significance. No attempt was made to grade or classify places on the Register since places do not neatly fall into local, regional or national classifications of significance. As discussed further in Chapter 4, some submissions to the inquiry also doubted the appropriateness of drawing distinctions between classifications of significance.

Timeliness

2.22 Finally, there is a view that the existing nomination process is too complicated and the time taken to evaluate the nominations is too long. According to Dr Mosley:

> The existing nomination system involves the filling out of a complicated form and selecting from a plethora of possible criteria. … Judging by the draft criteria for the proposed national and Commonwealth lists these would be much simpler. Hopefully an effort will be made to make the nomination process simpler also.[18]

2.23 In relation to these comments, the Committee notes the current backlog of 3012 nominations awaiting assessment by the AHC.[19]

2.24 While the Committee was not able to explore this issue in any depth, it notes that efforts to standardise heritage assessments between the states and the Commonwealth may help reduce the time taken to evaluate nominations for inclusion on the RNE.

Lack of an agreed heritage protection regime

2.25 The fourth point relates to the sometimes undefined role of the Commonwealth in heritage protection, and the nature of Commonwealth responsibilities. Tied in with this has been the reliance on indirect triggers, such as foreign investment approval or the foreign affairs power, to invoke Commonwealth jurisdiction in what are arguably state or territory matters.[20] As an AHC discussion paper notes:

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17 Mr King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 108.

18 Dr Mosley, Submission 5, p 1.

19 RNE statistics, Appendix 6.

20 Environment & Heritage Legislation Amendment Bill (No. 2) 2000, Explanatory Memorandum, p 4.

> At present there is no national policy that unites Commonwealth, state and territory governments in an agreed heritage protection regime. This has led to significant gaps and duplications.[21]

2.26 These issues led directly to the creation of the Council of Australian Governments (COAG) Heads of Agreement on Commonwealth/state roles and responsibilities for the Environment, which is discussed further below.

Appropriate roles for governments

2.27 The differing views on the strengths and weaknesses of the existing regime are further reflected in the substantial disagreement over the role that the Commonwealth should take in heritage protection and in particular, the extent to which heritage protection should be left to the states and territories. Some submissions call for a wide leadership role for the Commonwealth in heritage protection, while others, principally the states and territories, suggest that the Commonwealth should have little real role in the administration of heritage protection. There is further concern over the extent to which the practical details of Commonwealth/state relations rely on bilateral agreements which are yet to be determined.

2.28 This discussion first considers the role of the Council of Australian Governments (COAG) agreement on the environment. It then looks at the current status of Commonwealth/state negotiations and the principles and key institutional factors which should underpin the Commonwealth's role in heritage protection.

The COAG Agreement

2.29 The Council of Australian Governments (COAG) Heads of Agreement on Commonwealth/state roles and responsibilities for the Environment was signed by all States and Territories. Interested community groups and others involved in heritage protection were not, however, part of the official process. The Committee therefore notes that the COAG agreement does not necessarily have the support of the broader community.

2.30 The COAG agreement makes three key points in relation to the division of responsibilities between Australian governments for heritage protection.[22] First, instead of the ad-hoc use of the constitutional heads of power, the Commonwealth would only become involved in matters of national environmental significance. Implicit in this is a state grant of power to enable the Commonwealth to legislate on those nationally significant issues in those areas in which it lacks direct constitutional powers. Second, there was agreement to streamline Commonwealth and state processes with the objective of relying on state processes. This would be facilitated

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21 A National Future for Australia's Heritage, Discussion Paper, Aug 96, p 5.

22 *Heads of Agreement on Commonwealth/State roles and responsibilities for the environment*, which was signed by the Commonwealth, the states and territories, and the Australian Local Government Association.

by the development of bilateral agreements by which the Commonwealth and the states would accredit each other's processes. Third, the Commonwealth agreed to bind itself to state environment and planning laws.

2.31 In relation to heritage, in paragraph 6 the parties agreed:

> to the rationalisation of the existing Commonwealth/state arrangements for the identification, protection and management of places of heritage significance through the development, within twelve months, of a co-operative national heritage places strategy which will: (i) set out the roles and responsibilities of the Commonwealth and the states; (ii) identify criteria, standards and guidelines, as appropriate, for the protection of heritage by each level of government; (iii) provide for the establishment of a list of places of national heritage significance; and (iv) maximise Commonwealth compliance with state heritage and planning laws.

2.32 Importantly, the agreement notes:

> that indigenous issues are being addressed in a separate process and are not covered by the Agreement.

