

CHAPTER 4

THE FUTURE OF THE REGISTER OF THE NATIONAL ESTATE AND OTHER TRANSITIONAL ARRANGEMENTS

The Register of the National Estate represents a remarkable collective effort around Australia, which stems from federal government, state governments, territory governments, local governments, and all kinds of community bodies. I think it is a very significant effort to have produced that register.¹

Introduction

4.1 The Register of the National Estate (RNE) was established under Part IV of the *Australian Heritage Commission Act 1975* and forms one of the central institutions of the existing heritage protection regime, listing approximately 13,000 sites. Although it offers limited legal protection,² listing on the RNE has come to hold considerable significance. Under the current proposals the RNE will lose its statutory basis³ and will be replaced with the dual National and Commonwealth Heritage Lists. These lists will not, however, cover all the sites on the RNE. According to the Minister, the RNE will be maintained as an administrative tool, and ‘the information on the register will continue to be publicly available as a heritage information resource’.⁴

4.2 Submissions to this inquiry have raised two main issues in relation to the RNE. First, the importance of retaining the RNE as a national heritage inventory and statutory list, and second, the apparent absence of transitional protection for places already listed on or nominated for the RNE.

The importance of a national heritage inventory

4.3 A point stressed by many submissions is the importance of maintaining the RNE or developing some similar national repository of heritage information. As the Victorian government explained:

While offering little or no statutory protection for a vast number of sites contained within it, the RNE has, for many in the community, offered the definitive inventory of Australian heritage places, regardless of their level of significance. With the introduction of new Commonwealth legislation and the cessation of the RNE as a statutory register, the community will expect a

1 Professor Yencken, *Proof Committee Hansard*, Canberra, 28 February 2001, p 18.

2 See Appendix 5.

3 The AHC is created by Part IV of the AHC Act which would be repealed in its entirety by Schedule 1 of the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000.

4 Minister for the Environment & Heritage, Senator the Hon Robert Hill, Second Reading speech, p 2.

replacement. It is the responsibility of the Commonwealth to ensure that this occurs.⁵

4.4 The central justification for retaining the RNE is that with widely diverse state and territory legislation and associated protection regimes, there is no national framework for recording heritage. Each state and territory uses different definitions of heritage, and provides different levels of recognition to historic, natural and indigenous heritage. As such, there is a need for a 'national register or list representing all key strands of Australia's natural and cultural history which acts as a signifier of important values to all Australians and an active statutory body charged with responsibilities to help protect, promote, educate, train and research':

None of these roles can be substituted by heritage bodies, registers and activities in the states and territories. There is no equivalent to the Register of the National Estate in any state or territory. An amalgamation of all existing state and territory lists would not replicate the listings on the Register because state lists do not cover the full spread of cultural and natural places on the Register.⁶

4.5 A similar point is made by the ACF:

No state lists fully cover and include the range of heritage places (natural, indigenous, historic) that make up the RNE. Some state lists specifically exclude coverage of certain heritage places, eg natural. Hence, it may be quite some time (if ever) until the state lists are as comprehensive as the RNE and include all of the places presently identified by the Australian Heritage Commission, through the RNE, as having heritage significance.⁷

4.6 Mr Marshall, of Australia ICOMOS, elaborated on this point:

That is sort of true, at least in theory, for the historic environment. But there are not similar registers at state levels in all jurisdictions for the natural environment nor for Aboriginal or indigenous sites. There are certain inventories for indigenous sites in most states and territories but they are not registers in the sense that we are talking about.⁸

4.7 Dr Marsden, of the Australian Council of National Trusts, provided an interesting example of the uneven nature of state and territory lists:

I thought that the one single, obvious building in each state that would probably leap to everybody's mind that should be on all heritage registers is Parliament House in each state. I checked that, using the wonderful

5 Victorian government, Submission 31, p 7.

6 Professor Yencken, Submission 10, p 4.

7 ACF, Submission 16, p 9.

8 Mr Marshall, *Proof Committee Hansard*, Canberra, 7 March 2001, p 92. See also ACPHA, Submission 30, p 3.

Australian Heritage Places Inventory, which is online. It is very interesting because all parliament houses, and old parliament houses, in each state capital and in Canberra are in fact on the RNE. However, they are not all on the appropriate state registers. They are on both in Adelaide, Brisbane, Hobart and Melbourne; they are not in New South Wales or Perth; and they are on the nominated list, not yet gazetted, for the ACT heritage register. That gives you an idea of one single, iconic building that is not yet fully protected under state legislation.⁹

