The Parliament of the Commonwealth of Australia

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

Australian Heritage Council Bill 2000

Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000

Report of the Senate Environment, Communications,

Information Technology and the Arts References Committee

May 2001

ISBN 0 642 71127 5

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TABLE OF CONTENTS

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May 2001

LETTER OF TRANSMITTAL

Senator the Hon Margaret Reid
President of the Senate
Parliament House
Canberra ACT 2600

Dear Madam President

Pursuant to Standing Order 38, I present to you the report of the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, entitled *Inquiry into the Environment and Heritage Legislation Amendment Bill (No. 2) 2000, Australian Heritage Council Bill 2000 & Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000*, together with transcripts of evidence, submissions (35), tabled and additional documents and written answers to questions on notice.

Yours sincerely

Senator Lyn Allison
Chair

RECOMMENDATIONS

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.

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.

Recommendation 3.1

The Committee recommends that section 5 of the Australian Heritage Council Bill 1999 be amended to broaden the roles of the Council to reflect those of the existing Commission set out in section 7 of the *Australian Heritage Commission Act 1975*, and in particular to enable the Council to act both on its own motion and on the request of the Minister.

Recommendation 3.2

The Committee recommends that the Australian Heritage Council Bill 2000 be amended to include the reporting powers of the Commission provided for under section 7(d) of the *Australian Heritage Commission Act 1975*.

Recommendation 3.3

The Committee recommends that section 324Q of the Australian Heritage Council Bill 2000 be amended to require the Minister to consult with the Council before creating, amending or revoking management plans for a national heritage place. If the Minister does not follow the Council's recommendations, the Minister should publish his or her reasons in the Government Gazette.

Recommendation 3.4

The Committee recommends that the Government amend section 7 of the Australian Heritage Council Bill 1999 to retain the qualifications required for the present Australian Heritage Commission in section 12(4) of the *Australian Heritage Commission Act 1975,* or that it adopt the approach used to select members of the Biological Diversity Advisory Committee under the EPBC Act.

Recommendation 3.5

The Committee recommends that the Government give further consideration to the size of the Heritage Council and whether its membership of seven it adequate to deal with its roles and responsibilities.

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.

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'.

Recommendation 5.1

The Committee recommends that the Government incorporate all heritage properties on Commonwealth land that appear on the Register of the National Estate into the Commonwealth Heritage List.

Recommendation 5.2

The Committee recommends that Commonwealth heritage places should be recognised as matters of national environmental significance.

Recommendation 5.3

The Committee recommends that the Minister should release the Commonwealth Heritage Values criteria, and the Management Principles in draft or final form, before any final debate of the bills takes place.

Recommendation 5.4

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require the release, on request, of AHC assessments of heritage values and listing.

Recommendation 5.5

The Committee recommends the Government consider amendments to sections 324J and 341J of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 that would serve to either clarify the exact meaning of the phrase 'in the interests of Australia's defence or security', and require that decisions to remove a place from a Commonwealth or National Heritage List be executed by disallowable instrument.

Recommendation 5.6

The Committee recommends that the Government amend the bills to require Commonwealth agencies to implement a heritage inventory of their property portfolios that will properly identify and assess heritage values. Commonwealth agencies should be further required to review their inventories at least every five years.

Recommendation 5.7

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to prepare and maintain a heritage strategy for the management of their heritage places as was recommended by the Schofield Report.

Recommendation 5.8

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to undertake a survey of the heritage values of all newly acquired properties in accordance with standards and guidelines provided by the Australian Heritage Council.

Recommendation 5.9

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require reviews of management plans for both the National and Commonwealth Heritage Lists every five years.

Recommendation 5.10

The Committee recommends that the Government consider broadening the reporting requirements to include the range of matters suggested by submissions.

Recommendation 5.11

The Committee recommends that Commonwealth Departments and agencies detail the implementation of their heritage strategies in their annual reports.

Recommendation 5.12

The Committee recommends that the Government give further consideration to the range of measures offered to assist the owners of heritage properties including grants and tax and other concessions.

Recommendation 5.13

The Committee recommends that sections 324Y and 341ZA of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to enable Commonwealth funding assistance to any heritage place.

Recommendation 5.14

The Committee recommends that the Commonwealth Government give priority to negotiations with the state and territory governments that will clarify the role and extent of Commonwealth Government funding in relation to overall heritage protection.

Recommendation 6.1

The Committee recommends that the Government consider means to ensure that the range of actions triggering assessment under the *Australian Heritage Commission Act 1975* are also assessed under the proposed regime, especially with regard to the sale of Commonwealth properties and to the assessment of grants.

Recommendation 6.2

The Committee recommends that the Government consider additional administrative means to protect Commonwealth Heritage List places upon sale or disposal, incorporating a range of methods, including listing, to ensure the preservation of these properties.

Recommendation 6.3

The Committee recommends that the Government table the proposed definition of 'significant impact' in relation to natural heritage places, before any further debate on the bills takes place.

Recommendation 6.4

The Committee recommends that the Government place the definition of 'significant impact' in regulations created pursuant to the EPBC Act.

Recommendation 6.5

The Committee recommends that in framing the definition of 'significant impact' for heritage places, in the regulations, specific consideration should be given to including impacts caused by cumulative actions.

Recommendation 6.6

The Committee recommends that for places on the Commonwealth Heritage List, the Government include in the definition of 'significant impact' the neglect of the place.

Recommendation 6.7

The Committee recommends that the Government specifically addresses the issue of the neglect of places on the Register of the National Estate and National Heritage List through the adoption of measures such as management plans and grants funding.

Recommendation 6.8

The Committee recommends that sections 15B and 15C of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to prohibit any significant impacts on 'a heritage place or its heritage values'.

Recommendation 6.9

The Committee recommends that the Government consider incorporating a formal analysis of options and alternatives into section 341Y of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000.

Recommendation 7.1

The Committee recommends that the Government provide full details about the relationship between indigenous heritage protection in the proposed EPBC regime and the ATSHIP Act prior to the Senate's consideration of the bills. Indigenous people should be given the opportunity to comment on the Government's response.

Recommendation 7.2

The Committee recommends that the Government provide a full response to the recommendations contained in the Evatt Report.

Recommendation 7.3

The Committee recommends that the Government investigate with indigenous people the appropriateness of placing all indigenous sites currently on the RNE onto the Commonwealth List.

Recommendation 7.4

The Committee also recommends that the Government engage in further consultations with indigenous people about the best means to ensure the long term protection of heritage of significance to Aboriginal people.

Recommendation 7.5

The Committee recommends that the Government take appropriate steps to ensure that Australia's indigenous heritage protection laws reflect the principles and rights embodied in international legal instruments.

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.*[1]

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.[2] 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.[3]

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.[4]

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

4 Environment and Heritage Legislation Amendment Bill (No. 2) 2000, p 14.

the nomination of their decision not to list the place and of the reasons for their decision.[5]

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.[6]

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.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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.[12]

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'.[13]

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.[14]

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.[15]

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'.[16]

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.[17]

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.[18]

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*;

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*.[19]

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'.[20]

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'.[21]

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.

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[22]

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*,[23] 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:[24]

- 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:[25]

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.

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.[26]

26 ACF, Submission 16, pp 4-5.

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:
>
> - 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.
>
> 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.
>
> 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.

CHAPTER 3

THE AUSTRALIAN HERITAGE COMMISSION

Introduction

3.1 The bills involve a significant change in the key expert body tasked with advising the Commonwealth Minister for the Environment and Heritage and administering the legislation. The abolition of the Australian Heritage Commission and its replacement with the Australian Heritage Council (the 'Council') has met with criticism in relation to three key matters: the scope of the role of the Council; its powers to make determinations on heritage status; and its membership. These are discussed in turn.

The role of the Australian Heritage Council

3.2 The functions of the AHC are set out in section 7 of the existing *Australian Heritage Commission Act 1975*:

> (a) on its own motion or on the request of the Minister, to give advice to the Minister, on matters relating to the national estate, including advice relating to:
>
> > (i) action to identify, conserve, improve and present the national estate; and
> >
> > (ii) expenditure by the Commonwealth for the identification, conservation, improvement and presentation of the national estate; and
> >
> > (iii) the grant of financial or other assistance by the Commonwealth for the identification, conservation, improvement or presentation of the national estate;
>
> (b) to encourage public interest in, and understanding of, issues relevant to the national estate;
>
> (c) to identify places included in the national estate and to prepare a register of those places in accordance with Part IV;
>
> (d) to furnish advice and reports in accordance with Part V;
>
> (da) subject to Part VA, to administer the National Estate Grants Program, being the program devised for the grant by the Commonwealth, in accordance with that Part, of financial assistance to the States and internal Territories and to approved bodies for expenditure on National Estate projects;

(e) to further training and education in fields related to the conservation, improvement and presentation of the national estate;

(f) to make arrangements for the administration and control of places included in the national estate that are given or bequeathed to the Commission; and

(g) to organise and engage in research and investigation necessary for the performance of its other functions.

3.3 This can be compared with section 5 of the Australian Heritage Council Bill 1999, which defines the new Council's functions as:

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

(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*.[1]

3.4 There are two striking differences between these provisions. The first is the extent to which the bills remove the capacity of the Council to act on its own accord, instead requiring the direction of the Minister. Thus, the Council will no longer receive nominations for listing, and the Council must not undertake an assessment of a place's National/Commonwealth Heritage Values unless the Minister asks it to do so. Equally, if someone nominates a place for heritage listing to the Minister, yet the Minister for whatever reason decides not to forward the nomination to the Council, the

1 Australian Heritage Council Bill 2000, p 3.

Council is not permitted to undertake any assessment of that place's Heritage Values.[2] The second is the narrowing of the broader functions of the proposed Council in contrast to that of the existing Commission.

3.5 This Bill therefore serves to decisively alter the independence of the key administrative heritage body. In comparing these differences, the Australian Conservation Foundation comments:

> If the Commonwealth is to play a leading role in heritage issues, including best heritage practice, and have a council that has credibility and status, it is important that these duties be written into the functions of the new Council.
>
> Furthermore, these functions and duties must be able to be undertaken by the Council of its own volition and without requiring specific direction or request from the Minister (as required under the present AHC Bill). The Council cannot be restricted to acting only at the request of the Minister.[3]

3.6 The Environmental Defender's Office (EDO) stated:

> I think it is fair to say that these amendments give the bulk of the powers to the minister. Our concern is that may not be the most healthy recipe for heritage protection into the future. Heritage in some sense is a political issue but primarily it should be a technical issue: Does this have cultural aesthetic value to the community? Heritage can be very prone to political pressure and political mood swings, and there is a sense that it needs to be raised above that.[4]

3.7 Professor David Yencken, the foundation Chair of the Australian Heritage Commission, argues that the change is unjustified, with no evidence to suggest that the Commission has misused its powers:

> I think it is the view of all of the people who are making this joint submission that, given that the commission and its act have been reviewed some seven times over this period – three times in my incumbency – and the invariable conclusion has been, in basic principle, that the commission and its processes are worthy to be retained, the fact that we now have 25 years of experience should not be lightly cast aside.[5]

3.8 The Australian Council of National Trusts believe that the model proposed in the bills is also a fundamentally dangerous one:

> If one strikes a time when a minister is less keen to receive independent objective advice, then a body such as the Heritage Council will not be asked

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2 EDO, Submission 21, p 6.

3 ACF, Submission 16, p 12.

4 Mr Marc Allas, *Proof Committee Hansard*, Canberra, 28 February 2001, p 4.

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

> to give advice. Hence one of the principal concerns of the National Trust is that the structure that is set out in these bills will result in a council which potentially will be inactive. Whether it is going to be so or not in the future, none of us can tell because the intention of one minister compared to another over time will vary.[6]

3.9 The example was given during hearings of the Victorian Mineral Resources and Development Act, which has:

> … a whole series of sections, about the Environment Advisory Committee, which has a whole range of statutory functions but it can only become active if the minister asks it to give advice – and it has not met for four years, under both governments. It has not met for four years, so none of the statutory functions of the Environment Advisory Committee under that act have been performed, because the ministers, in their wisdom, have decided they could do without it.[7]

3.10 The EDO commented particularly on two aspects of the Council's restricted role. First is that under sections 324D and 341D, the public may nominate a place for inclusion in the National/Commonwealth Heritage List. The nomination, however, may be rejected by the Minister without any consideration by the Australian Heritage Council:

> At the very least, the Council should be able to make a preliminary assessment of the merits of a nomination, prior to any determination by the Minister.
>
> Nominations should be forwarded as a matter of course to the Australian Heritage Council as an independent body with expertise in heritage for their consideration of the nomination's merits. … This approach is consistent with that taken in relation to the nomination process for threatened species under the EPBC Act.[8]

3.11 Secondly, the EDO criticise sections 324G(4) and 341G(4) which allows the Minister to ask any person (with appropriate qualifications or expertise) to assess the merits of any comments received by the Minister on a proposed place for the National Heritage List:

> This provision is unnecessary and highly discretionary.
>
> There is no sound policy reason that the Network is aware of that would explain why the Australian Heritage Council, as '*an independent statutory body to advise on the Commonwealth's heritage responsibilities*' should not

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6 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 74.

7 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 82.

8 EDO, Submission 21, p 11.

> be primarily responsible for this function. By creating an ability to bypass the Council, this provision has the ability to undermine the Council's role.
>
> It would also potentially allow the Minister to ask, for example, the proponent or their consultants to assess the merits of the comments received, if the Minister deemed that they had 'appropriate qualifications or expertise'. This is clearly unacceptable.[9]

3.12 Many submissions therefore argue for the need to preserve a broad and independent role for the Council, including wide proactive and discretionary powers to promote national leadership and coordination. Thus, according to the Australian Council of National Trusts:

> In the crucial policy, standards setting, research, promotion and public education areas the new Council should act as an independent, proactive body similar to the present Australian Heritage Commission.[10]

3.13 Mr Peter King, Chair of the AHC, rejects criticisms that new Australian Heritage Council will not be an independent body:

> … the council has several obligations, which are discrete and confer very significant powers upon the body, which are much greater than the current commission has. For example, once a nomination has been put forward, there must be a referral by the minister to the council within 20 business days. That is section 341D. The council itself may make nominations. It is an absurd proposition to suggest that the council is not independent if it has the right – under this legislation, as proposed – to make a nomination itself. That means it has independent status to act of its own accord. That is subsection 324D(5).[11]

3.14 Mr Bruce Leaver, Executive Director of the AHC, also rejected the criticism of the Environmental Defender's Office in relation to the capacity of the Minister to seek additional comments:[12]

> That provision is put in the act as a natural justice and procedural fairness issue where the council itself has nominated a place for listing. It would be unfair in a judicial sense for the council then to be judge and jury – and I think the mining industry body referred to this – and assess comments made on their own nomination. It was considered essential that under circumstances where there was a conflict of interest and natural justice and

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9 EDO, Submission 21, p 12.

10 ACNT, Submission 4, p 5. See also Penrith City Council , Submission 23, p 3; Victorian government, Submission 31, p 3, and Submission 30, Australian Council of Professional Historians Association, p 3.

11 Mr Peter King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 110.

12 See para 3.11 above.

> procedural fairness issues were involved the minister should have the capacity to seek independent advice.[13]

3.15 In considering these issues, the Committee concludes that the bills fundamentally alter the role of the Commonwealth's main heritage agency, in ways that are not justifiable in the absence of any evidence that the Commission's existing powers have been misused. Furthermore, the Committee accepts the view that the functions of the existing Australian Heritage Commission are appropriate and will be as relevant in the future as they have been in the past and that they will enable the Council to continue carrying out its important role in providing national leadership on heritage issues.

3.16 For these reasons, the Committee concludes that the roles and functions of the Council should be broadened to enable the AHC to act independently of Ministerial direction. The role of the Committee in the preparation of management plans should also be expanded.