2.33 The stated intent of this agreement is therefore to remove uncertainty over which level of government is responsible for environmental laws. According to the Government, the current bills reflect the division of Commonwealth and state/territory responsibilities for the environment and heritage annunciated in the COAG agreement.

Bilateral agreements

2.34 The third structural element in Commonwealth/state relations, as provided for in the COAG agreement, are bilateral agreements. These are provided for in Part 5[23] of the EPBC Act, which provide for accreditation of state processes, decisions and management plans (among other things).

Current status of Commonwealth/state relations

2.35 Unfortunately, the promise of the COAG agreement and the consequential provision for bilateral agreements in the EPBC Act has not been borne out in practice. Major disagreement has emerged between the states and the Commonwealth in the implementation of the agreement. So far, only Tasmania has concluded a bilateral agreement with the Commonwealth, and the Committee is advised that negotiations have effectively stalled. This disagreement is very evident in the bills before the Committee. The Explanatory Memorandum notes three areas that could not be agreed upon:[24]

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23 See also EHLA Bill, section 51A

24 Environment & Heritage Legislation Amendment Bill (No. 2) 2000, Explanatory Memorandum p 11.

1. The referral of state powers to the Commonwealth to enable the full protection of nationally listed places;

2. The request by states for a veto on the nomination of a place for national listing; and

3. The development of common heritage protection standards.

2.36 Mr King, Chair of the AHC, makes a similar point:

> The problem emerged because the states were not prepared to give up their planning powers in relation to land on which there were places of potential national significance. You will understand that state governments jealously guard their planning rights and powers in relation to any land belonging to their states or coming within their jurisdiction. The COAG contemplated that there would be a mutual exchange of power so that the states could have access to planning controls with respect to Commonwealth-owned property but the Commonwealth would have access to state properties in relation to places of national significance. That came unstuck … .[25]

2.37 Mr Bruce Leaver, of Environment Australia, gives these reasons for the failure of agreements:

> The reason it failed is that heritage is dealt with very differently in different states. The Commonwealth's heritage, as reflected in these bills is historic, cultural, natural and indigenous heritage. The states vehemently object to that, and they deal with heritage in quite different ways. Western Australia, for example, is quite happy to cooperate till the cows come home on historic heritage, but as far as they are concerned, natural heritage and indigenous heritage are matters for them to consider and they certainly did not want those issues addressed in any national heritage regime.
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> I can answer your question by saying historic heritage would be comparatively easy. I think it would be easy to get common standards. The heritage profession, through the operation of instruments like the Burra Charter has a very common understanding of the standards and protection of historic heritage. When you get into natural heritage, I think you have a very robust fight on your hands and indigenous heritage in this nation has got a long way to go on that. So they were the reasons it fell apart.
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> The other reason it fell apart … is that they wanted a veto on listing of places of national heritage significance. From the Commonwealth's view, you would not have a national list if you only had a list of places that states wanted on the list.[26]

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25 Mr Peter King, *Proof Committee Hansard*, Canberra, 7 March 2001, p .

26 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p . See also AHC, Submission 8, p 3.

2.38 For their part, several states stressed the vital need for a cooperative approach and criticised what they see as the abandonment of discussions in favour of the bills:

> [A]ny national initiative will only be effective if it is done with the full agreement, cooperation and support of all parties.[27]

And:

> The unilateral decision by the Minister for Environment and Heritage to terminate dialogue with the states on the NHPS and focus (instead) on changes to the Commonwealth heritage regime was contrary to the terms of the 1997 COAG Heads of Agreement on Commonwealth/state roles and responsibilities for the environment.[28]

2.39 Accordingly, there remains fundamental disagreement between the Commonwealth and the states over both the subject matter and scope of Commonwealth powers in relation to heritage protection.

States view of the Commonwealth role

2.40 Consistent with the views outlined above, the majority of states are opposed to the legislation, and argue that it reflects an inappropriate role for the Commonwealth in what they see is essentially a matter of state control. The Victorian government, for example:

> does not support the proposed trigger. The proposal does not recognise or enhance the strengths of the existing state-based regimes. Instead the proposal introduces a new level of approval and management bureaucracy that unnecessarily increases the complexity of Australian heritage conservation. In addition, there appears to be a net loss of public benefit in the proposal, with the Commonwealth opting out of a number of roles that it is uniquely placed to fulfil.[29]

2.41 Accordingly, the states suggest that the Commonwealth should exercise an overall coordination role, and rely on state laws to protect heritage. The Tasmanian government states:

> [T]he state government does not support the use of corporations power or trade powers for the management of heritage places conservation. This has the potential to create perverse outcomes where parts of the heritage estate are protected and others are not.[30]

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27 Victorian government, Submission 31, p 2.