4.8 The RNE plays an associated role in providing a central research base for Australian heritage; a persuasive conservation role on listed places,¹⁰ and a crucial resource for the preparation of the State of the Environment Reports:

[I]f the Commonwealth intends, as it should, to continue to use heritage indicators in its State of the Environment reporting, then the continued development of the RNE is essential as the state lists are not comprehensive enough to use for this purpose. This situation will continue to exist until the states and territories all have their own comprehensive Registers, covering all natural, indigenous and historic heritage in the one list.¹¹

4.9 Submissions also note that to allow the RNE to lapse would be a waste of the enormous resources that have been invested into its development:

There is a real problem with the disappearance of the Register of the National Estate. ... the RNE is the only database which is nationwide and assesses places in a comparable way at a national level. This tool cost millions of dollars to develop over 25 years and to upgrade it into comparable computer bases and, it is an essential tool for developing the National List, both now and in the future.¹²

4.10 ATSIIC go further, suggesting that:

This signals to the electorate that the 25 years of work conducted by the AHC to compile a formidable national list of 13,000 sites all over Australia, that many Australian's would be proud of, was of little value other than 'for information only'.¹³

4.11 Two suggestions were offered of potential means by which the Register of the National Estate could be maintained within the proposed national heritage regime. One is to retain the RNE as an ongoing national database. This would not only include existing RNE and state register listings, but also incorporate new listings in

9 Dr Marsden, *Proof Committee Hansard*, Canberra, 7 March 2001, p 78.

10 Professor Lennon, Submission 11, p 6.

11 ACF, Submission 16, p 9.

12 Professor Lennon, Submission 11, p 5. A similar point is made by Ms Sullivan, Submission 14, p 4 who claims the development cost has been half a billion dollars.

13 ATSIIC, Submission 25, p 14.

cases where the AHC assess that a nominated place has heritage significance falling short of the national or Commonwealth significance required for listing in the National or Commonwealth Heritage Lists. Professor Lennon suggests that:

places assessed which have significance under the theme or in the region being assessed but which do not reach the threshold of national significance could be systematically added to the national data base and referred to the states for listing if they considered it appropriate.¹⁴

4.12 The Committee notes that the Department of Environment and Heritage is developing, with the Minister's approval, the National Heritage Places Inventory, which will be an electronic assemblage of all the statutory heritage lists in Australia:¹⁵

... all the places currently on the Register of the National Estate will go into the inventory.

In addition, there will be all of the places which are listed by local authorities and by state authorities, so that you will have a comprehensive listing of all places of any heritage significance around the country on one databank which will be managed and controlled by the Council. That will then have the benefits of access. We will ensure that we will not lose the information that is contained in the Register of the National Estate.¹⁶

4.13 The other option is to retain the Register of the National Estate as a statutory list, whilst developing the National List as a supplement to it. Professor Yencken told the Committee that the US arrangements provide a useful model for such a system:

the US National Historic Preservation Act provides a model for the way that the new proposed national heritage list might be very successfully added to the existing Register of the National Estate. In the United States there is a national register of historic places which contains, as I said, 73,000 places. In addition to that, there is a set of national historic landmarks. There are 2,300¹⁷ places which are designated as national historic landmarks. So there is a dual system there which would, I think, be a very effective model for the way in which we should proceed in the future.¹⁸

4.14 The protective provisions for the US National Register in the US National Historic Preservation Act are nearly identical to those of the *Australian Heritage Commission Act*. Professor Yencken pointed out that the US Register is much larger than the Register of the National Estate and that as is the case in Australia, the American States have also developed their own parallel heritage regimes.

14 Professor Lennon, Submission 11, p 5. See also WWF, Submission 12, p. 5

15 Ms Sullivan, Submission 14, p 5.

16 Mr King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 111.

17 The figure quoted in Hansard of 230,000 places has been subsequently amended to 2,300 places.

18 Professor Yencken, *Proof Committee Hansard*, Canberra, 28 February 2001, pp 18-19.

4.15 According to Professor Yencken, this wider national list would therefore serve as:

an indicator, to the whole nation, of the places that have real significance for whatever reason – whether it is because they are natural, cultural, prehistoric or whatever – so that there is a sense of the way in which our history has developed and has been given expression through these places, buildings, structures or whatever they may be.¹⁹

Conclusions and Recommendations

4.16 The Committee concludes that there is a compelling need for the ongoing development of the Register of the National Estate as a statutory list, essentially because of its role in defining the nation's heritage and its unique coverage of all places of heritage significance. The Committee concurs with observations that the RNE overcomes the parochialism of state and territory heritage regimes, which do not cover the same breadth and category of sites.