Recommendation 3.1

The Committee recommends that section 5 of the Australian Heritage Council Bill 1999 be amended to broaden the roles of the Council to reflect those of the existing Commission set out in section 7 of the *Australian Heritage Commission Act 1975*, and in particular to enable the Council to act both on its own motion and on the request of the Minister.

Recommendation 3.2

The Committee recommends that the Australian Heritage Council Bill 2000 be amended to include the reporting powers of the Commission provided for under section 7(d) of the *Australian Heritage Commission Act 1975*.

Determinations on heritage status

3.17 An issue that provoked considerable debate is the determination of heritage status. This involves two central and closely related questions: first, whether the Council or the Minister should make decisions on whether a nominated place should be listed on either the National or Commonwealth Heritage Lists; and second, what matters should be considered relevant to the decision.

3.18 Currently, the AHC makes decisions to list a place on the Register of the National Estate. Under the proposed system however, the new Council will be limited

13 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 122.

to providing the Minister with a written assessment of a place's heritage values. The decision to list or not is the Minister's.

Arguments supporting the AHC as decision maker

3.19 Critics of the bills, drawing on issues relating to the independence of the AHC, argue that the decision on listing should be removed from political considerations and made by heritage experts solely on the basis of a nominated property's heritage values. According to Professor Lennon:

> There is a long history in Australia of such decisions being made by expert heritage councils rather than Ministers except where the Minister has the right to 'call in' contentious cases. The range of decisions will be similar to those to be imposed by National Heritage Listing. With such a strong and successful history it seems entirely unnecessary for the Commonwealth Minister to make all such decisions, and much more appropriate for the expert Council to make the decisions.[14]

3.20 The key consideration for many submissions is that listing is a technical issue that should be determined by technical experts in the Council rather than by the Minister. Conversely, there is concern that decisions by the Minister are likely to be overly influenced by a range of political considerations unrelated to the central heritage issues. The Australian Conservation Foundation (ACF) argue that:

> Listing is a technical decision, not a political decision, and needs to be based on clearly defined and specified criteria. It is a decision in which the Minister should be seen to be at arms length and one for which the Australian Heritage Council should be publicly accountable through a public appeals process.[15]

3.21 In supporting this view, the ACF point to the 1997 Australian Heritage Commission discussion paper *Australia's National Heritage - options for identifying heritage places of national significance* which considers the merits of different approaches and states:

> The dependence on Ministerial decisions for listing could prove to be difficult for the Minister in terms of the time required to determine every listing proposal. This option also means that there is potential for other considerations to take precedence over heritage significance, resulting in a non-representative and/or non-comprehensive heritage register.[16]

3.22 ACF also note that the 1996 Report by Hon Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984,* made the same point:

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14 Professor Lennon, Submission 11, p 2.

15 ACF, Submission 16, p 7. See also Dr Mosley, Submission 5, p 2.

16 ACF, Submission 16, p 7.

> Minimum standards for state and territory laws should provide for assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of aboriginal heritage bodies; the latter the responsibility of the executive.[17]

3.23 According to the Environmental Defender's Office, this conclusion was generally agreed upon during the public consultation process at HERCON:

> In the long term, best practice heritage protection will not be achieved by political processes. Exposure to the politics of the day will ultimately make fragile heritage places vulnerable to development pressures and undermine heritage conservation goals. The credibility and integrity of the new national scheme will also be placed at risk. This is one of the most important failings of the proposed new scheme.[18]

3.24 Those supporting this view accept that there are a wide range of other issues that need to be considered but that these relate to the management of heritage properties and should not affect the central issue of determining the existence of heritage values. This separation of identification and management is one of the fundamental principles of the Burra Charter, an internationally recognised set of heritage management principles created by Australia International Council on Monuments and Sites (ICOMOS).[19]

3.25 Ms Sullivan explains this division of responsibilities:

> There are basically two separate processes involved here. The first is the assessment and identification of heritage places on the basis solely of their heritage value. The second is the subsequent decisions about their conservation or otherwise which take into account a whole range of factors other than these heritage values.[20] …
>
> [T]he proposal that the Council can only assess a place or places for National Listing or Commonwealth Listing on a reference from the Minister is unduly restrictive and confining. Such a provision would enable a Minister to prevent the assessment of controversial places at the beginning of the process, presumably on political or economic grounds. The place for a decision on these grounds is later in the process, after the significance of the place has been independently determined and made public.
>
> … Ideally the Council should make the decisions about listing, on the grounds of heritage significance, and the Minister should make subsequent management decisions, transparently based on a range of broader considerations. If the Council is not to make decisions about listing, but

17 ACF, Submission 16, p 7.

18 EDO, Submission 21, p 5. See also p 13.

19 The Hon Dr Barry Jones, *Proof Committee Hansard*, Canberra, 7 March 2001, p 90.

20 Ms Sullivan, Submission 14, p 6. See also ACF, Submission 16, p 6.

> only to recommend to the Minister then it is important that recommendations from the Council, about the significance of places and the analysis which backs this up should be publicly available.[21]

3.26 By separating the listing and management functions, heritage lists become the key source of information which is then used, together with other considerations, to inform management decisions. Thus, according to Mr Simon Molesworth, Member, Australian Council of National Trusts:

> The list should not reflect the management and financial responsibility. The list should be driven by significance, because no-one in this world ought to be fearful of information. A heritage list is basically being informed of what is significant, and what is significant is quite divorced from any issue of what you are going to do with it in the future. It might be that you have to knock it over, but at least you would do that with your eyes open, and you would know. That is why we need lists untainted by processes that might follow.[22]

3.27 In addition, the Hon Dr Barry Jones pointed out that where this separation is not followed and the Minister makes decisions, there is the likelihood that heritage issues will receive less attention in the wider considerations of departmental officials advising the Minister:

> there is a danger, I think, that if the Minister is not looking at objective, arms-length, expert advice from the council – or the renamed commission which becomes the council – he then relies on the department. There is a danger that the department may, as it sometimes appears to do, take a whole of government approach … [23]

Arguments supporting the Minister as decision maker

3.28 Other evidence however, supports the view that the Minister is the appropriate decision maker for heritage listing decisions. A key point in this argument is that in contrast to listing on the RNE, under the proposed legislation, listing has major enforcement, social, and economic ramifications, including on the Government administration of its own properties. Such decisions also involve issues of federal-state relations, and potentially significant budget implications. It is therefore argued that for a decision to be workable, it should be made by the Minister to ensure that Government 'owns' the decisions. In addition, such decisions, when made by elected government, are more fully accountable to the electorate and Parliament.[24]

3.29 Mr Bruce Leaver, Executive Director of the AHC, explains:

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21 Ms Sullivan, Submission 14, p 6. See also Australia ICOMOS, Submission 17, p 4; ACPHA, Submission 30, p 4; and Mr Connor, *Proof Committee Hansard*, Canberra, 28 February 2001, p 56.

22 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 79.

23 The Hon Dr B Jones, *Proof Committee Hansard*, Canberra, 7 March 2001, p 96.

24 Mr Leaver, Submission 18, p 3.

> Decisions on natural and indigenous cultural heritage can be deeply controversial and, as a result, decisions are most often made at the State Cabinet level or even by Parliament. The notion of an independent body deciding on these heritage listing conflict outcomes is difficult to accept and, in all probability, would be unworkable because of the major land use conflict issues involved, often dealing with complex political, social and economic issues.[25]

3.30 Mr Leaver elaborated on these points during public hearings:

> Unlike the Register of the National Estate, national listing may mean major impositions on property use through the application of significant penalties and environmental impact assessment obligations. These will be backed by the injunction and judicial review provisions of the EPBC Act. In view of the possible implications for affected citizens, it would be sound governance, in the department's opinion, for the decision maker to be accountable and responsible to parliament.
>
> Depending on the nature of the heritage values involved, listing may impact on property rights, triggering section 51 (xxxi) of the Australian Constitution, thus requiring settlement 'on just terms' – to use the terms of that section. In fact, it is noted that in recent cases some members of the High Court have moved to a broader reading of that section of the Constitution, so if the Commonwealth intervenes to protect property and the property owner's rights to freely use a property are constrained, including a state government, this can, in some cases, give rise to a compensation obligation. It is highly questionable, in the department's opinion, whether or not unelected bodies should have the power to commit governments to potentially significant and unbudgeted compensation liabilities.
>
> There is another reason that the decision should be responsible to Parliament. I have mentioned the affinities between world heritage and national heritage places. Unlike Register of the National Estate entry, world heritage nominations are preceded by extensive intergovernmental discussions on a range of issues and management arrangements. As these often involve exceptionally sensitive social and economic issues, the discussions are properly conducted between governments. A non-government heritage authority would be in no position to make judgments or commitments on these matters.[26]

3.31 There are significant natural justice issues involved:

> An assessment process must allow those adversely impacted the opportunity to put their case. A body of heritage experts would be very poorly placed indeed to reasonably deal with the economic and social arguments that may be advanced by affected parties. The current bills provide for the

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25 Mr Leaver, Submission 18, p 3.

26 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 118.

> opportunity to put a case (324F(2), 324G). The case is put to the Minister who would presumably weigh up the heritage and other arguments before making a decision to list or not to list.[27]

3.32 Mr Leaver also points out that it is incorrect to point to the listing powers of various state and territory bodies in support of listing powers for the Council:

> There is often a fundamental misunderstanding of the heritage scope of the state/territory bodies. 'Heritage' at the Commonwealth level covers historic, natural and cultural heritage. Heritage at the state/territory level invariably means *historic heritage*. When the operation of independent state heritage councils is advanced in support of a similar Commonwealth arrangement the argument is like comparing chalk and cheese. The state arrangements work comparatively smoothly because by and large they only deal with historic heritage.[28]

3.33 According to the Department, only Queensland and Tasmania have heritage regimes in which the Council makes listing decisions, and in both cases, these decisions relate exclusively to historic heritage. A table summarising state and territory decision making processes is at Appendix 5.

3.34 It should also be kept in mind that giving autonomous listing powers to the Heritage Council would grant it powers only exercised by the Minister in the rest of the EPBC Act, in relation to threatened species, biodiversity conservation etc.[29] The model proposed is therefore consistent with the general framework of the EPBC Act.

Conclusions and recommendations

3.35 The Committee has carefully considered the arguments raised in what is one of the central issues of this inquiry. The Committee agrees with the concept that there must be a separation between the assessment of heritage values and the management of heritage places, that is, there must be a separation between the responsibility for listing and for decisions relating to a listed place.

3.36 Accordingly, the Committee considers that the Council should make the final decision on listing since it is the most qualified to make such technical decisions. The Committee furthermore feels that this approach best serves the primary objective of reforms, which is to strengthen heritage protection in this country. The Minister then has the responsibility for decisions related to a listed place – decisions that the Committee feels are appropriate for an elected representative of the people to make.

3.37 However the Committee recommends that section 324Q of the Australian Heritage Council Bill 2000 be amended to require the Minister to consult with the

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27 Mr Leaver, Submission 18, p 4.

28 Mr Leaver, Submission 18, p 3.

29 Professor Lennon, Submission 11, p 3.

Council before creating, amending or revoking management plans for a national heritage place. If the Minister does not follow the Council's recommendations, the Minister should publish his or her reasons in the Government Gazette.

Recommendation 3.3

The Committee recommends that section 324Q of the Australian Heritage Council Bill 2000 be amended to require the Minister to consult with the Council before creating, amending or revoking management plans for a national heritage place. If the Minister does not follow the Council's recommendations, the Minister should publish his or her reasons in the Government Gazette.

Membership of the Australian Heritage Council

3.38 The final issue in relation to the Council is its membership and how members are appointed. Under Part 3 of the Bill, the Minister appoints the Chair and six members, who must have experience or expertise concerning heritage.

3.39 Submissions have raised three principal issues in relation to the membership of the Council: that appointments to the Council should not be made by the Minister; that the qualifications for membership should be amended; and that the number of members should be increased.

3.40 In relation to appointment to the Council, it is argued that to ensure both the perception and reality of independence, it is inappropriate for the Minister to appoint the members on the grounds that it may grant the Minister undue influence over the Council and impair its impartiality. Thus, members may be less inclined to give advice 'without fear or favour'.[30] There is also the potential for the Minister to avoid appointing anyone to the Council who does not share the Minister's general views and values. For this reason, Professor Lennon suggests that appointments should be by the Governor-General[31] in accordance with the existing AHC Act.[32]

> Ministerial appointment of the chair and members of the proposed Heritage Council may lead to its politicisation and as a result lower its credibility as an independent arbitrator on heritage issues within the Australian community.[33]

3.41 The Australian Council of National Trusts recommends that membership include nominees of peak conservation bodies, both community-based organisations

30 for example, ATSIC, Submission 25, p 19.

31 Professor Lennon, Submission 11, p 2. See also Penrith City Council, Submission 23, p 1.

32 *Australian Heritage Council Act 1975*, section 12(2)

33 Penrith City Council, Submission 23, p 1.

and statutory committees at state level, and that the Chairman be elected by the members of the Council.[34]

3.42 The Committee accepts the view that the existing appointment procedures under the AHC Act are an appropriate means of ensuring the independence and integrity of the Council and for this reason believes they should be retained. Secondly, there is a view that the Bill should require higher standards of expertise and experience.

> [F]or the credibility of the Council its membership should be of the highest technical excellence. … To ensure this I consider that the provisions relating to the expertise of members of the Council should be strengthened to include the stipulation that at least some of members of the Council should possess the appropriate technical qualifications.[35]

3.43 This would mirror similar provisions in the EPBC Act for the appointment of the Biological Diversity Advisory Committee.[36] Others suggest the inclusion of a requirement that nominees to the Council possess a demonstrated commitment to heritage protection,[37] while in relation to indigenous representation, the NSW government suggests a focus on the appointment on indigenous cultural values in preference to non-indigenous professional expertise in indigenous culture.[38]

3.44 The Australian Mining and Exploration Council (AMEC) advance an alternate view that the Council's membership include persons with commercial experience or expertise to provide a broader range of advice or else create a separate Ministerial liaison committee with representatives of community and industry.[39]

3.45 Mr Peter King, Chair of the AHC, recommends the retention of the existing AHC Act definition of qualifications for membership of the Council:

> section 7 of the proposed Australian Heritage Council Bill identifies persons entitled to be appointed as having 'experience or expertise concerning heritage.' But I think section 12, subsection 4 of the current act is a better approach. It provides for the appointment of persons having 'qualifications relevant to, or special experience or interest in, a field relating to the functions of the commission' – in this case the Council.
>
> My own view is that it is better to have councillors who represent the community and who assess the advice from the Public Service and the

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34 ACNT, Submission 4, p 4.

35 Ms Sullivan, Submission 14, p 9. See also ACF, Submission 16, p 11; WWF, Submission 12, p 12.

36 EPBC Part 19, Section 504(5)

37 ATSIC, Submission 25, p 20.

38 New South Wales government, Submission 29, p 3.

39 AMEC, Submission 9, p 18 and 20. This issue is explored above in context of the decision making role of the Council and the scope of its considerations.

> assistance that council obtains by referring matters to experts in the Public Service. I think the idea of experts assessing experts is not a good one in the administration of any statute where you have an independent advisory body.[40]

3.46 The Committee accepts the view that members of the Council need to be of the highest possible standard – meaning that they have considerable technical expertise – and that either the approach adopted in the AHC Act or that used to select members of the Biological Diversity Advisory Committee under the EPBC Act would be suitable.

3.47 The Committee does not agree with the suggestions of AMEC in relation to membership. Given the decision making arrangements in the bills, it would be inappropriate to have 'a balancing' industry representation on the Council since the purpose of the Council is quite specifically to make recommendations based on heritage considerations only.