28 Victorian government, Submission 31, p 2. See also Tasmania government, Submission 28 and Heritage Council of Western Australia, Submission 26.

29 Victorian government, Submission 31, p 1.

30 Tasmania government, Submission 28, p 3. See also South Australian government, Submission 27, p 4.

2.42 The South Australian government points to a broad range of state acts covering development, heritage, native title, and national parks and concludes that these bills duplicate existing state laws.[31] The Tasmanian government agrees:

> State and territory governments are constitutionally the land use managers in Australia and as such have information on heritage resources and linkages to stakeholders that the Commonwealth Government does not have.[32]

2.43 And further:

> The states and territories should retain their traditional responsibility for on-ground upkeep and management works of land and heritage resources. The management of properties on the national list should be undertaken using state legislation and processes.[33]

2.44 Some states are therefore concerned that the proposed laws do not resolve what they consider to be the existing duplication between state and Commonwealth roles, and therefore fail to achieve one of the key purposes of the reform. As the Heritage Council of Western Australia explain:

> The system duplicates the permit approval systems already in place under the state heritage acts, and the assessment and registration system in place under the state heritage acts.[34]

2.45 In place of the proposed bills, the states generally suggest the Commonwealth take a coordination role, while leaving the administration of the sites to state and territory laws. The Victorian government sees the role of the Commonwealth in these terms:

> The Commonwealth is uniquely placed to take the lead on many heritage matters such as developing national standards, bench-marking, policy coordination, and community education.[35]

2.46 Similarly, the Western Australian government describes the need for a broader Commonwealth commitment to:

- Supporting the activities of state government heritage agencies directly;
- Coordinating national projects which require a national focus but which do not necessarily relate solely to the National list (eg the National

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31 South Australian government, Submission 27, p 4. See also ANZMEC, Submission 24, p 4.

32 Tasmanian government, Submission 28, p. 3. This view is also reflected in AMEC, Submission 9, p 11.

33 Tasmanian government, Submission 28, p 3. See also Heritage Council of Western Australia, Submission 26, p 2; Victorian government, Submission 31, p 4.

34 Heritage Council of Western Australia, Submission 26, p 2.

35 Victorian government, Submission 31, p 6.

Databasing project, the HERA online bibliography, national training initiatives, the National Heritage Officials Forum etc.)

- Developing national heritage policy initiatives … .[36]

2.47 In considering these views, the Committee is also mindful that for the system proposed by the states to work effectively, the Commonwealth would need to make a strong commitment to funding state agencies, as well as binding itself to state and territory laws to ensure that both the actions of Commonwealth agencies and actions taken in relation to Commonwealth lands were covered by the state/territory laws.

2.48 Given the stalemate associated largely with the COAG process, the Committee considers it appropriate to look at the key institutional arrangements and factors which should underpin the Commonwealth's role in heritage protection, namely the extent of the Commonwealth's constitutional powers and its national leadership role, as a means of moving the debate forward.

Commonwealth constitutional powers for heritage protection

2.49 Any discussion of the respective roles for Commonwealth and state/territory governments in heritage protection must consider the Australian Constitution. As a federation, the Commonwealth government shares powers with the six states and two territories, with the relationship defined by the Constitution. Thus, the Commonwealth must be able to identify the constitutional source of authority for any law.

2.50 The Constitution grants the Commonwealth government two types of power: exclusive and concurrent. The Commonwealth has exclusive powers over Commonwealth property and the Commonwealth public service (section 52). The Commonwealth shares law making powers with the states and territories in relation to matters set out in section 51, however under section 109, a state or territory law is invalid to the extent that it is inconsistent with a Commonwealth law.

2.51 The heads of power in section 51 generally used for environment and heritage protection are:

- Trade and commerce [s.51(i)]
- Finance and taxation [s.51(ii)]
- Corporations [s.51xx)]
- The 'people of any race' power [s.51(xxvi)]
- External affairs [s.51(xxix)].