4.17 Through submissions and hearings, the Committee has come to appreciate the significance of the RNE to the Australian community and the considerable resources in terms of both time and effort that have gone into its development. These resources would be partially wasted if the RNE was to cease functioning, as no project with its status or scope would replace it.

4.18 The Committee considers it appropriate that the ongoing development of the RNE remain the primary responsibility of the Commonwealth. As discussed in Chapter 2, the Committee also considers it appropriate that the Commonwealth be involved in the development of the proposed National and Commonwealth lists.

Recommendation 4.1

The Committee recommends that the Government retain the Register of the National Estate and that the Register continues to be actively developed and expanded.

Improving the statutory protection of sites on the RNE.

4.19 As has been previously discussed, there is general concern about the limited protection offered to those sites on the RNE which are located on private or commercially owned land (for more details, see discussion in Chapter 2). This concern is especially heightened for those places on the RNE which are not also listed on state and local registers, and hence are afforded little statutory protection.

4.20 In the view of the Committee, one of the simplest options to improve the protection of sites on the RNE would be to develop a systematic program to ensure

19 Professor Yencken, *Proof Committee Hansard*, Canberra, 28 February 2001, p 24.

that all sites on the Register are also listed on other state or local lists. The COAG process should also work towards developing stronger, more uniform protection at the state and territory level.

Transitional protection of RNE places

4.21 As noted above, the Committee is of the view that the Register of the National Estate should be retained and further developed. The Committee is nonetheless mindful that it should provide advice on the preferred course of action with respect to the transitional protection of RNE places in the event that other options are pursued.

4.22 The abolition of the statutory basis of the RNE raises the concern that this will consequently lead to the loss of any protection for RNE listed places. As noted above, there are currently over 13,000 places listed on the RNE, and the number of places placed on either the National or Commonwealth Heritage Lists is intended to be much smaller. Many groups fear this loss of protection:

ATSIC and its constituents are concerned that lifting this minimal protection that sometimes is viewed as ‘moral protection’, will potentially open the flood gates for damage to heritage sites and their disposal to third parties without any protection apart from questionable implied protections from the broader definition of the ‘environment’ in the EPBC Act.²⁰

4.23 According to Professor Lennon:

[M]any sites especially natural sites will fall through the net because the states have no legislation to protect them and putting them on the Register was the only way of giving them any recognition. This is particularly the case for natural areas with social or community values such as particular bits of forest, fossil sites etc.²¹

4.24 ACF offer as an example, those:

[N]atural places that are on private land, identified as heritage by listing on the RNE, but not included – and not able to be included in some states – on state heritage lists. Until such anomalies are corrected, it is important/imperative that the RNE continues to exist and be developed.²²

4.25 The Penrith City Council note that a major consequence of the bills is that the current protection available under the AHC Act will no longer bind the Commonwealth:

This will leave a legislative vacuum, as no places with national estate values will have protection from the development aspirations of Commonwealth

20 ATSIC, Submission 25, p 13.

21 Professor Lennon, Submission 11, p 5. See also EDO, Submission 21, p 4 and ATSIC, Submission 25, p 13.

22 ACF, Submission 16, p 9.

entities that own such places. In this regard all items currently listed on the Register of the National Estate should be afforded the same protection as currently exists under section 30 of the Australian Heritage Commission Act until there is a rigorous review of all items on the Register for potential inclusion on the National Heritage List and Commonwealth Heritage List.²³

4.26 Dr Mosley also notes that the status of places nominated for inclusion on the RNE is unclear:

There is a particular injustice involved with regard to the 7,000 sites nominated but not assessed for the RNE. Some of these will be of national importance but the nomination will have to be done all over again. The legislation should provide for the consideration of the data already compiled in connection with the nominations and the evaluations.²⁴

4.27 Many submissions point to the lack of arrangements to retain protection for listed places by transferring the listing to other Commonwealth, state or territory lists. The EDO argue:

The amendments do not provide any clear structures which would guarantee the existence of state heritage schemes (including registers and determining bodies) of equivalent strength which would ensure the protection of those places which, whilst not considered to have national heritage values, have historic/cultural/natural/indigenous values which are recognised at state level.²⁵