3.48 The third matter relates to the suggestion that the proposed seven members of the Council will be inadequate to provide the breadth of experience required and the resources to manage the considerable workload.[41] Professor John Mulvaney, a former AHC Commissioner, argues that this applies particularly to indigenous membership:

> No single Aboriginal following the minister's direction under the act could be expected to evaluate and take responsibility for the whole continent, distinguishing so-called national from B-grade places. The responsibility for drawing up a national list would seem to me to be a terrible burden to place on a few Aboriginal people.[42]

3.49 The Committee feels that it has not received enough advice to determine whether or not the proposed membership of the Australian Heritage Council is large enough to cope with its proposed workload. The Committee does, however, recommend that the Government review this point, particularly since it has been made by a former Commissioner.

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40 Mr King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 113.

41 Tasmanian government, Submission 28, p 6; ACPHA, Submission 30, p 3 and EDO, Submission 21, p 24.

42 Professor Mulvaney, *Proof Committee Hansard*, Canberra, 28 February 2001, p 20.

Recommendation 3.4

The Committee recommends that the Government amend section 7 of the Australian Heritage Council Bill 1999 to retain the qualifications required for the present Australian Heritage Commission in section 12(4) of the *Australian Heritage Commission Act 1975,* or that it adopt the approach used to select members of the Biological Diversity Advisory Committee under the EPBC Act.

Recommendation 3.5

The Committee recommends that the Government give further consideration to the size of the Heritage Council and whether its membership of seven it adequate to deal with its roles and responsibilities.

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 basis[3] 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

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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

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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 ATSIC 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

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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 ATSIC, 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 2,300[17] 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.

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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

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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:

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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:

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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 sees 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'.

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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.

CHAPTER 5

ADMINISTRATION OF THE NATIONAL AND COMMONWEALTH HERITAGE LISTS

An extensive component of Australia's national heritage is in public ownership, under the stewardship of the Commonwealth Government ... . The Australian people are the owners of these heritage properties and the Commonwealth has a responsibility to conserve and sustain these assets.[1]

Introduction

5.1 As has been discussed in earlier chapters, the single most significant change proposed by the bills is the replacement of the existing Register of the National Estate with two smaller, but more strongly protected lists: the National Heritage List and the Commonwealth Heritage List. While the Committee broadly supports the development of the National and Commonwealth Heritage Lists, there are a number of issues identified in submissions which need further consideration. These issues are:

- the scope of the lists;
- the assessment criteria and management principles;
- opportunities for external comment;
- ministerial accountability;
- removal of places from the list;
- heritage surveys and registers;
- the application of state laws to Commonwealth land;
- review and reporting requirements;
- compensation;
- program funding; and
- thematic listing.

5.2 Enforcement and protective provisions are discussed in the following chapter.

Scope of the lists

5.3 The Committee has heard two main views expressed in relation to the scope of the two proposed heritage lists: the National Heritage List and the Commonwealth Heritage List. The first is that the new system proposes to implement a graded system

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1 ACNT, Submission 4, p 2.

of lists, and in doing so will need to determine the nature of the heritage significance of places nominated for listing. Thus, decisions will need to be made not only as to whether a place has heritage significance, but also whether the significance is local, regional, or national. This consideration will then determine whether the place will be listed and if so, whether it should appear on a local, state or territory, or federal list.

5.4 The Australian Conservation Federation argues against this system, claiming that the National Trusts unsuccessfully explored the use of graded or selective lists decades ago.[2] According to the Australian Council of National Trusts, there are:

> … serious concerns about the concept of a restricted National Heritage List. Australia's natural and cultural heritage is constantly evolving through environmental and historical change. Hence, judgements of heritage significance are also evolving. The concept that there could be fixed 'levels' of importance, enabling a finite national heritage list, is inherently flawed. There will be a few places with generally agreed iconic national status. There will also be many places of only local significance. Between these extremes there will be a very large array of places with no 'fixed' status.[3]

5.5 The second issue raised is that as the guiding principle of the new arrangements should be to strengthen overall protection for heritage properties, all properties listed on the RNE should be transferred to the one of the two new lists. As one submission noted, this would accord with the growing protection afforded to heritage in other western countries:

> In all western countries over the last 30 or so years there has been a progressive strengthening of heritage protection, reflecting increasing public awareness of the significance of heritage protection. Lists and registers have grown very much larger. In the UK there are now over 440,000 places on national heritage building lists. In the US, with a federal system of government, there are now over 60,000 places on the National Register of Historic Sites. These are historic sites only.[4]

5.6 Mr Simon Molesworth QC, representing the Australian Council of National Trusts, argues that a direct incorporation of the RNE into the new lists is the most efficient use of the register:

> Why on earth does the new bill have a provision in it that says the minister *may* approve the incorporation of places listed in the registered national estate in the Commonwealth list? Why do we have to reinvent the wheel? Surely the excellence of the work of the Australian Heritage Commission over the last 26 years is such that you do not have to go back and again look

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2 ACF, Submission 16, p 8.

3 ACNT, Submission 4, p 1.

4 Professor Yencken, Submission 10, p 4. This point is also made by ATSIC, Submission 25, p 13; and Professor Adam, Submission 20, p 2.

> at the Melbourne Town Hall or look at rock art sites and Kakadu and say, 'Do you thing we ought to put this on or not?', call for inquiries, go through the process.[5] [italic added]

5.7 The Committee notes that decisions on what places will go onto either of the two lists will depend on the criteria for Commonwealth or National heritage values. These criteria are still to be finalised, although the criteria for the National List are available in draft form.[6]

5.8 The Committee also notes that the probable size of either list remains unclear. As Mr King, Chair of the AHC commented during hearings, the National List is likely to contain certain obvious sites such as the Sydney Harbour foreshores, the Gippsland forest, Uluru, and Riversleigh[7] but there are no indicative lists.

5.9 The Committee considers the suggestion of placing all RNE sites that are on Commonwealth land onto the Commonwealth Heritage Register is an attractive proposition since it should result in greater protection of Commonwealth heritage places. The key criteria for the Commonwealth list revolves around Commonwealth ownership of the land and is not tied to any particular level of heritage significance. As was discussed in Chapter 2, Commonwealth land is not subject to state or territory law, and following the impasse in negotiations, it does not seem likely that the Commonwealth will bind itself to state laws in the foreseeable future, although the Committee considers that it should do this. Consequently, since heritage sites on Commonwealth land cannot be protected by any other law, they must remain under the protection of the Commonwealth.

5.10 There are two ways in which this could occur. First, as discussed in Chapter 4, entries on the RNE would, according to the Department, receive protection via sections 26 and 28 of the EPBC Act. Second, they could be transferred directly to the Commonwealth Heritage List.

5.11 The Committee considers that the second of these offers clearer protection but that this should be augmented by recognising Commonwealth heritage places as matters of national environmental significance.

Recommendation 5.1

The Committee recommends that the Government incorporate all heritage properties on Commonwealth land that appear on the Register of the National Estate into the Commonwealth Heritage List.

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5 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, pp 81-82.

6 See Appendix 4

7 Mr Peter King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 110.

Recommendation 5.2

The Committee recommends that Commonwealth heritage places should be recognised as matters of national environmental significance.

The assessment criteria and management principles

5.12 Two of the key documents that will affect the administration of the proposed heritage protection regime are the criteria for Heritage Values[8] and National Heritage Management Principles.[9] The criteria are used to determine whether a nominated place has heritage values, and the Minister is required to set these out in regulations. The management principles provide the basis for the management arrangements of all listed places.[10]

5.13 Two principal concerns have been raised with the Committee in relation to these documents. The first is that while both types of document are fundamentally important to the operation and effectiveness of the bills, neither have been publicly released for comment (noting however that the draft criteria for assessment of places on the National List were released last year). According to one submission:

> … without finalised criteria, it is extremely difficult to reach any conclusions about the implications of the proposed regime. The criteria are particularly important as they will correspond to the national heritage values – a vital consideration in the referrals and assessment process under the EPBC Act.[11]

5.14 And elsewhere:

> [T]hese principles are vital to a number of processes under the proposed legislation. For example, the national heritage management principles will be essential considerations before entering into bilateral agreements or making Ministerial declarations in relation to national heritage places. They are also fundamental to the preparation and review of management plans for all heritage places.
>
> Once again, this is an example of key information which is not set out in the proposed legislation. The detail to be contained in these principles is left

8 Section 324C for National Heritage Values and section 341C Commonwealth Heritage Values

9 Section 324W for National Heritage Management Principles and section 341W for Commonwealth Heritage Management Principles.

10 See Chapter 1 for a more detailed description of the operation of these provisions.

11 WWF, Submission 12, p 3. See also AMEC, Submission 9, p 15.

> completely up to Ministerial discretion, and will not be subject to any formal public scrutiny.[12]

5.15 These concerns suggest that without an examination of these documents, no effective review of the proposed regime is possible.

5.16 Mr Leaver, of Environment Australia, responded in hearings that:

> Whilst a considerable amount of work has been done on management principles, national heritage management principles and Commonwealth heritage management principles, a considerable amount more work needs to be done, particularly on the very difficult melding together of the various heritage environments, including indigenous heritage. It is the department's view that these are best detailed in regulations to the act, rather than the act itself, to provide flexible tools that can be changed relatively easily over time as the understanding and concepts relating to these difficult heritage issues are discussed and ways forward are worked through with the community.[13]

5.17 The Committee appreciates the difficulties faced by the department in formulating these documents. Nevertheless, they are critical to an understanding of how the proposed regime will operate in practice. Although when the final versions of these documents are released in the future, they will no doubt be discussed in detail, the fact remains that both the public and Parliamentary debate about the proposals is occurring now, and the absence of key documents limits the capacity to make a fully informed judgement on the merits of the bills.

5.18 The Committee also considers that in relation to the assessment criteria for the Commonwealth list, this should remain the same as the current criteria for the RNE.

Recommendation 5.3

The Committee recommends that the Minister should release the Commonwealth Heritage Values criteria, and the Management Principles in draft or final form, before any final debate of the bills takes place.

5.19 In relation to the second issue, submissions have argued for the need to release the management principles as regulations subject to disallowance, in order to ensure the accountability of the documents to the Parliament. According to WWF, the proposed approach is:

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12 WWF, Submission 12, p 13. See also ACNT, Submission 4, p 9.

13 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

> inconsistent with the Ramsar wetland Management Principles (s 335) and the World Heritage Management Principles (s 323), which are contained in (disallowable) the EPBC Regulations.[14]

5.20 The Environmental Defender's Office mirror these comments and state:

> In this regard, we note the Commonwealth Government's assurance to the World Heritage Committee in November 2000 that Australia was introducing National Heritage amendments to give nationally significant sites an equivalent level of protection enjoyed by World Heritage sites.[15]

5.21 This view is shared by several of the state governments, stressing the need for both consultation with the states, and the inclusion of all key documents in the legislation itself; as a schedule to the Act, or as regulations.[16] The South Australian government points out that this has been the practice in their equivalent state legislation in the *Heritage Act 1993* and the *Development Act 1993*.[17]

5.22 The Committee recognises that locating the Management Principles as gazetted documents rather than as regulations, offers advantages of administrative flexibility and the capacity to evolve their contents. However, the Committee considers that in the interests of transparency and accountability, it is more important that the Management Principles be released as part of the regulations.

Opportunities for external comment

5.23 A number of submissions received by this inquiry have argued that the regime proposed by the bills offers inadequate opportunity for public involvement.

5.24 The Committee notes that the bills offer a number of opportunities for public participation, including: the requirement to invite public comments prior to listing a place;[18] the requirement that the heritage lists be publicly available;[19] as well as the reporting requirements discussed below.[20] In making assessments of heritage values, the Australian Heritage Council is obliged to give a place's owner/occupier and any indigenous persons with rights or interests a reasonable opportunity to comment.[21]

5.25 The Department also noted that the inclusion of the heritage protection regime into the EPBC Act gives interested persons the opportunity to ensure compliance

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14 WWF, Submission 12, p 13.

15 EDO, Submission 21, p 16.

16 Tasmanian government, Submission 28, p 4. See also Penrith City Council, Submission 23, p 4; and New South Wales government, Submission 29, p 2.

17 South Australian government, *Proof Committee Hansard*, Canberra, 7 March 2001, p 6.

18 Sections 324G and 341G

19 Sections 324M and 341M

20 see paragraphs 5.67 – 5.72

21 Sections 324F and 341F

through the injunction provisions of section 475 and the natural justice and procedural fairness provisions of section 487.[22]

5.26 Several groups believe that these provisions do not go far enough in providing avenues for public involvement in decision making and consultation, which should extend to the preparation of key documents such as the Heritage Values; the Management Principles; and management plans.[23] The Environmental Defender's Office also recommend that all nominations received by the Minister should be automatically advertised for public comment.[24]

5.27 The state governments also argued strongly that the bills should give much greater opportunity for state and territory involvement in the listing process. The Tasmanian government argues:

> The legislation should provide for automatic referral of nominations to the relevant state or territory for comment and this comment should be considered in the decision making process.[25]

5.28 The NSW government makes a similar point:

> [T]here is no provision in the proposed legislation for the Commonwealth to consult with relevant state and territory governments before adding places to the National Heritage List.
>
> There was strong agreement at previous meetings of State and Commonwealth officials that consistent with the COAG Heads of Agreements, the preparation and management of the NHL should be undertaken in a cooperative manner between the Commonwealth and the States. The listing of places on the NHL should only be undertaken after consultation and agreement with the relevant state or territory.[26]

5.29 According to the Victorian government:

> Victoria believes that the state or territory interests or involvement in properties nominated for the National List is no less than for World Heritage properties. Therefore the state or territory participation in the process for listing properties to the National List should not be less than that provided for listing World Heritage properties.[27]

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22 Mr Leaver*, Proof Committee Hansard*, Canberra, 7 March 2001, p 118.

23 EDO, Submission 21, p 11, 14 and 16; WWF, Submission 12, p 14-15; and ACNT, Submission 4, p 9.

24 EDO, Submission 21, p 11.

25 Tasmanian government, Submission 28, p 3 and 6.

26 New South Wales government, Submission 29, p 1. See also South Australian government, Submission 27, p 4.

27 Victorian government, Submission 31, p 3. See EPBC Act Part 15

5.30 A key aspect of any legislative reform is the role for public participation in decision making processes. The Committee considers that maximising such opportunities is part of best practice public administration, and reflects a strong community expectation that government and their agencies will operate in an open and transparent way. This is particularly so in relation to decisions on the management and protection of heritage properties.

5.31 If it is to be effective, consultation must cover both specifically affected individuals and groups as well as the wider community, and offer sufficient time for the consideration of a proper response. In this respect it is worth noting that object 3(1)(d) of the EPBC Act, refers to the need to 'promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples'.

5.32 For these reasons, the Committee considers that as a general proposition every opportunity for public involvement should be maximised. In most respects though, the Committee considers that this principle is complied with. The Committee does, however, feel that there should be an opportunity for public comment on the draft regulations which should include the Heritage Values and Management Principles. The Committee also would expect that, in line with past practice, the Department will provide opportunities for consultation on all key documents, including the Management Plans.

5.33 The Committee does not, however, agree with the states' proposition that they should have an effective veto over listings. As noted in Chapter 2, this issue has been one of several causes of the breakdown in negotiations between the states and the Commonwealth. The Committee agrees with the Commonwealth government that listing and protection of places of identified national significance should not require the prior agreement of the relevant state or territory government.