36 Heritage Council of Western Australia, Submission 26, p 2.

2.52 The practical limits of these law making powers are complex and have been evolving constantly since Federation. It is clear that initially, the Commonwealth was not intended to play any significant role in land management. As Dr Gerry Bates, a leading environmental lawyer, states:

> In general, it may be said that responsibility for land use decision making and hence, historically, environmental protection has lain with State governments. The Commonwealth has no direct legislative powers in relation to the environment because in 1900, at the time the Commonwealth Constitution Act was passed environmental protection was not an issue which occupied the minds of the legislators.[37]

2.53 This position has changed considerably. However, the true extent of the Commonwealth powers is unclear, with views presented to the Committee in this inquiry varying significantly. Mr Bruce Leaver, the Executive Director of the AHC, described the Commonwealth jurisdiction in the area:

> [T]he Commonwealth's constitutional powers are quite spotty … It depends on the heritage you are talking about: indigenous heritage, the Commonwealth has constitutional powers. A natural site that has biodiversity values or it might be a migratory bird site or wetlands of significant sites, the Commonwealth has constitutional powers. If it is natural site not related to biodiversity, the Commonwealth has no constitutional powers. If it is a historic site the Commonwealth has no constitutional powers … [except] in relation to finance and trading corporations and the bill, in fact sets those out. So if there is a place of national historic significance and is under threat, the only power of protection the Commonwealth can bring to bear is the application of its financial and trading corporation powers.[38]

2.54 Ms Sharon Sullivan, a former Executive Director of the AHC, observes:

> One weakness of the Bill, which it is difficult to see a way of resolving, is that it provides the Commonwealth with only limited powers relating to places of historic value of national significance. This is a constitutional problem which is not possible to overcome without more cooperation from the states than has been forthcoming on this issue.[39]

2.55 Conversely, Professor David Yencken and other former AHC Commissioners take a wider view:

> In 1975 when the Australian Heritage Commission Act was passed, the constitutional powers of the Commonwealth had not been fully tested. Following a series of High Court decisions it has become clear the

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37 Dr Gerry Bates, *Environmental Law in Australia*, 3rd Edition, 1992, p 53.

38 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 126.

39 Ms Sullivan, Submission 14, p 1. See also AHC, Submission 8, p 3.

> constitutional powers of the Commonwealth related to environment and heritage are much greater than previously thought.[40]

2.56 The Committee notes that a series of High Court decisions have confirmed a wide ranging legislative power for the Commonwealth to enact laws for the protection of the environment and heritage. A key principle that emerged was that the Commonwealth may pass laws to achieve a purpose that may be unrelated to the head of power relied on.[41] This Committee in an earlier report noted the comments of Professor James Crawford that:

> The lesson of a careful study of the last fifteen years experience is that the Commonwealth has, one way or another, legislative power over most large-scale mining and environmental matters.[42]

2.57 In this context it is also important to note that the states and territories do not have the legislative power to bind the Commonwealth. Therefore, in order to provide protection to heritage places on Commonwealth land, or limit actions by Commonwealth government agencies, either the Commonwealth itself must either legislate, or bind itself to state or territory laws.

2.58 The Committee concludes that the Commonwealth has wide powers to legislate on environment and heritage matters, but that the extent of these powers may be subject to constitutional uncertainty. At the same time, it is obviously desirable to work cooperatively with the states and territories. To a large extent, therefore, it is a matter for political judgement where to draw the line of Commonwealth responsibility.

A leadership role for the Commonwealth

2.59 Many submissions, particularly those from environment and heritage groups, argue that the Commonwealth should use the full potential of its constitutional powers to take a strong leadership role in heritage protection to ensure national consistency in standards and to enforce a 'bottom-line' of protection.

2.60 The Australian Conservation Foundation (ACF) points to the communique of the National Heritage Convention which agreed in 1998:

> [T]hat while there may be a need for administrative divisions at different government levels for the management of heritage in Australia, the Commonwealth Government must take responsibility for leadership and

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40 Professor Yencken, Submission 10, p 5. See also Professor Yencken, *Proof Committee Hansard*, Canberra, 28 February 2001, p 23.

41 *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR1

42 Crawford J, *The Constitution and the Environment* (1991) 13 Sydney L.Rev. 11 at p. 30. Quoted in the Report of the Senate Environment, Communications, Information Technology and the Arts Committee into *Commonwealth Environmental Powers*, May 1999, p 9.

> standards setting for the conservation of all heritage places at whatever level they are managed.[43]

2.61 Similarly, Ms Sullivan states:

> We need legislation which while not interfering with the states' proper jurisdiction allows the Commonwealth to encourage the protection of heritage places generally – in fact I would argue that unless the Commonwealth does show such national leadership, and unless heritage is treated as a national asset and responsibility (as has been recognised in the case of biodiversity) the Commonwealth's role in heritage protection may end up being reduced.[44]

2.62 Submissions argue that this role includes management of the cooperative role between governments and communities to ensure proper education and consultation[45] and that there is a public expectation that the Commonwealth actively set standards and monitors heritage protection.[46] There is also a view that a broad definition should be taken of 'national significance', based on the fear that some of the states and local governments may not be inclined, or have the expertise to properly protect local heritage places. The Norfolk Island Conservation Society, for example, states:

> A small island community would not be reliable and have the resources and political will to implement appropriate standards and meet specified criteria in terms of national values and responsibilities.[47]

2.63 Consequently, the new arrangements involve:

> Too much responsibility handed over to a small community where self interest and pecuniary interest prevail … .[48]

2.64 This view would therefore place the Commonwealth in the role of guarantor of minimum standards, particularly given the differing standards and definitions of heritage protection across the states and territories. Associate Professor Paul Adam states:

> While there has been an increase in heritage activity by state and local government, it is not clear how effective it is in most cases, and there are clear deficiencies (for example in NSW a number of Councils have yet to

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43 ACF, Submission 16, p 11.

44 Ms Sullivan, Submission 14, p 3. See also EDO, Submission 21, p 9.

45 ACNT, Submission 4, p 6.

46 EDO, Submission 21, p 8. EDO cite in evidence the *National Heritage Convention (1998)* and the *National Strategy for Australia's Heritage Places (1999).* See also for example, Heritage Council of Western Australia, Submission 26, p 2.

47 NICS, Submission 13, p 5.

48 NICS, Submission 13, p 9.

> complete their heritage inventories, and in some cases have only included built environment items to the exclusion of the natural environment).[49]

2.65 Dr Mosley believes that the states and territories have the major role in conservation,[50] especially where a state or territory government intends to provide an equal or better level of protection for the site, but also sees problems when state or territory governments do not act to protect heritage. Dr Mosley gives the example of Norfolk Island:

> There you have the case where the Norfolk Island government is very pro development and, since it first began this attempt, it has not been able to come up with its own legislation after trying for nearly 29 years. So there is little prospect of it providing the protection that already exists for sites which are on the Register of the National Estate … .[51]

2.66 While recognising the constitutional limitations, the Environmental Defender's Office argues that there are a broad range of options available to the Commonwealth to take the necessary leadership role:

> [T]he Commonwealth ought to be involved in monitoring and coordinating responsibility for heritage over all levels of government. State protections can be inadequate. All states and territories do have heritage laws, but they are of varying degrees. The Commonwealth should be involved in formulating best practice standards, be active in monitoring those heritage regimes of the states and generally take a national leadership position in heritage policy.[52]

2.67 And:

> There are other ways – through grants, through policy, through councils, through referral of powers – that the Commonwealth could remain very active in heritage protection if it wanted to. The point I want to make is that there will be ways under the Constitution to do that if the will was there.[53]

2.68 As such, these submissions conclude that the bills do not live up to the claims made in the Second Reading Speech to the Environment and Heritage Legislation Amendment Bill (No. 2) 2000, that:

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49 Associate Professor Adam, Submission 20, p 2.

50 Dr Mosley, *Proof Committee Hansard*, Canberra, 28 February 2001, p 11.

51 Dr Mosley, *Proof Committee Hansard*, Canberra, 28 February 2001, p 14.

52 Mr Marc Allas, *Proof Committee Hansard*, Canberra, 28 February 2001, p 2.

53 Mr Marc Allas, *Proof Committee Hansard*, Canberra, 28 February 2001, p 7.

> This national scheme harnesses the strengths of our Federation by providing for Commonwealth leadership while also respecting the role of the states in delivering on-ground management of heritage places.[54]

2.69 Conservation and heritage groups also raised two specific concerns at the implications of concluding the bilateral agreements envisaged under the EPBC Act.

2.70 First, there is concern at the extent to which bilateral agreements would see the decision making on matters of national significance devolved to the states. According to the Australian Conservation Foundation:

> One of the crucial flaws in the EPBC Act is the capacity for the Commonwealth Environment Minister to delegate approval powers. Whilst the delegation of assessment powers is supported on the basis that this can be a means of improving state assessment procedures, approval powers should remain the final responsibility of the Minister. Amendments should be introduced which remove the capacity to delegate approval powers and clearly require that State assessment methods be prescribed by legislation and at least as rigorous as Commonwealth methods.[55]

2.71 This point was expanded during hearings:

> We do support accreditation of state assessment regimes, but we support that through a mechanism that lifts up those state assessment regimes. So there should be an explicit proviso that the state assessment procedures should be at least the same for the Commonwealth. We do have some serious concerns that that is not the practice as is evolving underneath the EPBC Act. The Tasmanian bilateral, which is the only one for assessment which has been signed, is of a lesser standard than that provided for the Commonwealth in a number of areas and also is less than some of the undertakings given to the Senate by the Minister in recent debate on the passage of the regulation.[56]

2.72 Other environmental groups make a similar point:

> We do not support approval of bilateral agreements under which the Commonwealth can accredit state assessment *and approval* processes in certain circumstances. We believe it is inappropriate for Federal approval powers in relation to all matters of 'national' environmental significance – including national heritage places – to be devolved to the states. Approval decisions are highly discretionary in nature, and we are concerned that states and territories could make approval decisions based on state economic

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54 Environment & Heritage Legislation Amendment Bill (No. 2) 2000, Second Reading speech, p 1.