4.28 A similar point is made by AMEC:

[T]here are no transferral or referral mechanisms in the bills which provide for the states and territories and local government to take responsibility for the 12,000 or more places currently on the Register of the National Estate ... the Commonwealth should endeavour to ensure that the states, territories and local government assume an appropriate level of responsibility for the places listed on the Register into the future.²⁶

4.29 Alternatively, ATSIC argue for the creation of transitional arrangements that would see all RNE properties transferred to the new lists, pending final determinations.²⁷

4.30 The EDO note that there is provision for the creation of regulations to deal with any transitional issues arising as a result of the repeal of the *Australian Heritage Commission Act 1975 (Cth)*,²⁸ but observe that:

23 Penrith City Council, Submission 23, p 5.

24 Dr Mosley, Submission 5, p 3.

25 EDO, Submission 21, p 4. See also WWF, Submission 12, p 4.

26 AMEC, Submission 9, p 15.

27 ATSIC, Submission 25, p 14.

Simply relying on regulations to resolve this critical issue is not satisfactory, given the obvious public concern over the fate of the Register of the National Estate.²⁹

Departmental view – the protection of RNE properties

4.31 In addressing these concerns, Environment Australia argues that the proposed regime will not leave places on the RNE without protection. According to the Department, taking actions that have an impact on an RNE listed place is sufficient to trigger sections 26 and 28 of the EPBC Act which create a range of offences relating to actions involving Commonwealth land, or actions taken by the Commonwealth that have a ‘significant impact on the environment’. Environment is defined under section 528 of the EPBC to be:

- (a) Ecosystems and their constituent parts, including people and communities; and
- (b) Natural and physical resources; and
- (c) The qualities and characteristics of locations, places and areas; and
- (d) The social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).

4.32 In the Department’s view, ‘heritage’ comes within the definition of ‘environment’. Consequently, listing on the RNE or an equivalent state list is an indicator of heritage values for the purpose of the definition of the term ‘environment’. The intended outcome of these changes is explained by Mr Bruce Leaver, of Environment Australia:

The RNE will continue to be used for the protection of heritage under section 28 of the EPBC Act and, through section 26 of the act, protect Commonwealth heritage as the Commonwealth heritage list is set up. I recall comments that there will be a six-month gap between the commencement of the act amendments and the Commonwealth places being listed on the Commonwealth list. The concerns are unfounded. The heritage on all those places has been protected under the EPBC Act since July last year. The register will also be used in joint projects with the states to identify gaps on state heritage lists. Already, New South Wales, Queensland and Western Australia have indicated an enthusiasm to undertake such an identification project, and I expect the other states will follow suit.³⁰

4.33 The AHC mirrors this view:

28 Section 10 of the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 (Cth).

29 EDO, Submission 21, p 4.

30 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 120.

The Commission however is aware that the RNE will continue as a technical resource for the operation of section 28 of the EPBC Act and thus places on the RNE will enjoy a greater level of protection than is the case under section 30 of the AHC Act.³¹

4.34 However, according to a number of submissions, this protection is not sufficiently clear, and should be made explicit:

This can be achieved by including heritage in sections 26 and 28 of the EPBC Act and in the definitions under section 528. Although it could be argued that places in the RNE presently have the protection of sections 26 and 28 of the EPBC Act, it is imperative that places included in the RNE are explicitly included in the definition of environment and covered by sections 26 and 28 of the EPBC Act. This can be done simply by adding ‘heritage’ after ‘the environment’.³²

Conclusions and recommendations

4.35 The Committee appreciates concerns that the removal of the statutory basis of the RNE, will consign heritage places on the register into unprotected oblivion.

4.36 However, as has been recognised, the current protection of places listed on the RNE is limited since the AHC Act imposes limited requirements on Commonwealth agencies, and none at all on states, corporations or private owners.

4.37 The Committee appreciates the advice of the Department that places listed on the RNE will be protected by the EPBC Act, but it does nonetheless see advantages in clarifying the protection offered by the EPBC Act. While accepting that the Act will operate in the way indicated by the Department, it is important to those using and affected by the Act to clearly understand its operation, particularly where criminal penalties apply. The Committee therefore concludes that the definition of ‘environment’ in the EPBC Act should be amended to explicitly include ‘heritage’. The Government should also consider including a general definition of ‘heritage’ within the Act.

Recommendation 4.2

The Committee recommends that the definition of ‘environment’ in section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* be amended to include the term ‘heritage’.

31 AHC, Submission 8, p 3.

32 ACF, Submission 16, p 7. See also WWF, Submission 12, p 4; and Ms Chapple, *Proof Committee Hansard*, Canberra, 28 February 2001, p 30.