Ministerial accountability

5.34 Submissions reflect a concern that the bills do not provide adequate accountability mechanisms for ministerial decision-making. Under the proposed legislation, the Minister is obliged to advise the nominator of reasons for choosing not to accept a nomination;[28] or not to list;[29] the Minister must publish a Statement of Significance prior to listing a property on either of the Lists;[30] and the both lists must specify the heritage values for which they were listed.[31] The Minister must also table

28 Section 324D(2)(b)

29 Section 324H(1)(b)

30 Section 324G(2)

31 Sections 324B(3) and 341B(3)

reasons in each House of Parliament explaining the decision to remove a place from a List.[32]

5.35 Submissions have argued that these provisions do not go far enough. According to the Australian Minerals Exploration Council:

> The bill's processes are essentially a 'closed shop' closed to all but the Minister, his advisers, his Department and the Australian Heritage Council, a Council which reports exclusively to him and whose members he appoints.[33]

5.36 Accordingly, some submissions have argued that in the interests of transparency and accountability the Minister should be required to publish reasons for decisions not to accept a nomination or not to list, rather than merely advise the nominator.[34] The Minister should also make public all heritage assessments of the AHC,[35] in place of the proposed prohibition on the AHC from disclosing their assessments.[36]

5.37 In considering these issues, Environment Australia notes there are several reasons why the reasons for Minister's decisions not to accept nominations are only provided to the nominator:

> Publicising the results of a nomination can often have a significant adverse impact on the nominee, particularly in rural or regional communities. The experience is that often heritage listing of a place can be bitterly resented by some and the nominee can be socially ostracised or face worse impacts. The heritage nominations on Norfolk Island mentioned in Mosley's evidence has precipitated this type of reaction.[37]

5.38 Environment Australia also note that Principle 11 of the *Privacy Act 1988* places limits on disclosure of personal information. Also, the reasons for a Ministerial decision have to be given to any interested person through the operation of section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.[38]

5.39 Many of the considerations discussed in the preceding section apply equally to this issue. For a heritage protection regime to have credibility, especially given the often controversial nature of the debate, it is essential that the Minister be fully

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32 Section 324J(6)

33 AMEC, Submission 9, p 14.

34 EDO, Submission 21, p 13.

35 EDO, Submission 21, p 14.

36 Sections 324P & 341P

37 Letter from Mr Bruce Leaver to the Secretary dated 9 March 2001.

38 This Act is linked to the matters covered by the bills by s 487 of the EPBC Act. Letter from Mr Bruce Leaver to the Secretary dated 9 March 2001.

accountable for all important decisions. On this point the Committee notes the views of Mr Molesworth:

> There is a long-standing practice of good government to always write laws for the worst governments because, as time goes by, you can have very good ministers, you can have less good ministers and you can have bad ministers.[39]

5.40 The Committee views the assessments of the AHC as being centrally important to the process of public accountability especially given that in Chapter 3, the Committee argued that the Australian Heritage Council should have the final decision on listing. Listing decisions are limited to heritage considerations, while the Minister is expected to take into account the wider range of economic and social considerations in coming to decisions on management arrangements. For this process to be transparent, the AHC assessment of listing should be a public document.

5.41 The Committee recognises the privacy issues raised by the Department but does not consider them to pose insurmountable obstacles to disclosure. The privacy of nominations could and should be protected, but this does not mean that the assessments should not be published.

5.42 It is arguable that the bills already provide for the release of much of the assessments. As mentioned, sections 324H and 341H of the Heritage Bill require the publication of a statement of heritage values for every place listed. However, this may or may not amount to information as detailed and specific as that provided in the AHC assessment. However, this section does not provide for the publication of assessments when places are not listed.

5.43 Also sections 324P and 341P of the Heritage Bill impose certain duties on members of the AHC not to disclose assessments or advice. The implications of this section are not clear, and while appearing not to prohibit disclosure under certain circumstances, they do not impose any positive obligation to publish AHC assessments. The Committee believes they should.

5.44 However in relation to public disclosure, the Committee recognises the need to properly protect certain types of information, such as the location and significance of certain kinds of aboriginal sites. Accordingly, the Committee endorses the confidentiality provision proposed in sections 324N and 341N of the Environment and Heritage bill.

Recommendation 5.4

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require the release, on request, of AHC assessments of heritage values and listing.

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39 Mr Molesworth*, Proof Committee Hansard*, Canberra, 7 March 2001, p .

Removal of places from the list

5.45 The bills provide several mechanisms for removal of places from the two lists by the Minister.[40] The first is where the places do not have any national/Commonwealth heritage values. The second is when 'it is necessary in the interests of Australia's defence or security to do so'. To effect a removal, the Minister must gazette the removal, together with a statement of reasons laid before both Houses of Parliament. A key difference however, is that whereas the instrument is subject to disallowance on the first ground, it is not disallowable in relation to removal on defence or security grounds.

5.46 This has been the subject of some criticism on the grounds that the terms 'defence or national security' are not defined and therefore liable to abuse. ATSIC note the recommendations of the Justice Woodward Royal Commission into Aboriginal Land Rights in the 1970's in relation to the national security over-ride:

> The over-ride was for eventualities such as national emergencies and it was not to be used for more trivial matters such as the economic status of any corporation or employment. However to safeguard the process for such an over-ride, Woodward recommended that the instrument to over-ride the veto ought to be a disallowable instrument … .[41]

5.47 The Australian Council of Professional Historians' Association add their concern that the use of the general terms 'defence and security reasons' may enable an opportunistic interpretation that could include any matter relating to the operations of defence or security agencies.[42]

5.48 Conversely, the South Australian government and the Australian New Zealand Minerals and Energy Council (ANZMEC) argue that the bills should be amended to enable both state governments and the owner or occupier to require the Minister to consider whether to remove a place from a list.[43]

5.49 The Committee shares the concerns relating to the scope of the 'defence or security' provisions for removal from a list, particularly as it is not subject to review or disallowance, in the way ordinarily foreseen by the bills for removal of places. The generality of the terms opens the possibility for abuse, and the Committee concludes that the provision should be tightened.

5.50 The Committee does not agree that states, territories or land owners/occupiers should be given the right to compel the Minister to consider removing a place. Where a place is listed and managed appropriately, it would not be expected that there would be many instances of the heritage values of that place being lost. Similarly, where the

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40 Sections 324J and 341J

41 ATSIC, Submission 25, p 16.

42 ACPHA, Submission 30, p 6.

43 South Australian government, Submission 27, p 5 and ANZMEC, Submission 24, p 8.

place is listed following a proper assessment and public comment, the listing should not need re-evaluation and constant retesting. The Committee considers that the inclusion of the provisions suggested is therefore unnecessary.

Recommendation 5.5

The Committee recommends the Government consider amendments to sections 324J and 341J of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 that would serve to either clarify the exact meaning of the phrase 'in the interests of Australia's defence or security', and require that decisions to remove a place from a Commonwealth or National Heritage List be executed by disallowable instrument.

Heritage surveys and registers

5.51 A recurring problem on Commonwealth property appears to be mismanagement of heritage properties caused by a failure of individual agencies to properly identify their significance. According to Ms Sullivan:

> Commonwealth buildings, and areas of great natural heritage under the control of the Commonwealth have been neglected, misused, sold off to the highest bidder, or returned to the states in an extremely dilapidated condition.[44]

5.52 Similar comments were made by the Australian Council of National Trusts:

> Under the present regime, few Commonwealth agencies have identified all of their heritage properties and those that have identified some and developed management plans often act in disregard of those plans. Most Commonwealth-owned property is being disposed of without any assessment or public consultation.[45]

5.53 Mr Peter King, Chair of the Australian Heritage Commission, expressed this view:

> The Commonwealth, frankly, has not had a good record of looking after its own heritage, which is a matter of which the Commonwealth cannot be proud, and successive governments have failed to properly identify and conserve their own heritage – such as the wonderful post offices, defence facilities and many other places of natural and cultural significance right around this country.[46]

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44 Ms Sullivan, Submission 14, p 8.

45 ACNT, Submission 4, p 2.

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

5.54 This problem may have worsened since the 1989 devolution of the property management function to individual agencies and away from the centralised control of the Department of Administrative Services. The Schofield Report notes that it has not been the role of the AHC to undertake identification of heritage property. Neither is there recognition of responsibility for the identification and conservation of heritage property in the legislation or Corporate Plans of most Commonwealth entities:

> As a result there has been no comprehensive program for the identification of all Commonwealth owned heritage properties and most identification has been done by non-Commonwealth bodies (such as the National Trust).[47]

5.55 The bills appear to maintain this position, in that section 341X of the Heritage Bill requires Commonwealth agencies that own or control places that have or might have heritage values:

> must take all reasonable steps to assist the Minister and the Australian Heritage Council in the identification and assessment of the place's Commonwealth heritage values.

5.56 It was put to the Committee that this provision does not go far enough in correcting the problem of the lack of identification of heritage places, identified in the Schofield Report.[48] According to the Australian Conservation Foundation:

> Among other recommendations in the Schofield Report that have not been adopted by the Commonwealth or incorporated in these Bills is the recommendation that the Commonwealth implement a three-year program to identify and list in the RNE all Commonwealth places of heritage significance. This would seem to be a highly important duty for the Commonwealth to accept in its approach to looking after its own heritage, especially as it is well recognised that a full inventory of Commonwealth heritage has never been carried out.[49]

5.57 Professor Lennon makes a similar point, and suggests amending section 341X to require Commonwealth agencies to:

- seek to conserve heritage places under their control;
- identify heritage places and keep an inventory;
- undertake a survey of places under their control to identify those with heritage value. The initial survey to be completed by 2003;

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47 1996 Commonwealth Report by the Committee of Review – Commonwealth owned Heritage Properties – A Presence for the Past, Chapter 3, page 1.

48 A Presence for the Past, Chapter 3

49 ACF, Submission 16, p 14. See also EDO, Submission 21, p 20; ACNT, Submission 4, p 3; WWF, Submission 12, pp 5 & 10; Ms Sullivan, Submission 14, p 8.

- survey within 6 months any new places brought under their control, to identify heritage values;
- surveys shall conform to guidelines and standards provided by the Australian Heritage Council; and
- Commonwealth agencies will review their inventories at least every 5 years.[50]

5.58 An alternative suggestion is that the bills be amended to require an inventory of heritage sites on Commonwealth land and Commonwealth properties similar to the current requirement for threatened species contained in section 172 of the EPBC Act.[51]

5.59 The Committee agrees with these views, and considers that it is fundamental to the proper and methodical management of Commonwealth property, that a proper effort is made to thoroughly assess the heritage values of places in the Commonwealth property portfolio. This has become particularly important in the current devolved environment. The Committee also considers that the heritage values of places should be known before decisions are made to sell or dispose of property.

Recommendation 5.6

The Committee recommends that the Government amend the bills to require Commonwealth agencies to implement a heritage inventory of their property portfolios that will properly identify and assess heritage values. Commonwealth agencies should be further required to review their inventories at least every five years.

Recommendation 5.7

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to prepare and maintain a heritage strategy for the management of their heritage places as was recommended by the Schofield Report.

Recommendation 5.8

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to undertake a survey of the heritage values of all newly acquired properties in accordance with standards and guidelines provided by the Australian Heritage Council.

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50 Professor Lennon, Submission 11, p 5.

51 Mr Pittock, *Proof Committee Hansard*, Canberra, 28 February 2001, p 31.

Application of state laws to Commonwealth land

5.60 The Committee has heard some debate on the extent, if any, to which Commonwealth agencies managing heritage places should be bound by state/territory laws. As a matter of law, Commonwealth land is not subject to state or territory law by reason of the grant to the Commonwealth of exclusive law making powers in relation to Commonwealth land in section 52(2) of the Australian Constitution. Nevertheless, the Commonwealth may exercise the option of deeming itself bound by state/territory law.

5.61 Some submissions have argued that obliging Commonwealth agencies to comply with state/territory heritage protection regimes would lead to better protection. As the Schofield Report states:

> Very few Commonwealth agencies list their properties in state/territory registers, a move criticised by states … . Conversely, in some instances, state/territory governments have been reticent to include Commonwealth properties on their registers because of the limitations on protection implied by the Commonwealth's immunity from state/territory legislation … .[52]

5.62 The report accordingly goes on to recommend that Commonwealth agencies 'have full regard to state and territory heritage and planning regulations where practicable'.[53] This view is supported by the Australian Council of National Trusts, who note that this is consistent with the COAG agreement, in which the governments:

> Agree to increased compliance by Commonwealth and State departments, statutory authorities, agencies, business enterprises and tenants with the relevant state's environment and planning [including heritage] laws.[54]

5.63 The ACNT comment that this intention was then carried through in the AHC briefings during 2000:

> All Commonwealth Government Business Enterprises (GBEs), non-GBE companies, statutory authorities whose primary functions are commercial, and business units, would be required to comply, and non-compliant Commonwealth agencies, were to secure approvals in accordance with Commonwealth measures which are at least equivalent to the environment and planning laws of the relevant state.[55]

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52 A Presence for the past, p. 24

53 A Presence for the past, p. 25

54 Part (g). ACNT, Submission 4, p 7. See also ACF, Submission 16, p 14; EDO, Submission 21, p 7.

55 ACNT, Submission 4, p 7

5.64 Among the states, Tasmania was also expecting to see Commonwealth compliance with state and territory laws:

> The Tasmanian government was advised that the new legislation would contain provisions by which the Commonwealth would have to comply with State law. The Bill contains no such provision and there is no acknowledgement of existing State processes.[56]

5.65 According to the Tasmanian government, the absence of compliance can cause significant problems:

> The Hobart General Post Office (GPO) offers a prime example of the problem of the Commonwealth not complying with State processes. The post office building has historic heritage values and certain restrictions are placed on works to the site. In late 2000, the GPO decided to erect a neon sign adjacent to the building. The normal planning requirements set out by the State were completely ignored because the GPO was able to use Commonwealth exemptions to avoid them.[57]

5.66 As was examined in Chapter 2, the absence of provisions binding the Commonwealth to state or territory laws on Commonwealth places can be attributed in large part to the failure of negotiations on the bilateral agreements. Nevertheless, the Committee notes that the bills and the EPBC Act provide the framework for the eventual accreditation of state and territory laws, processes and decisions.

5.67 The Committee also notes that there is a general public expectation that heritage places on Commonwealth land will be managed to a uniform standard in accordance with best practice. The Committee has heard evidence demonstrating wide divergence in state and territory laws, definitions, and practices across the heritage protection field. Until uniform Australian standards are agreed upon, it would be impractical for the Commonwealth government to base heritage protection on Commonwealth land solely upon state and territory laws.

5.68 In considering these issues, the Committee concludes that the Commonwealth government should continue to actively negotiate with the state and territory governments to work towards the agreements envisaged in the Schofield Report and the terms of the COAG Agreement. In addition, Commonwealth agencies, should commit to compliance with relevant state or territory planning and heritage laws; where two protective regimes apply, the Commonwealth should bind itself to whichever law offers the maximum level of protection. Commonwealth departments and agencies should also begin listing Commonwealth properties on relevant state, territory or local government heritage registers.

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56 Tasmanian government, Submission 28, p 4.