55 ACF, Submission 16, p 15.

56 Mr Connor, *Proof Committee Hansard*, Canberra, 28 February 2001, p 55.

> interests rather than national environmental interests. We also have major concerns as to the enforceability of bilateral agreements.[57]

2.73 Submissions therefore argue that accreditation of any state assessments must be preceded by certain minimum standards set by the Commonwealth and proper parliamentary scrutiny. In addition, there should be full consultation with stakeholders in the development of all assessment bilateral agreements.

2.74 Second, there is concern at the workability of the proposed regime given the uncertainty dominating discussions between the Commonwealth and the states:

> Clearly the success of the legislation will devolve [sic] to a significant extent on the ability of the Commonwealth to negotiate bilateral agreements with the states and territories. In the absence of jurisdictional co-operation the risk of a return to the divisive conflicts over heritage listings will be heightened.[58]

2.75 The Association of Mining and Exploration Companies (AMEC) argues that in any case, agreement should be reached prior to the legislation coming into force so there is certainty.[59]

Conclusions and recommendations

2.76 The Committee recognises the need to reform Australia's heritage protection regime, in order to strengthen the protection of the nation's heritage and to set out clearly the roles and responsibilities of each level of government.

2.77 The Committee appreciates that there are both significant strengths and weaknesses associated with the current regime. The Committee feels that one of the great strengths of the current regime is its comprehensive and inclusive approach to national heritage – an issue which is further discussed in Chapter 4.

2.78 In acknowledging some of the weaknesses of the current regime, the Committee does, however, feel the need to elaborate on the issue of duplication which has been raised predominantly in government submissions to the inquiry.

2.79 Two key points have been made with respect to this issue. Firstly, the duplication of sites on Commonwealth and state registers, and secondly, the duplication of protective regimes. In relation to the latter, the Committee finds that this argument is probably overstated given that under the current AHC Act, listing on the RNE binds Commonwealth agencies only. Hence, if a site is listed on both

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57 WWF, Submission 12, p 19. See also ACF, Submission 16, p 18; Mr Marc Allas, *Proof Committee Hansard*, Canberra, 28 February 2001, p 7; and ATSIC, Submission 25, p 19.

58 AMEC, Submission 9, p 10.

59 AMEC, Submission 9, p 11. See also Mr Layton (AMEC), *Proof Committee Hansard*, Canberra, 28 February 2001, p 41; and Sydney Water, Submission 7, p 3.

Commonwealth and state registers then only the protection provisions of state legislation apply.

2.80 The Committee also recognises that there is almost certain to be an issue of duplication associated with the proposed National List since it is likely to comprise sites already on state registers. Having parallel heritage regimes at both the Commonwealth and state level – which is entirely appropriate - will therefore lead to some level of duplication. This is furthermore to be expected in a federal system.

2.81 The Committee is concerned with the breakdown in Commonwealth/state relations over the COAG agreement and in relation to heritage protection more generally. The workability of the agreement is premised on an exchange of powers between the Commonwealth and the states. As we have seen, this has broken down in practice, and the states have indicated clearly their reluctance to provide the Commonwealth with the powers to fully administer places of national significance. The Commonwealth has also failed to bind itself to state and territory laws to ensure that both the actions of Commonwealth agencies and actions taken in relation to Commonwealth lands are covered by state/territory laws. The Committee considers that the Government must now move towards this agreed action and that it should bind itself to whichever law offers the maximum level of protection. (see Chapter 5).

2.82 The Committee strongly believes that heritage places must not be made to suffer for this stalemate and that it is entirely appropriate to continue working towards arrangements that will secure improved heritage outcomes. The Committee appreciates that the Government has tried to achieve this through these bills and to also implement the COAG Agreement on the Environment. The Committee, however, disagrees with the more limited role for the Commonwealth in heritage protection – focusing almost exclusively on sites of national heritage significance - as suggested in the COAG agreement. According to the Committee, the Government should retain a broader national leadership role. In practice, this means the retention and development of the Register of the National Estate as a definitive list of heritage places in Australia (as discussed in detail in Chapter 4). It also requires the continuing commitment of Commonwealth agencies to develop a national agreement on standards for the identification, assessment and management of heritage places. Importantly though, this process must be underpinned by the use of Commonwealth powers to raise overall standards, and 'avoid a lowest common denominator' approach. The Committee further notes that as uniform standards and comprehensive laws are developed, the mechanisms provided for in the EPBC Act will enable the Commonwealth to accredit an increasing proportion of state laws.