57 Tasmanian government, Submission 28, p 4.

Review and reporting requirements

5.69 The bills propose a number of reporting obligations, including reviews of heritage listed management plans at least every seven years,[58] and a review of and report on the two heritage lists at least every ten years.[59]

5.70 Submissions have argued that in both cases, the stipulated timeframe is too long, suggesting that both management plans and heritage lists need to be reviewed every five years. Adoption of this time-scale would also relate the reviews to the existing five year State of the Environment reporting period,[60] and be consistent with the review requirements for World Heritage management plans.[61]

5.71 A second issue in relation to the heritage list review is the content of the reports themselves. Submissions recommend amendments to require consideration of broader matters than are stipulated in the bills.[62] The Environmental Defender's Office suggests the reports on the heritage lists should include:

- Details of nominations referred to the Council, including details of Council's assessments and final determinations.
- The extent and nature of the sale of Commonwealth properties, and the impact on heritage values.
- Strategic issues and indirect impacts upon National/Commonwealth Heritage Values. For instance, impacts brought on by Commonwealth, State and local environmental planning and development processes.
- Australia's compliance with the World Heritage Convention.
- The effectiveness of and compliance with heritage standards across the nation.
- The effectiveness of heritage protection under any bilateral agreement with States and Territories.[63]

5.72 According to another submission the reports should include:

> details of assessments and approval (including any conditions on those approvals) under the EPBC Act in relation to places included in each list, details on the monitoring of compliance with those approval, and the general

58 Section 324U and section 341V

59 Section 324Z and section 341ZB

60 Pursuant to section 516B of the EPBC Act 1999. Professor Lennon, Submission 11, p 4.

61 EDO, Submission 21, p 15.

62 At sections 324Z(2) and 341ZB(2)

63 EDO, Submission 21, p 18.

> level of compliance with the EPBC Act requirements relating to national and Commonwealth heritage places.[64]

5.73 Sydney Water made the added point that where possible the Commonwealth and the states should set up common reporting:

> Sydney Water already reports on such matters to the NSW Heritage Council/Office. Sydney Water recommends that the Commonwealth and states liaise so that the reporting format suitable for reporting to the Parliament is such that the state information can be forwarded to the Minister for inclusion in the report to Parliament, thus avoiding further duplication of reporting by an organisation.[65]

5.74 The Committee agrees with these views and reiterates the comments made earlier in this chapter on the importance of transparency and accountability. Information is a key prerequisite for public participation. Effective monitoring of the outcomes of heritage protection, and proper comparison across lists and times, also requires comprehensive information that is as standardised as possible.

Recommendation 5.9

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require reviews of management plans for both the National and Commonwealth Heritage Lists every five years.

Recommendation 5.10

The Committee recommends that the Government consider broadening the reporting requirements to include the range of matters suggested by submissions.

Recommendation 5.11

The Committee recommends that Commonwealth Departments and agencies detail the implementation of their heritage strategies in their annual reports.

Compensation

5.75 The EPBC Act refers to compensation for the acquisition of property,[66] in accordance with the requirements of paragraph 51(xxxi) of the Australian Constitution. The Australian Mining and Exploration Council (AMEC) raise their

64 WWF, Submission 12, p 15.

65 Sydney Water, Submission 7, p 3.

66 Chapter 7, Section 519

concern that the provision for compensation is too narrow and does not adequately recognise other categories of loss that may occur when properties are listed on one of the heritage lists:

> In AMEC's view, this treatment of the compensation issue is totally inadequate … There are a whole range of other losses people could suffer as a result of heritage listings, ranging from decreases in property values, loss of access resources, eg water and loss of future income.
>
> The compensation payable by the Commonwealth clearly needs to be extended past the single category of property acquisition… .[67]

5.76 The Committee has not received enough evidence on this issue to form any conclusions on the extent or the exact nature of the costs that may be associated with heritage listing of a property. It does, however, consider that AMEC raise an important point, which should receive further consideration.

5.77 The Committee considers that as a matter of general policy, where the Australian people wish to protect a place for its heritage values, the owners of such places should, as much as possible, not suffer financial disadvantage. The Committee notes, however, that as with planning laws which have similar impacts, some positive, some negative, mandatory compensation is not an effective policy nor is it a policy that is generally applied in Australia or elsewhere. In addition, the Committee notes that heritage listing, in some instances, increases the value of a property.

Recommendation 5.12

The Committee recommends that the Government give further consideration to the range of measures offered to assist the owners of heritage properties including grants and tax and other concessions.

Funding issues

5.78 The bills provide for 'financial or other assistance for the identification, promotion, protection or conservation' of a Commonwealth or National heritage place.[68] This contrasts to the provision in the AHC Act for the National Estate Grants Program[69] and the mandate for the AHC to administer it.[70]

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67 AMEC, Submission 9, p 19. See also Mr Layton, *Proof Committee Hansard*, Canberra, 28 February 2001, p 41.

68 Sections 324Y and 341ZA

69 AHC Act 1975, Part VA.

70 AHC Act 1975, Section 7

5.79 The National Estate Grants Program has since been changed into the Cultural Heritage Projects Program. In 1999/2000, the AHC considered 401 applications under this program, and the Minister provided financial assistance to 44 projects valued at $3.25 million.[71] This program is designed to conserve places of cultural significance – built and indigenous heritage, but does not include natural heritage places.[72]

5.80 Submissions raised the concern that future Commonwealth funding of heritage places will be restricted to the probably smaller number of places on the two new lists, which witnesses argue amounts to a further withdrawal by the Commonwealth from its national leadership role. Mr Molesworth, Australian Council of National Trusts, notes that funding:

> … may be available to heritage properties on the Commonwealth list and there is funding that may be available to heritage properties that are on the national list. There is no provision in the proposed legislation to provide funding generally to the vast number of other significant heritage properties in this country.
>
> Under the old National Estate grants program, the eligibility was listing on a heritage register, not just on the National Estate list but also on the state lists. So the Commonwealth was able very proactively to protect, in a way, by providing the incentive of money, and it was available right across the board to all listed properties. What we have now is a possibility of that method of the Commonwealth protecting heritage being restricted just to the national list and the Commonwealth list – excellent for those properties that happen to be on those lists; sad for those that are not.[73]

5.81 The Australian Council of National Trusts further comment that:

> In the past 25 years NEGP funding has made an immense contribution to practical conservation and to pioneering work in identifying and interpreting heritage places.[74]

5.82 These changes have also attracted the criticism of state governments. By transferring management of most heritage places to the states and territories, the bills will also transfer responsibility for the funding of heritage protection of these places to the states and territories. This has major budgetary implications.

5.83 According to the NSW government, the Commonwealth must fund 'the additional costs that [NSW] incurs as a result of exercising its responsibilities under the new legislation'.[75] And further:

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71 AHC Annual Report 1999/2000, p. 26

72 Environment Australia website, http://www.environment.gov.au/heritage/awhg/chpp/information.html#info (as at 2 March 2001)

73 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 79.

74 ACNT, Submission 4, p 6. See also ACF, Submission 16, p 11.

> Commonwealth financial assistance should be available to owners of heritage properties regardless as to whether they are of National, state or local heritage significance.[76]

5.84 The South Australian government adds that:

> It is considered that the intentions of the Commonwealth in respect of the continued provision of funding assistance for the protection and management of other Australian heritage assets, in accordance with the significant role that it has played historically, should be clarified, discussed and agreed with the states. Also, the implications for states' resources of the proposed cooperative development of a management plan for the national heritage places need to be considered and understood to ensure that arrangements for financial and other assistance from the Commonwealth are appropriate.[77]

5.85 The Victorian government gives a similar view:

> a significant retreat from the historical role played by the Commonwealth. It is important that the Commonwealth continues to provide funding assistance for the protection and management of Australia's heritage assets at levels, not simply those exhibiting national heritage values.[78]

5.86 The Committee has not received evidence relating to the extent or outcomes of discussions between the Commonwealth and the states in relation to these funding issues. Nevertheless, it is clearly a matter critical to the creation of an effective heritage protection scheme. As discussed in Chapter 2, the Committee believes that the Commonwealth should commit to a role of national leadership, and this carries with it certain funding responsibilities. For this reason, the Committee concludes that it is undesirable that the legislation should limit funding to places on the Commonwealth and National Heritage Lists, particularly given the Committee's recommendation that the Register of the National Estate be retained.

5.87 The Committee notes the suggestions of several witnesses for ways in which funding can be directed to protect a large number of listed properties. Dr Susan Marsden, National Conservation Manager, Australian Council of National Trusts (in relation specifically to the RNE), states:

> There are a range of quite sophisticated ways in which you can protect those 13,000 places without necessarily reducing them to a very small list of national places. Firstly, you can do what, for example, English Heritage does. Every year it puts out a register of buildings at risk, compiled from its

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75 New South Wales government, Submission 29, p 3.

76 New South Wales government, Submission 29, p 3.

77 Ms Burch, *Proof Committee Hansard*, Canberra, 7 March 2001, p 64. See also Tasmanian government, Submission 28, p 5.

78 Victorian government, Submission 31, p 6.

> much greater register of buildings in the UK, and then provides funding and advisory support to local authorities to help look after those buildings.
>
> Secondly, you could still keep the Register of the National Estate but simply highlight each year a different range of places – not necessarily a finite list each year – bring them up to scratch, develop management regimes with the appropriate governments that might protect and interpret those places, and then move on.[79]

5.88 Two other important funding issues are first, the provision of funding for education – particularly in relation to the requirements of the heritage regime – and second, for monitoring of compliance with that regime. As the Humane Society International's submission noted, 'the effective implementation of the new Commonwealth heritage regime will ultimately depend on adequate enforcement of the regime'.[80] The Government must therefore ensure that sufficient funds are directed towards these two needs.

Recommendation 5.13

The Committee recommends that sections 324Y and 341ZA of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to enable Commonwealth funding assistance to any heritage place.

Recommendation 5.14

The Committee recommends that the Commonwealth Government give priority to negotiations with the state and territory governments that will clarify the role and extent of Commonwealth Government funding in relation to overall heritage protection.

The potential for thematic listings

5.89 An aspect of the bills which has attracted some enthusiastic responses is the provision for the creation of thematic listings in the National Heritage List.[81] Dr Mosley comments that this concept has considerable history in Australia, and the provision for thematic listings offers the opportunity to utilise information collected over many years by government agencies.[82] He comments that:

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

80 WWF, Submission 12, p 16.

81 Section 324D(6)

82 Peak Environmental Enterprises, Submission 5(a)

> … there is a possibility – and a great opportunity if you like – for two kinds of cultural landscapes to be accepted as themes for the national heritage list. One would be indigenous cultural landscape as a type, and the other would be areas that are, if you like, the combined results of humans and nature. There are wonderful examples of these on the fringes of nearly every one of our big cities. For instance, in Perth we have the Darling Ranges. Here around Melbourne we have the Mornington Peninsula, the Dandenong Ranges and Mount Macedon. In Adelaide we have the Adelaide Hills. In Sydney we have the Hawkesbury River country, and other areas. I could go on.[83]

5.90 Mr Bruce Leaver, of Environment Australia, also notes:

> the potential for national place assessment under a nominated theme to be done in conjunction with state and local government, to provide a package of sites under that theme which could then be marketed and managed as a heritage product, particularly for regional development.[84]

5.91 The Committee believes that the development of thematic listings should be given further consideration.

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83 Dr Mosley, *Proof Committee Hansard*, Canberra, 28 February 2001, p 13

84 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 122.

CHAPTER 6

ENFORCEMENT OF HERITAGE PROTECTION

Introduction

6.1 A key driver of reform in heritage legislation is the need to provide more effective protection of heritage places. As was discussed in earlier chapters, the listing of a property on private or commercially owned land under the Register of the National Estate confers largely symbolic protection. Under the proposed regime, this will be replaced with the stronger enforcement provisions contained in the *Environment Protection and Biodiversity Conservation Act 1999*.

6.2 Although submissions to the inquiry largely support this stronger enforcement regime, a number of weaknesses were identified. These relate principally to the definitions of particular words and phrases, and the need to extend protection to encompass certain additional categories of offence. These issues are explored in this chapter.

Definition of 'action'

6.3 The definition of 'action' is very significant to the operation of the enforcement provisions of the proposed heritage protection regime. The sections of the Bill creating offences relating to national heritage places[1] and those of the EPBC Act requiring approval of proposals[2] are triggered by 'actions'. These are defined in the EPBC Act to include projects, developments, undertakings or alterations, but exclude various types of decisions and provisions of grant funding.[3]

6.4 This definition is considerably narrower than the AHC Act definition it is designed to replace. Section 30(4) of the AHC Act expressly includes government decisions; approval of programs; the issuing of licences or permits; grants of financial assistance or the adoption of recommendations.[4]

6.5 Submissions argue for the definition of 'action' to be broadened to include disposal actions and grants.

Disposal actions

6.6 In relation to the former, the Australian Council of National Trusts argues:

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1 Section 15C

2 EPBC sections 26 & 28

3 EPBC sections 523,524 and 524A

4 WWF, Submission 12, p 9. See also ACF, Submission 16, p 11.

> Currently, the Commission is alerted if disposal is planned but under the new Act this appears unlikely. This will mean that Commonwealth agencies will not have to consult concerning the disposal of property – which is happening apace across Australia – and so heritage properties may pass out of Commonwealth control with no effective heritage protection unless already state heritage-listed.[5]

6.7 The bills currently provide specific provisions for the protection of any heritage listed properties subject to sale or disposal.[6] The effectiveness of these sections is discussed below.

6.8 These sections do not cover the disposal of properties that are not listed, and cases where the heritage values of a place have not been identified. While priority should be given to the identification of these values as a precursor to proper management, the Committee realises that this will not always happen, and hence a 'safety net' mechanism is needed to ensure the long term protection of the heritage values of these properties.

Grants

6.9 In relation to the second matter, other groups point to the importance of the definition continuing to include grants, in order to achieve better heritage outcomes in two major types of grant programs:

> Firstly, grants programs designed for heritage outcomes, such as the Federation Fund, will be checked by a technically equipped organisation, the Council and its staff, to ensure that all aspects of the grant are positive and that the maximum benefits accrue to the heritage place, the community and the grant recipient.
>
> Secondly, grants programs that are not of a heritage nature will be assessed by a heritage aware Council for any impacts that could affect the heritage place. In so doing, the Commonwealth will be aware of any unintended affects on heritage places that a grant program could have caused.[7]

6.10 This point was expanded upon by Dr Warren Nicholls, Australian Conservation Foundation:

> Experience with the Heritage Commission – where section 30(4) of that Act does pick up grants as a Commonwealth action – shows that, with many Commonwealth grants programs, there are often well intended proposals put by applicants who seek to do the right thing but which, if funded, would result in a negative effect on heritage. By the Heritage Commission, as an expert body, having this opportunity of being able to review these programs

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5 ACNT, Submission 4, p 4.

6 Bill sections 324X and 341Z

7 ACF, Submission 16, p 11.

> and suggest small changes to what is proposed, projects that could have had an adverse effect on a heritage place have been changed around to have a very positive effect. The outcome is very positive for the government. Its funding is going to result in a positive effect for heritage, and there are no problems with subsequently finding out that what was intended as a good grant ended up having an adverse effect. The applicants are happy because they have had their projects amended in a positive way and, of course, the important thing is that the heritage benefits.[8]

6.11 The Committee agrees that Commonwealth grants should be subject to assessment to ensure that they further heritage protection and do not have counterproductive outcomes. However, the Committee is also mindful that 'action' is defined in section 528 of the EPBC Act, and that an amended definition would affect the operation of the whole of the Act, and not only matters relating to heritage. Consideration of such a wider impact is beyond the scope of the Committee's current inquiry.

Recommendation 6.1

The Committee recommends that the Government consider means to ensure that the range of actions triggering assessment under the *Australian Heritage Commission Act 1975* are also assessed under the proposed regime, especially with regard to the sale of Commonwealth properties and to the assessment of grants.

Protection upon sale or lease

6.12 When heritage listed property is sold or leased by the Commonwealth, there is a danger that its heritage values will no longer be properly protected. This issue is of particular relevance in the context of the wide ranging policy of disposals of Commonwealth properties around Australia, teamed with a policy of sale and lease-back of significant amounts of office accommodation. Accordingly, the bills provide[9] that the Commonwealth must include a covenant to protect heritage values whenever it executes a contract for the sale or lease of Commonwealth land involving heritage, and must take reasonable steps to ensure that this covenant binds the successors in title.

6.13 The Committee has heard evidence that covenants are not the most effective means of providing protection to heritage properties. The Australian Council of National Trusts state:

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8 Dr Nicholls, *Proof Committee Hansard*, Canberra, 28 February 2001, p 54.

9 Sections 324X and 341Z. See also ACNT, Submission 4, p 4, and WWF, Submission 12, p 11.

> Disposal is a key issue of concern as the only protection proposed in the Bill is covenants. This does not represent best-practice. In the experience of National Trusts and state heritage agencies, covenants do not provide long term protection of heritage values and rarely remain effective past the first change in ownership. Far more effective protection is provided by heritage listing (state or local listing) before the property is disposed of.[10]

6.14 The Department acknowledged that there may be weaknesses with the proposed system but considers that it remains the best alternative:

> If somebody can develop a better more workable system in relation to protection of heritage through the sale of property, then we would certainly be interested in it, but through the protracted consultation process that appeared to be the simplest and most workable of the options that were open.[11]

6.15 Submissions have offered several solutions to these limitations. In the view of the Schofield Report, it is preferable to avoid sale of Commonwealth properties with heritage values and use instead a long term lease; or alternatively, in order of preference:

- freehold sale to a State Body for conservation purposes;
- freehold sale to a Local Authority, private body with adequate protection under State Heritage Laws;
- a covenant in perpetuity on freehold sale. [12]

6.16 Others recommend amendments to require a conservation agreement under Part 14 of the EPBC Act to be entered into with the new land-holder prior to the execution of the contract for the sale or lease of that land;[13] or the use of permits and other mechanisms, such as heritage agreements for monitoring and continuing to preserve heritage values after disposal.[14]

6.17 The Environmental Defender's Office recommend that:

> [Sections] 324X and 341Z should be amended to require that any National or Commonwealth heritage place that is the subject of a sale or lease by the Commonwealth be subject to adequate heritage listing under State heritage

10 ACNT, Submission 4, p 4. See also ACF, Submission 16, p 14.

11 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 124.

12 Quoted in EDO, Submission 21, p 16.

13 WWF, Submission 12, p 11.

14 ACNT, Submission 4, p 3.

> legislation. Alternatively, the Commonwealth must take all reasonable steps to ensure that the place is protected by a State heritage listing.[15]

6.18 The Committee notes that the identification of the need for provision of better protection of Commonwealth heritage properties after sale or disposal was one of the outcomes of the Schofield Report.[16] The Committee also recognises that over time, problems may emerge with the effectiveness of the covenant system provided for in the bill. For these reasons, there are obvious benefits in considering some of the other options suggested by submissions such as leasing (thereby retaining a property under Commonwealth laws); sale to a state or territory; or listing under state or territory registers. However, the Committee also recognises that these options may be inappropriate in some circumstances, and may impose unwarranted restrictions on the operational flexibility of an agency.

Recommendation 6.2

The Committee recommends that the Government consider additional administrative means to protect Commonwealth Heritage List places upon sale or disposal, incorporating a range of methods, including listing, to ensure the preservation of these properties.

Definition of 'significant impact'

6.19 The meaning of 'significant impact' is also critical to the enforcement and triggering provisions discussed above. As one submission explains:

> The Minister's decision as to whether a proposed action will have a 'significant impact' on a matter of NES, and therefore whether the action requires approval under the EPBC Act, is one of the most important decision-making points in the processes under the Act.[17]

6.20 Submissions have raised three central objections to this arrangement: the source of the definition in Administrative Guidelines; and the failure of the definition to encompass damage to heritage properties caused by either cumulative impacts or neglect.

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15 EDO, Submission 21, p 16. See also Dr Nicholls, *Proof Committee Hansard*, Canberra, 28 February 2001, p 57.

16 1996 Commonwealth Report by the Committee of Review – Commonwealth owned Heritage Properties – A Presence for the Past, p 62.

17 WWF, Submission 12, p 7.

Administrative Guidelines

6.21 The first relates to the source of the definition. What constitutes 'significant' for the purposes of the Act is to be prescribed by the regulations,[18] however, two submissions have pointed out that the definition is derived not from regulations but rather Administrative Guidelines,[19] which they argue have no statutory force; are easily changed; are not enforceable and thus provide no certainty for stakeholders.[20] There is the concern that:

> As a result, the Minister has a very broad discretion as to whether to subject a project to environmental assessment and approval under the EPBC Act. Given the importance of this decision, we consider that the definition of significant should be in Regulations, as provided for under section 524B of the EPBC Act.[21]

6.22 The Committee has not received sufficient evidence on the legal status and enforceability of administrative guidelines to draw any clear conclusions. However, in general terms, it would appear that the guidelines are not binding on the Minister, and accordingly provide the Minister with considerable discretion to interpret and amend the concept of 'significant impact'. While there are some advantages in this approach, the Committee considers that the concept of 'significant impact' is sufficiently central to the enforcement provisions of the regime to render it desirable that the issue is clearly defined in regulations, as envisaged by the EPBC Act. Again, this view is tempered by the observation that such a change may have wider impacts on the operation of the EPBC Act that the Committee has not considered in the context of this inquiry.

Recommendation 6.3

The Committee recommends that the Government table the proposed definition of 'significant impact' in relation to natural heritage places, before any further debate on the bills takes place.

Recommendation 6.4

The Committee recommends that the Government place the definition of 'significant impact' in regulations created pursuant to the EPBC Act.

18 EPBC section 524B

19 'Administrative Guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the *Environment Protection and Biodiversity Act 1999*.' See Environment Australia website: http://www.erin.gov.au/epbc/proponents/significance_guidelines_text.htm

20 EDO, Submission 21, p 9.

21 WWF, Submission 12, p 7.

Cumulative impacts

6.23 The second issue relates to the threshold requirement of 'significant impact', which may not properly take account of multiple, small but cumulative or incremental actions that overall may have a major impact on a heritage listed place:

> Such impacts can be critical, especially when repeated on many occasions, in many places in close proximity to each other. Examples would include repeated actions to one or a series of adjacent buildings or a series of developments along a stretch of coastline.[22]

6.24 The Australian Council of National Trusts explains that heritage places unlike natural places, are non-renewable, and the destruction of historical fabric, no matter how minor, involves permanent loss:

> a series of minor physical changes will collectively and cumulatively lead eventually to the total loss of heritage value, particularly in precincts comprising several places.[23]

6.25 An alternative is to retain in the new regime, the terms used in the existing Act: 'adversely affects' and actions 'that might affect to a significant extent', which it is argued are suited to heritage protection and carry the added advantage of already possessing well established common law interpretations.[24] Accordingly, submissions advocate several other solutions, including the use of section 341R management plans as a tool to control limited actions;[25] or the creation of:

> a range of lesser offences not requiring 'significant impact' to encompass more 'minor' actions – for example, altering or damaging a Commonwealth heritage place.[26]

6.26 These would be regulated through a permit system modelled on Part 13 of the EPBC Act relating to actions impacting upon members of threatened species.[27]

6.27 The Committee notes that under the existing Administrative Guidelines, it is arguable that such minor or cumulative impacts could amount to a significant impact. The Guidelines require consideration of (among other things):

- all direct and indirect impacts;
- the frequency and duration of the action;

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22 ACF, Submission 16, p 13. See also ACNT, Submission 4, p 3.

23 ACNT, Submission 4, p 2.

24 ACF, Submission 16, p 13.

25 ACF, Submission 16, p 13.

26 WWF, Submission 12, p 10. Note also the comments of EDO, Submission 21, p 21.

27 ACF, Submission 16, p 13.

- the total impact which can be attributed to that action over the entire geographic area affected, and over time;
- and invokes the precautionary principle.[28]

6.28 Although the guidelines relating specifically to heritage protection are not yet available, examination of guidelines for other matters of environmental significance, such as world heritage properties, also suggest that cumulative impacts may be covered.

6.29 Nevertheless, the Committee concludes that the concept of 'significant impact' caused by cumulative impacts should be explicitly covered.

6.30 The Government may also wish to consider developing a permit system for cumulative actions affecting Commonwealth heritage. This could be similar to the existing system under Part 13 of the EPBC Act for members of species in Commonwealth areas.

Recommendation 6.5

The Committee recommends that in framing the definition of 'significant impact' for heritage places, in the regulations, specific consideration should be given to including impacts caused by cumulative actions.

Protection against neglect

6.31 In a closely related issue, it is argued that the provisions of the Bill do not offer protection against neglect of heritage places, and therefore need to be extended to cover both positive and negative acts in the protection regime. Associate Professor Paul Adam comments:

> In the built environment it has been recognised that 'demolition by neglect' is a major threat. There is a need to recognise that failure to manage can have the same effect in the natural environment.[29]

6.32 It is therefore argued that the Bill should be amended to impose minimum standards for the maintenance and repair of listed places, similar to the requirements of section 118 of the *Heritage Act* 1977 (NSW).[30]

6.33 The Committee agrees with the importance of preventing destruction through neglect. However, it is noted that adding the proposed amendments to the definition of 'significant impact' would result in attaching criminal penalties to the failure to

28 Administrative Guidelines p 2.

29 Associate Professor Adam, Submission 20, p 3.

30 WWF, Submission 12, p 7. See also ACF, Submission 16, p 14.

properly maintain a heritage place. The Committee is mindful that proper maintenance may imply considerable expenditure for the owners of heritage places. For this reason, criminal penalties may be appropriate for Commonwealth owned heritage places, but are probably less so for private owners, and that the Commonwealth should address the issue by means of management plans and associated grants programs.

6.34 In the Committee's view, the size and scope of the list (which has not yet been announced) will have some bearing on the appropriateness of this action since criminal penalties may be appropriate for the owners - whether public or private - of Australia's icon sites, but less so for other sites. As a general principle, however, attaching criminal penalties for failing to properly maintain a heritage place would appear to be appropriate for government owned properties but arguably less so for privately owned sites, especially where considerable expenditure may be required to maintain that site and where this places financial burden on the owner. In these cases, it would be more appropriate for the Commonwealth to address the issue by means of management plans and associated grants programs.

Recommendation 6.6

The Committee recommends that for places on the Commonwealth Heritage List, the Government include in the definition of 'significant impact' the neglect of the place.

Recommendation 6.7

The Committee recommends that the Government specifically addresses the issue of the neglect of places on the Register of the National Estate and National Heritage List through the adoption of measures such as management plans and grants funding.

Definition of damage to heritage

6.35 There is also concern that the sections 15B and 15C of the Bill, which create the central penalty provisions, refer to actions that have a significant impact on the 'heritage values' of a national heritage place. Submissions have argued that this definition should be altered to cover impacts on the place itself, rather than being limited to impact on national heritage values:

> protecting only the values of a national heritage place requires a careful articulation of those values during the listing process. Any oversight could

> subsequently result in damage to 'unlisted', but nevertheless important, values.[31]

6.36 It is further argued that:

> Whilst identification of the values of a heritage place can assist in the management of that place, it is far too nebulous a concept to provide adequate protection. One of the concerns is that all values are not always known at the time of listing. Indeed, on this issue, the Senate has already passed amendments to the EPBC Act that would focus on protection of world heritage 'properties, including associated values'. A similar approach is needed for heritage protection.[32]

6.37 The Australian Conservation Foundation submission further notes that this distinction is reflected in the later section 341Y which requires a Commonwealth agency to ask the Minister for advice before taking any action that could have a significant impact on a Commonwealth heritage *place*.[33]

6.38 The Committee agrees with this suggestion and considers that references to heritage values is unnecessarily restrictive.

Recommendation 6.8

The Committee recommends that sections 15B and 15C of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to prohibit any significant impacts on 'a heritage place or its heritage values'.

Retention of the prudent and feasible alternative test

6.39 An important provision for the protection of Commonwealth Heritage List places is the requirement that before a Commonwealth agency takes an action that could have a significant impact, it must ask the Minister for advice.[34] In contrast, the earlier section 30(1) of the AHC Act:

> requires each Minister responsible for a Commonwealth department or authority to give directions to ensure that no action of the department adversely affects the National Estate, unless satisfied that there is no

31 WWF, Submission 12, p 8. See also EDO, Submission 21, p 8.

32 ACF, Submission 16, p 12.

33 ACF, Submission 16, p 12.

34 Section 341Y

> reasonable and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse affect will be taken.[35]

6.40 According to several submissions, the proposed new section 341Y is a poor substitute for the 'prudent and reasonable alternative'. The North Queensland Conservation Council (NQCC) state:

> It is now recognised in law in the United States that the assessment of prudent and feasible alternatives in the impact assessment process is the 'heart' of impact assessment. It is consider[ed] critical to proper and impartial decision-making and to protection of those areas that are held most valuable.[36]

6.41 NQCC explains that there are several key requirements for a proper evaluation of alternatives. First, objectives must be defined in a manner that does not constrain the consideration of alternatives to a particular site or a particular manner of development. For instance, 'a safe harbour and canal estate in Nelly Bay' effectively prevents a proper analysis of prudent and feasible alternatives. Second, is a needs analysis, which is not the same as 'want' but a reflection of demand, social requirements, and the degree to which the proposal reflects a public good.[37]

6.42 A proper evaluation of alternatives assists in a broader and more innovative assessment of possible ways to achieve a given objective, and by inference must be conducted as early as possible in the process. NQCC notes that under the US *National Environmental Policy Act*,[38] and its regulations, an Environmental Impact Statement must:

> [r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.[39]

6.43 The Environmental Defender's Office take a similar view and suggest the following amendment to section 341Y(2):

- A Commonwealth Agency should not take an action that is likely to have a significant impact on a Commonwealth heritage place unless there is no reasonable alternative;
- If there is no reasonable alternative the Commonwealth agency must take all reasonable steps to minimise the adverse impact;

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35 EDO, Submission 21, p 21.

36 NQCC, Submission 1, p 2.

37 NQCC, Submission 1, p 2.

38 42 U.S.C. 4332(2)(C)(iii)

39 40 C.F.R. 1502.14(a). NQCC, Submission 1, p 2.

- The Commonwealth agency should provide details to the Australian Heritage Council for its comment on the proposed action affecting a Commonwealth heritage place.
- The Australian Heritage Council can request the Minister to hold an inquiry into a matter relating to the Commonwealth estate.[40]

6.44 The Committee considers that there is considerable benefit in formally incorporating the substance of the 'reasonable and prudent alternative' test into the consideration of actions by Commonwealth agencies in relation to Commonwealth Heritage List places. Under the proposed system, the agency is under no obligation to formally consider alternatives, which the Committee believes to be a key part of any proper analysis.

Recommendation 6.9

The Committee recommends that the Government consider incorporating a formal analysis of options and alternatives into section 341Y of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000.

Enforcement of the EPBC Act

6.45 Concerns have also been raised over the general effectiveness of the protection afforded by the EPBC Act. Evidence to the inquiry[41] drew attention the low number of referrals to the Minister. For example, eleven per cent of the total number of referrals to the Minister were from the ACT, whilst only six per cent came from Western Australia, notwithstanding the enormous differences in the size of the two areas. While recognising that the EPBC Act has only recently come into force, such anomalies may suggest problems which the Department should consider.

6.46 The Committee notes with interest the inconsistencies in the number of referrals made to the Minister under the EPBC Act. However, a detailed examination of this issue is beyond the scope of the inquiry which must remain focused on the provisions of the bills before it.

Authority of the Commonwealth Minister

6.47 Although the previous chapter discussed concerns over the breadth of the Commonwealth Environment and Heritage Minister's powers, several submissions also suggested that in two key respects, the Minister's powers should be expanded further.

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40 EDO, Submission 21, p 21.