2.83 The Committee concludes that in the light of recent decisions of the High Court, the Commonwealth in fact has wide law making powers should it choose to exercise them, and it is likely that the Commonwealth government could take the broad leadership role in heritage protection advocated by many of the witnesses as well as the Committee. The extent to which it does so is therefore principally a political decision.

Recommendation 2.1

The Committee recommends that in order to strengthen the protection of Australia's heritage the Government should take a broader role in heritage protection than what is being proposed and hence that its efforts should not be limited to sites on the proposed National and Commonwealth lists.

Recommendation 2.2

The Committee recommends that the Government actively pursue measures to achieve common standards and benchmarks for the identification, assessment and management of heritage places Australia wide and that high standards and benchmarks are set in order to improve heritage protection outcomes.

Heritage protection in the EPBC Act

2.84 A general issue is the appropriateness of placing protection provisions for historic and indigenous heritage into an act whose primary purpose is specifically environmentally focused, as its name implies. At the same time, there is the danger that the corporate and legal experience of the operation of the existing dedicated regime will be lost, as Australia International Council on Monuments and Sites (ICOMOS) explain:

> The EPBC Act model may be suitable for environmental and biodiversity matters but this does not mean that it is either suitable or superior to the lessons provided by specific heritage legislation which has had the benefit of decades of operation.[60]

2.85 The Australian Conservation Foundation states:

> One of the major concerns is that, by attempting to integrate heritage protection within the EPBC Act, many important aspects of the unique requirements of heritage protection are neglected or omitted.[61]
>
> …
>
> [H]eritage has its own special requirements needing particular consideration if it is to be properly protected under an amended EPBC Act. It cannot be simply slotted in to the EPBC Act without significantly reducing or losing some of the strengths of the existing legislative arrangements. The resultant

60 Australia ICOMOS, Submission 17, p 2.

61 ACF, Submission 16, p 3.

> arrangements would be (and are, under the present Bill) well short of best practice and neglect the lessons learnt on heritage protection and legislation over the past 25 years.[62]

2.86 A similar point is made by the Hon Dr Barry Jones, representing Australia ICOMOS, who sees the bills reflecting a wider focus on natural heritage to the cost of cultural heritage:

> In our view the legislation is fatally flawed because it has the wrong model. It sees the heritage legislation as being an extension of environment protection and biodiversity conservation. These are admirable things in their own right and while they are absolutely appropriate for something like the Great Barrier Reef, for example, it is hard to see how they apply to the Sydney Opera House.[63]

2.87 Indigenous groups have similarly argued that placing indigenous heritage protection in the context of the EPBC Act is inappropriate as it causes duplication and confusion with the role of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. This matter is discussed in detail in Chapter 7.

2.88 In responding to these views, Mr Leaver of Environment Australia, notes that it was always the intent of the EPBC Act to provide an omnibus piece of legislation that would encompass the full natural, historical and cultural environment.[64]

Naming of the EPBC Act

2.89 A related issue is whether the name of the EPBC Act should be changed to reflect its new heritage content, as argued by a number of submissions.[65] Whereas currently, heritage protection is provided for in an expressly titled act – the *Australian Heritage Commission Act* – under the proposed regime, heritage will be completely subsumed into the EPBC Act. Submissions therefore argue that the Act should be renamed to something like the 'Environment Protection and Biodiversity and Heritage Conservation Act'.

Conclusions and recommendations

2.90 The Committee has considered the arguments that heritage protection, and in particular, cultural heritage, is fundamentally not suited to inclusion in the EPBC Act. However, the Committee feels that no compelling evidence has been put to suggest that the proposed arrangements would not work subject to amendments proposed in this report. The Committee would, however, like to stress that the successful

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62 ACF, Submission 16, p 4. See also Mr Connor, *Proof Committee Hansard*, Canberra, 28 February 2001, p 52; and Professor Adam, Submission 20, p 2.

63 The Hon Dr B Jones, *Proof Committee Hansard*, Canberra, 7 March 2001, p 88.

64 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 125.

65 Professor Lennon, Submission 11, p 4. See also WWF, Submission 12, p 16, ACNT, Submission 4, p 7; Heritage Council of Western Australia, Submission 26, p 2.

implementation of the AHC Act should not be lightly dismissed. Indeed, many of the recommendations the Committee has made in this report are based upon the successful operation of the AHC over the past 25 years.