41 WWF, Submission 12, p 16.

6.48 The first of these relates to the status of 'advice' given by the Minister. Before taking actions that have or are likely to have significant impacts,[42] or making, amending, revoking or replacing a management plan,[43] a Commonwealth agency must ask the Minister for advice. However, the weight that must be given to this advice is unclear. In the case of the former, the agency must 'take account of' the advice while in the latter, no indication of the authority of the advice is given. This raises the obvious possibility that Commonwealth agencies may largely ignore the advice given by the Minister, rendering the protection afforded by the legislation potentially useless. This has already been identified as a major weakness of the AHC Act.[44] Ms Sullivan argues that:

> Firm measures are required if other Commonwealth departments and ministers are to pay more than lip service to heritage conservation. The Heritage Minister should have a final say in these matters, rather than simply having his advice taken into account.[45]

6.49 The second matter relates to the issue of referral of 'actions' to the Minister. Under the EPBC Act, proponents are required to refer proposals to the Minister,[46] while states or territories may choose to refer.[47] The Minister may also 'request' but cannot compel a referral in the event that proponents fail to do so.[48] It has been suggested that this limited 'call in' power needs to be strengthened:

> While the penalties for contravention of the EPBC Act do provide some incentive to refer relevant actions, if a proponent chooses to ignore the Minister's request, there are very few options available to the Minister (or the community) other than to commence expensive and time consuming legal proceedings.[49]

6.50 The Environmental Defender's Office argue that the need to grant coercive powers to the Environment and Heritage Minister is stronger in the now devolved property management environment:

> Since 1989, the Commonwealth Government has devolved responsibility for its property use from one central agency to several agencies. These individual agencies have their own goals and targets, prescribed policies and financial concerns, and it has been demonstrated that heritage preservation has not been a consistent priority.

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42 Section341Y(1)

43 Section 341Q(4)

44 Chapter 2, paragraph 2.8

45 Ms Sullivan, Submission 14, p 8.

46 EPBC Act section 68

47 EPBC Act section 69

48 EPBC Act section 70

49 WWF, Submission 12, p 17.

> Regardless of the existence of an accredited management plan, allowing Commonwealth Agencies to determine, unchecked, their own actions over Commonwealth heritage properties will not lead to the effective or optimal levels of heritage protection. Instead, the Minister should retain responsibility for ensuring that any actions taken are consistent with the goals of heritage protection.[50]

6.51 The Committee is sympathetic to both these views, and considers that there is a case to strengthen the powers of the Commonwealth Minister by allowing for the provision of compulsory advice and stronger call-in powers. However, as has been the case in several matters in this chapter, the amendments suggested involve changes that would effect the operation of the EPBC Act in a range of matters that have been beyond the scope of this inquiry. There is still, however, a need to consider how these changes could be achieved.

50 According to the EDO, the Schofield Report (A Presence for the Past) further noted that for a number of years the Commonwealth has not been providing consistent directives to its departments on preserving heritage. EDO, Submission 21, p 20.

CHAPTER 7

INDIGENOUS HERITAGE

> *There are few issues of greater importance to indigenous people than the protection of indigenous cultural heritage. Significant intangible heritage, areas and objects form an irreplaceable cultural and physical link between the past and present for the vast majority of indigenous people.*[1]

Introduction

7.1 An important element of the bills is the provision of legislative measures to protect indigenous cultural heritage. The inclusion of indigenous heritage in the wider heritage protection regime raises some complex issues, however. The first is how the proposed legislation will relate to existing laws. The second relates to indigenous culture and the role the Commonwealth should play in national heritage protection.

Relationship of the Bills to other Commonwealth legislation

7.2 An obvious starting point for consideration of indigenous issues within these bills is the relationship the proposed laws will have with the existing Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and its proposed replacement, the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.[2]

7.3 The ATSIHP Act states as its purpose:

> [T]he preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.[3]

7.4 Similarly, the ATSIHP Bill aims to:

> … establish procedures relating to:
>
> (a) the preservation and protection from injury or desecration of certain significant indigenous areas, and of certain significant indigenous objects, that are situated in Australia or Australian waters; and

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1 ATSIC, Submission 25, p 8.

2 The Bill was passed by the House of Representatives on 11/2/99 and by the Senate on 26/11/99 with amendments. The House of Representatives did not agree to all the Senate amendments, and this was reported back to the Senate on 9/12/99.

3 Section 4 Purposes of Act

> (b) the accreditation of the laws in force in States and self-governing territories as accredited heritage protection regimes in respect of a particular matter or matters.[4]

7.5 Mr Bruce Leaver, of Environment Australia, explained that the ATSIHP Act (and the Bill):

> Is a development control act engaging heritage protection in the face of development proposals. These bills propose the identification and protection of heritage as values in its own right outside the pressure of development proposals. There is one linkage between the two acts [sic], and that is an obligation of the proposed Australian Heritage Council to seek the advice of the director of indigenous heritage established under the ASTIHP Act regarding listings, but beyond that these bills regards indigenous heritage as part of the natural social and cultural heritage of Australia and deal with it accordingly.[5]

7.6 Nevertheless, the Committee is concerned that there is no clear discussion in either the legislation itself or the accompanying materials about the intended relationship between the two regimes.[6] This is unacceptable given the complexity and sensitivity of indigenous heritage protection, and the amount of negotiation, consultation, review and inquiry that has been invested into the ATSIHP legislation, including the:

- Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 by the Hon Elizabeth Evatt AO (the Evatt Report)
- Joint Parliamentary Committee on Native Title and the Aboriginal Torres Strait Islander Land Fund 11th and 12th Reports
- Senate Legal and Constitutional Legislation Committee report into the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998.

7.7 The Evatt Report in particular, is regarded as providing an influential blueprint for establishing a heritage protection regime.[7] In particular it is worth noting that one of the main recommendations of the report was the establishment of a national indigenous heritage body that would be staffed and managed by Indigenous people in recognition of the fact that they are the custodians of their cultures. This was a point reiterated by the Chairman of ATSIC, Mr Geoff Clark, in his presentations to the Committee.[8]

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4 Section 4 Main object of Act

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

6 Note the shared concerns of the Victorian government: Submission 31, p 4.

7 National Heritage Convention Key Outcomes, p. 45

8 Mr Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 103.

7.8 The Committee concludes that while no evidence has been received that suggests any direct conflict between the two regimes, the importance and complexity of the subject matter dictates that every measure is taken clarify this relationship and how the regimes will interact to provide the necessary level of protection of indigenous heritage. The Committee considers that the relationships between the two regimes should be clarified before the Senate considers the bills. ATSIC and other relevant indigenous organisations should be invited to provide the Committee with their views on the Government's response so that the Committee can develop a fully informed position on the issues.

Recommendation 7.1

The Committee recommends that the Government provide full details about the relationship between indigenous heritage protection in the proposed EPBC regime and the ATSHIP Act prior to the Senate's consideration of the bills. Indigenous people should be given the opportunity to comment on the Government's response.

Recommendation 7.2

The Committee recommends that the Government provide a full response to the recommendations contained in the Evatt Report.

Appropriateness of the proposed measures

7.9 Evidence has also argued that the proposed legislative framework for heritage protection centred around the concept of places of National Environmental Significance, is fundamentally unsuited to its task, due to the characteristics of indigenous heritage. This is explained by Professor John Mulvaney:

> each linguistic or 'tribal' grouping reveres its own fundamental creation/Dreaming places and interconnecting pathways ('Songlines')[.] Europeans, for example, rate Uluru as the supreme Aboriginal place (witness the National Museum's 'Uluru Line'). Yet its significance for Aboriginal people was limited to the people of that region, and it was not more important to them than many less impressive places. Indigenous elders in totally diverse regions (Cape York, Kimberley, Arnhem Land) would list many places which, to them, are as 'national' as Uluru.[9]

7.10 Accordingly, there is a danger that site selection will be dominated by eurocentric values and notions of what makes a place important. Ms Sullivan reinforces this point:

9 Professor Mulvaney, Submission 3, p 2. See also Australian Council of Professional Historians Association, Submission 30, p 4.

> [T]here are very real problems in limiting the protection of indigenous heritage places outside the Commonwealth jurisdiction to those which are deemed to have national significance. Many very significant Indigenous sites do not have such significance, or, if they were deemed to do so, Indigenous people do not want them to be treated in this way – that is, turned into national icons.[10]

7.11 ATSIC agree, noting that the traditional European notion of culture and heritage, centered around monuments and 'leading' civilisations, is too narrow:

> ATSIC shares this view that a Eurocentric domination of any listing will be absolutely discriminatory to the very basis of Australia's Indigenous heritage and its people.[11]

7.12 A similar concern is raised by the Tasmanian government:

> The Tasmanian government believes that there are significant deficiencies in the Bill as it relates to the provision of Indigenous Heritage protection. Indigenous heritage has been incorporated into a document that was originally written for built heritage. The language and methods of European built heritage conservation are not necessarily appropriate for Indigenous Heritage.[12]

7.13 At the same time, ATSIC asserts that the bills are flawed in their inadequate provision for protecting 'intangible' heritage, and are instead completely focused on tangible sites, places and objects.[13] Intangible heritage includes cultural heritage not capable of physical embodiment such as singing of songs, stories, spiritual attachments, intellectual and cultural property.[14]

7.14 A second issue that arises in consideration of the appropriateness of the proposed measures is that of adequate protection of indigenous sites. Mr Preston Thomas, an ATSIC Commissioner, explained that many indigenous people are reluctant to use listing provisions for fear that information about the site's location and significance will be publicly available.[15] Such a release of information may be culturally inappropriate and may also lead directly to the damaging of those sites by unauthorised visitors. Mr Geoff Clark, the Chairman of ATSIC, gave an example of such disclosure involving the release over the internet of cultural site information by a visiting researcher. He went on to explain that:

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10 Ms Sullivan, Submission 14, p 7.

11 ATSIC, Submission 25, p 12.

12 Tasmanian government, Submission 28, p 5.

13 ATSIC, Submission 25, p 12.

14 EDO, Submission 21, p 9.

15 Mr Preston Thomas, *Proof Committee Hansard*, Canberra, 7 March 2001, p 100. Also Mr Clark

> This bill has reached a critical stage where it needs to include all Aboriginal sites. It needs to take into consideration how Aboriginal stories are held in terms of their sacredness, in terms of who should know, whether you are male, female or a young person, et cetera.[16]

7.15 According to Mr Bruce Leaver of Environment Australia, the Department has been aware of these issues in drafting these bills,[17] but makes two points. First, notwithstanding the conceptual problems associated with listing criteria requiring indigenous sites of 'national' significance, there has been interest by indigenous people in listing:

> many historical sites particularly associated with the first European contact, battle sites, massacre sites and so on which would be very worthily listed as a place of national heritage significance … .[18]

7.16 Second, Mr Leaver claims that a sensitive approach will be taken to the listing process that will ensure that key indigenous heritage sites will be protected with appropriate controls over confidentiality:

> it should be made absolutely clear that in these bills indigenous places will be available for inclusion on the national and Commonwealth lists subject to the views that have affected indigenous communities and the confidentiality provisions of the bills. The issue of dealing with the concept of 'national', as I have mentioned, applying to an individual community site will have to be dealt with on a site by site basis and I expect, like its predecessor, the Australian Heritage Council will take a constructive, consultative and sensitive approach to the listing of indigenous places.[19]

7.17 While acknowledging the best intentions of departmental officials, the Committee is not convinced that this will necessarily be the case. Although the bills do provide for confidential listings, the fact remains that departmental officials will be bound by the requirements of the law, which will still require demonstrated 'national' or 'Commonwealth' heritage values in order to list a place on either of these proposed lists.

7.18 The Committee also considers that greater consideration should be given to the protection of intangible heritage.

7.19 Witnesses have suggested several solutions. Ms Sullivan proposes that the bills should be amended to:

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16 Mr Geoff Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99.

17 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

18 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

19 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

> allow the Minister, in consultation with relevant Aboriginal groups, as well as the Australian Heritage Council, to declare or List an Aboriginal cultural heritage place to be a Commonwealth Heritage Place.[20]

7.20 This would require either that the place be situated on Commonwealth land, or that the definition of the Commonwealth list is amended.

7.21 The Committee has also heard evidence that during the consultation period for the proposed new regime that indigenous communities and other groups were advised that all indigenous sites currently on the RNE would be automatically listed on the Commonwealth list as 'matters of constitutional interest'.[21] The Committee sees considerable merit in this approach, but is also mindful that significant changes of this nature need to be fully canvassed with indigenous communities and other options should also be discussed given the current problems that are identified with the listing process by indigenous people, some of which have been highlighted above.

7.22 The importance of comprehensive consultation is further reiterated by ATSIC who argue that it is the key to resolving these issues properly:

> These are complicated issues that this bill does not address because it has not had sufficient, we believe, consultation with Aboriginal people in understanding those issues or, if those issues are understood, they have been ignored.[22]

7.23 The Committee appreciates that there are problems with attempting to apply the definition of 'national' significance to many of the indigenous heritage sites. As the bills stand, sites of indigenous heritage significance will be listed on much the same grounds as historic or natural sites of 'national' significance, rather than reflecting any particular significance to indigenous Australians.

7.24 The Government argues that this is in accordance with the general objective of the bills and that it is not the intention of the bills to provide the principal mechanism for indigenous heritage protection. The Government says, however, that the bills do serve to provide an overarching protection to those few items of heritage that have a national significance. In this sense, 'national' is explicitly intended to refer to the significance of a place to all Australians, rather than indigenous Australians specifically. Indigenous sites that may be placed on the National list, may be thought of as being of 'national' significance by non-indigenous people, but they will probably not be regarded as being of 'national' significance by indigenous people, particularly given the large number of Aboriginal nations in Australia. There is therefore a real problem if the National List is not 'owned' by all Australians and if Aboriginal people feel in any way that the broader community is appropriating their heritage. This would be a counter-productive outcome since it would send a very

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20 Ms Sullivan, Submission 14, p 7.

21 ACF, Submission 16, p 8.

22 Mr Geoff Clark, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99.

negative message to Aboriginal people about how the broader community values their heritage.

7.25 In considering these issues, the Committee is of the view that the concept of a national list is a culturally discrete concept that should not be imposed upon indigenous heritage if it is something that Aboriginal people feel is inappropriate and which may actually cause significant harm and offence.

7.26 The Committee fully understands and supports the need to protect indigenous heritage based on its significance to indigenous Australians, and considers that the bill does not adequately achieve that. The Committee concludes that listing all indigenous sites on the Commonwealth list, may be a possible means of resolving concerns over the placement of indigenous sites on the National List, but that this approach requires further consultation with indigenous peoples.

7.27 The Committee further concludes that given the problems with the placement of sites on the National List, that this is another good reason for the retention of the RNE, in which all indigenous sites can be listed. The Committee is also mindful of the fact that the given the significance of indigenous heritage to the Australian community as a whole, that it would be of great concern not to have indigenous sites represented on some kind of national register of Australia's collective heritage.

7.28 The Committee notes, however, that the RNE is not a comprehensive listing of indigenous sites given the concerns that some Aboriginal people have with listing processes. The Committee agrees with ATSIC, therefore, that further dialogue with Aboriginal people is needed to determine an effective long-term solution for the protection of heritage of significance to Aboriginal people.

Recommendation 7.3

The Committee recommends that the Government investigate with indigenous people the appropriateness of placing all indigenous sites currently on the RNE onto the Commonwealth List.

Recommendation 7.4

The Committee also recommends that the Government engage in further consultations with indigenous people about the best means to ensure the long term protection of heritage of significance to Aboriginal people.

International and national obligations

7.29 ATSIC also drew the Committee's attention to a number of relevant principles of international law that should inform debate on the protection of indigenous heritage.[23] These include the:

- Draft Declaration on the Rights of Indigenous People[24]
- Convention on the Elimination of Racial Discrimination (CERD)
- International Covenant on Civil and Political Rights (ICCPR)[25]
- International Convention on Economic Social and Cultural Rights (ICESCR)
- International Labour Organisation (ILO) Convention 169 concerning Indigenous and Tribal peoples in independent countries, provide relevant principles.[26]

7.30 In raising these matters, ATSIC comments that:

> the standards set out by the draft declaration, especially the rights of self-determination, are regarded as a necessary minimum to safeguard the cultural diversity represented by indigenous people.[27]

7.31 The Committee concludes that these international instruments are sources of important general principles that should be taken into consideration in developing heritage protection laws for indigenous peoples.