2.91 In the view of the Committee, ultimately, there will always be difficulties in determining how to organise legislative instruments. In this case it appears as though the Government has made a legitimate policy decision to place all heritage protection under the one legislative roof.

2.92 The Committee is, however, mindful that given the recommendations made in this chapter and in Chapter 4 related to the retention of the Register of the National Estate and changes suggested in Chapter 3 to the Australian Heritage Council, that the Government may wish to reconsider the best means of organizing these legislative reforms. It may well be the case that it would be simpler and more appropriate to use the existing Australian Heritage Commission Act as the basis for legislative reforms. This would enable all national heritage protection provisions to be contained in the one Act. There may also be other options which still retain the AHC Act.

2.93 With respect to the naming of the proposed legislation, there are strong grounds to change the title of the EPBC Act to reflect the important heritage protection role it would have if passed. As submissions have argued, the current title gives no indication of heritage content, which may serve to implicitly downplay the significance of heritage protection. For practical reasons also, the title of the legislation should reflect its functions.

Recommendation 2.3

The Committee recommends that the bills provide for the renaming of the *Environment Protection and Biodiversity Conservation Act* to explicitly recognise the Act's new heritage protection role.

Coverage of the bills

2.94 Submissions to the Committee have raised two further issues: the extent to which the bills cover and strengthen legal protection for movable heritage and shipwrecks.

Movable heritage

2.95 Both Mr Browning and the Australian Council of National Trusts state the importance of ensuring the protection of movable heritage, which they consider is not included in this legislation.[66]

66 Mr Browning, Submission 2, p 1 and ACNT, Submission 4, p 8.

2.96 The Committee agrees with the importance of protecting movable heritage but makes two observations. First, as noted in Chapter 1, movable heritage is protected by a Commonwealth Act, the *Protection of Movable Heritage Act 1986*, which is administered by the Department of Communications, Information Technology and the Arts. Under the proposed regime, this Act would remain the principal source of protection for movable heritage. However, movable heritage would be covered by the bills to the extent that it is associated with or connected to a heritage place.[67]

2.97 The Committee appreciates concerns that the *Protection of Movable Heritage Act 1986*, offers only limited protection, but considers that attempts to strengthen the protection afforded to Australia's movable heritage should primarily be made through amendments to this Act.

Shipwrecks

2.98 Both the Australian Institute for Marine Archaeology (AIMA) and the Australian Council of National Trusts also made submissions in relation to the importance of protection of shipwrecks. The National Database of Australian Shipwrecks currently encompasses over 6,500 shipwrecks. AIMA is concerned:

> [T]hat the present review of the Commonwealth Heritage Legislation does not include the Historic Shipwrecks Legislation. This implies that shipwrecks are not part of Australia's heritage and AIMA is concerned that this will further marginalise shipwrecks as part of our heritage, particularly in the eyes of the Australian public and government agencies.[68]

2.99 AIMA also points to the particular difficulties involved in the protection of historic shipwrecks:

> There are no owners that put money into them, as in the built heritage, there are only a scant number of community groups that do anything with regard to maritime heritage—a handful of government and community museums, compared to the hundreds of general heritage museums and groups.[69]
>
> At the same time, recreational diving and both recreational and professional fishing have a considerable impact on historic shipwrecks. Much of this impact is due to a lack of awareness of the impact of their activities. With fishing activity, anchors and trawl nets often cause severe damage and dispersal of shipwrecks without the owner being aware of its presence in the first place. In other cases, fishing is being carried out illegally on historic shipwrecks intentionally but due to a lack of resources to monitor this activity, it continues undisturbed.[70]

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67 Clause 40 of the Bill, amending the definition of 'place' in the EPBC Act, section 528.

68 Australian Institute for Marine Archaeology, Submission 6, p 1. See also ACNT, Submission 4, p 8.

69 Australian Institute for Marine Archaeology, Submission 6, p 3.

70 Australian Institute for Marine Archaeology, Submission 6, p 3.

2.100 The Committee appreciates the particular difficulties involved in historic shipwreck protection. However, the Committee notes that, as with movable heritage discussed above, the principle protection for shipwrecks is provided by the Commonwealth *Historic Shipwrecks Act 1976*. The current bills are not intended to displace this primary act, but rather to add a layer of additional protection to those particular shipwrecks that are considered to be of national significance and are listed on the Commonwealth or National Heritage lists.

2.101 For these reasons, the Committee **concludes** that proper consideration has been given to both these issues in the bills.