Recommendation 7.5

The Committee recommends that the Government take appropriate steps to ensure that Australia's indigenous heritage protection laws reflect the principles and rights embodied in international legal instruments.

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23 ATSIC, Submission 25, p 10 - 11. Mr Geoff Clarke, *Proof Committee Hansard*, Canberra, 7 March 2001, p 99-100.

24 Articles 4, 12, 13,14, 25, 26, 27, 28 and 29.

25 Articles 1.1 and 27.

26 Preamble, paragraph 7

27 Mr Preston Thomas, *Proof Committee Hansard*, Canberra, 7 March 2001, p 100.

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

Australian Heritage Council Bill 2000

Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000

MINORITY REPORT BY GOVERNMENT SENATORS

Introduction

1.1 The main Committee report addresses a broad range of issues and arrives at some thirty-five separate recommendations. In this minority report, the Liberal Senators do not intend to address all of these recommendations, but rather to focus on several central issues. However, in so doing, the Liberal Senators should not be taken to agree with the remaining conclusions or recommendations of the main report.

Australian Heritage Council – Listing powers

1.2 Government Senators do not agree with the recommendation at Chapter 3 that the AHC should have the power to autonomously list places on the Commonwealth or National Heritage Lists. This power should remain with the Minister as envisaged by the bills.

1.3 Government Senators agree with the concept that there must be a separation between the assessment of heritage values and the management of heritage places. However, it does not necessarily follow that this requires the AHC to have a listing power. The model proposed by the bills provides this separation of roles, in that the AHC is responsible for the assessment of heritage values and in so doing, is precluded from taking into account anything other than heritage issues. The Minister is then responsible for the consideration of whether to enter a place on one of the two new lists, and to administer subsequent management actions through approvals and management plans.

1.4 Government Senators consider that the major implications of listing and the often controversial subject matter, make the listing decision an inherently political decision. It is therefore considered appropriate that the decision maker should be an elected representative answerable to the Parliament.

1.5 In addition, evidence to the inquiry showed that no other regime in Australia that provides for an independent body to make the listing decision in circumstances where:

- the relevant legislation covers natural, cultural, historic and indigenous heritage; and
- the listing attracts substantive protection of the kind offered by the EPBC Act and the proposed heritage reforms.

1.6 We also note that this mechanism is based on the process for listing nationally threatened species (a science-based approach), which has worked well in practice.

Australian Heritage Council – composition and functions

1.7 Government Senators consider that there may be grounds for amending Section 5 of the Australian Heritage Council Bill 1999 to allow the AHC a more proactive role in terms of public education and promotion of heritage conservation. However, the proposed membership and qualifications of members of the Council are considered appropriate and should not be changed.

1.8 However, for the reasons stated above, the Government does not believe that these changes should extend to allowing the Council to nominate and assess a place on its own motion.

1.9 It should be also be emphasised that the bill provides for the AHC to act under the direction of the Minister, by which means, the agency is answerable to the Minister who is in turn accountable to the Parliament. In this respect, Government Senators reject the implication that to work to the direction of the Minister implies that the agency will be prevented from carrying out its tasks effectively and professionally.

Future role of the Register of the National Estate

1.10 Chapter 4 of the report addressed the future of the RNE. Government Senators do not agree with the need to maintain the RNE as a statutory list in addition to the proposed National and Commonwealth Lists.

1.11 Firstly, the RNE will continue as a public reference source and will be transferred in its entirety into the National Heritage Places Inventory. None of the work put into developing the RNE will be lost.

1.12 Secondly, the bills are premised on a particular allocation of roles between the Commonwealth and the states and territories, based on extensive negotiations leading to the COAG Agreement. For the Commonwealth to maintain a list of heritage places not directly the responsibility of the Commonwealth (as distinct from coordinating a combined register like the NHPI) would defeat the purpose of the bills.

1.13 The Government Senators do not believe that all Commonwealth places on the RNE should automatically go on the new Commonwealth List (Recommendation

5.1). To do so would undermine the integrity of the regime which is based on expert assessment before listing against rigorous criteria (yet to be settled).

Transparency

1.14 The Government Senators endorse the comments of the main report relating to the transparency of the process, and note that the Government will seek public comment on the draft 'heritage management principles' and criteria when they are finalised. In general, the bills provide a very high level of transparency and accountability. The opportunities for public participation and comment are greater than in any comparable legislation, and certainly represent a significant advance over the *Australian Heritage Commission Act 1975*.

Funding for heritage properties

1.15 Sections 324Y and 341ZA of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 will not have the effect of limiting Commonwealth funding to places on the National or Commonwealth list. The provisions authorise expenditure of Commonwealth funds on Nation or Commonwealth Heritage list places, but do not preclude other expenditure under the Cultural Heritage Projects Program or the Natural Heritage Trust administered by Environment Australia.

Definition of 'action'

1.16 It is not agreed that either grants or disposal of a property should be included within the definition of 'action'(Recommendation 6.1). In relation to grants it is not necessary to provide for funding as an 'action' to trigger the EPBC Act, since the project being funded will itself trigger the EPBC Act if it affects a matter of National Environmental Significance.

1.17 In relation to disposal, where the heritage values of a property are known, the covenant provisions of sections 324X and 341Z provide the necessary protection as discussed below. It should also be noted that the function of the word 'action' in the AHC Act triggers consultation, in contrast to its function in the EPBC Act which is linked to enforcement provisions.

Protection on sale or lease

1.18 Government Senators do not agree that there is a need for additional administrative measures to protect properties on sale or disposal (Recommendation 6.7). The bills provide a mechanism for attaching covenants to properties with heritage significance, which is a major initiative not in the existing *Australian Heritage Commission Act 1975*. This is considered adequate protection.

Definition of significant impact

1.19 Government Senators note the discussion in Chapter 6 relating to the definition of 'significant impact'. The Government will develop administrative guidelines dealing with the significant impact test, and in doing so, will consider

whether more effective administration of the Act and greater certainty can be achieved by placing these guidelines in regulations as recommended by the main report.

John Tierney (Deputy Chair)

Senator for New South Wales

RESPECTING AUSTRALIA'S HERITAGE

MINORITY REPORT BY LABOR SENATORS

Introduction

In this Centenary year we are presented with a historic opportunity to set in place a visionary regime for the maintenance and protection of Australia's rich and diverse natural, cultural and indigenous heritage.

The *Australia Heritage Commission Act*, introduced in 1975 by the Whitlam Government, revolutionised the way in which Australian heritage was managed, and it represented world's best practice in heritage legislation at that time. It was truly visionary and has been instrumental in the preservation of much of Australia's heritage.

However, despite its many strengths, the legislation also has its weaknesses. International trends are towards stronger, more pro-active, heritage protection and there is broad agreement that the current legislation can be improved. We have the opportunity for Australia to re-establish our international leadership in the area of heritage protection.

However, the legislation presented to Parliament does not do this. Although it strengthens some aspects of heritage protection, overall it is a significant step backwards. The Labor Party does not support these bills in their current form and will seek to amend the legislation in Parliament.

During the years of the Howard Government, there has been a progressive politicisation of heritage protection, including natural, cultural and indigenous heritage.

The Government-appointed Chair of the Australian Heritage Commission and current Chair of the World Heritage Bureau is a preselected Liberal candidate for the upcoming Federal election, calling into question the independence of the Australian Heritage Commission and undermining Australia's international standing on heritage issues.

The Howard Government has sanctioned the mining of uranium at Jabiluka in a World Heritage area, and has aggressively pursued this in the international arena, despite strong community concerns about its impacts on the environment and indigenous communities.

The Government now appears set to ignore legitimate concerns raised by stakeholders regarding its proposed heritage legislation.

In their submission to the Committee, seven former eminent Chairs and Commissioners of the Australian Heritage Commission, set out the six principles that they thought should form the basis for any amendments to Commonwealth Heritage legislation. They are:

- Heritage protection in Australian needs strong national presence with national leadership from the Commonwealth. This requires 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.

- Complementary State and Territory heritage action should be strongly encouraged.

- Any amendment to Commonwealth Heritage Legislation should be progressively strengthening existing legislation, not weakening it in any way.

- Constitutional powers of the Commonwealth should be used to their full extent to protect places of heritage value to the nation.

- The decision to include or not include and to remove places from national registers or lists should be vested in an independent professional body, not in the Minister.

- Those parts of heritage systems that have worked well for a long time should not be lightly discarded.[1]

The Labor Party supports all of these six principles, which have not been followed in the development of the legislation presented to the Parliament.

Significant concerns have been raised with the Committee in the submissions and presentations to the Committee, many of which are detailed below. This list is not exhaustive, but provides an overview of the key issues raised.

These issues will need to be adequately addressed to the satisfaction of the Labor Party before it supports the passage of the legislation.

Using the Environment Protection and Biodiversity Conservation Act framework

Concerns have been raised about whether or not the EPBC Act is an appropriate framework for heritage protection. By attempting to integrate heritage protection into the EPBC Act, the heritage protection regime will be subject to the same deficiencies and inappropriate ministerial discretions that undermine the environmental legislation.

Specific concerns regarding the EPBC Act framework include:

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1 *Submission 10*, Professor Yencken and others, p 4-5.

- the ability to delegate approval powers on issues of national significance to the states through bilateral agreements;
- limitations of the current terminology in the Act to reflect heritage objectives and the limited definition of heritage 'values', rather than 'places and associated values';
- the more limited definition of 'action' under the EPBC Act compared to the AHC Act, including the omission of the allocation of grants;
- the 'significant impact' threshold test on values does not require consideration of prudent and feasible alternatives as in the existing legislation; and
- uncertainty about the definition of 'significant impact' and whether it adequately covers likely impacts on heritage.

The Register of National Estate (RNE)

Of the 13,000 places currently on the Register of the National Estate, it could be expected that only a few hundred places might be included in each of the new lists. With the repeal of the *Australian Heritage Commission Act 1975*, the Register of the National Estate will no longer be a statutory register and the fate of the places included on the list becomes uncertain.

Although there is currently no substantive protection for heritage places of national significance, those places that are removed will have no protection whatsoever. There is grave concern that the interim arrangements are inadequate and that the loss of the statutory basis of the list will lead to its demise.

The Commonwealth list

The 1996 report by the Committee of Review – Commonwealth owned heritage property, *A Presence for the Past* (the Schofield Report), was a comprehensive assessment of Commonwealth heritage management and protection. Many of the key recommendations of this report have been omitted from this legislation.

Separation of assessment and listing processes

The listing of places under the current regime is based on an independent technical evaluation of its heritage values undertaken by the Heritage Commission. Under the proposed regime, responsibility for listing lies with the Minister, guided by advice from the new Australian Heritage Council.

Many witnesses presented an argument that listing should be based solely on a technical assessment of its heritage values, separate from political considerations. Decisions regarding the management of places that are heritage listed are subjective decisions, and more likely to be affected by politics, but the listing of places should be a technical decision and therefore the responsibility of the Council.

Although the proposed listing process includes a mechanism for the consideration of public nominations, the expert Council is unable to instigate an assessment of a place for listing, as this is also at the discretion of the Minister.

The Australian Heritage Council

The proposed Council represents a significant downgrading of the Commission. The functions and powers of the Council will be significantly different from those of the Commission, which currently include the ability to identify places to be included in the Register of the National Estate, to prepare the Register, to give advice on grants, to encourage public interest, to further training and education, to organise and engage in research and to give advice to the Minister on heritage matters.

The functions of the proposed Council by contrast are to advise the Minister, on request from the Minister, about conserving and protecting places on or being considered for the new Lists and about heritage research, promotion, education, national policies, grants and monitoring.

The Council's sole function of its own motion is to nominate places to the Minister for inclusion on the new Lists.

Indigenous heritage

Specific issues raised by ATSIC include the lack of consultation with the indigenous community on the proposed legislation, its relationship with the Aboriginal and Torres Strait Islander Heritage Protection Bill, currently before parliament, the nature of indigenous representation on the Australian Heritage Council, and whether the Bills together deliver on the recommendations of the Evatt Report into the protection of indigenous heritage.

The Federal Labor Party shares these concerns, particularly given that strong protection of indigenous heritage is awaiting amendments to the *Aboriginal and Torres Strait Islander Heritage Bill,* currently being held up by the Federal Government.

To ensure that there is adequate legislation covering indigenous heritage, the Federal Labor Party believes that both these bills should be brought on together, given the negotiated agreement of indigenous representatives plus the clear Senate majority in support of these amendments to the *Aboriginal and Torres Strait Islander Heritage Bill*.

Management principles

Both the proposed national heritage management principles and Commonwealth heritage management principles are not set out in the legislation, and no drafts have been made publicly available.

It is proposed that these principles would be contained in instruments published in The Gazette. Yet these principles are vital to a number of processes under the proposed

legislation and to the preparation and review of management plans for all heritage places. Concerns have been raised about the lack of consultation on these significant principles.

The Federal Labor Party does not support these bills in their current form, but reserves its position on the legislation until the debate in parliament.

Nick Bolkus

Senator for South Australia

APPENDIX 1

LIST OF SUBMISSIONS

Sub No	Name/Organisation	State
1	North Queensland Conservation Council	QLD
2	Mr John Browning	QLD
3	Emeritus Professor Mulvaney, AO, CMG	ACT
4, 4(a)	Australian Council of National Trusts	ACT
5, 5(a)	Peak Environmental Enterprises	VIC
6	Australian Institute for Marine Archaeology	SA
7	Sydney Water	NSW
8	Australian Heritage Commission	ACT
9	Association of Mining and Exploration Companies (Inc)	WA
10	Emeritus Professor Yencken, AO Emeritus Professor Mulvaney, AO, CMG Dr Baker, OBE Ms Domicelj, AM Associate Professor Davis, AM Mr Molesworth, QC Dr McCarthy, AO	VIC
11	Professor Jane Lennon	QLD
12	World Wide Fund for Nature (Australia) Humane Society International Tasmanian Conservation Trust Conservation Council of South Australia	ACT
13	Norfolk Island Conservation Society	Norfolk Island
14	Ms Sharon Sullivan	NSW
15	Barjar Aboriginal Corporation	NSW

16	Australian Conservation Foundation Conservation Council of South East Region and Canberra	VIC
17	Australian International Council on Monuments and Sites	VIC
18	Mr Bruce Leaver	ACT
19	Mr Graeme Worboys	ACT
20	Professor Paul Adam	NSW
21	Environmental Defenders Office Ltd (NSW)	NSW
22	Minister for Urban Services, ACT	ACT
23	Penrith City Council	NSW
24	Australian and New Zealand Minerals and Energy Council	NT
25	ATSIC	ACT
26	Heritage Council of Western Australia	WA
27, 27(a)	South Australian Government	SA
28	Tasmanian Government	TAS
29	New South Wales Government	NSW
30	Australian Council of Professional Historians' Association	ACT
31	Victorian Government	VIC
32	Mr Graham Hyde	ACT

APPENDIX 2

WITNESSES AT HEARINGS

Canberra – Wednesday, 28 February 2001

Environmental Defender's Office

- Mr Marc Allas, Solicitor

Peak Environmental Enterprises

- Dr John Geoffrey Mosley, Principal

Emeritus Professor David Yencken, AO (private capacity)
Emeritus Professor John Mulvaney, AO, CMG (private capacity)
(also representing):

Dr Baker, OBE
Ms Domicelj, AM
Mr Molesworth, QC
Associate Professor Davis, AM
Dr McCarthy, AO

World Wide Fund for Nature (Australia)
Humane Society International
Tasmanian Conservation Trust
Conservation Trust of South Australia

- Mr Jame Pittock, Program Leader, Nature Conservation & Murray Darling Basin (WWF)
- Ms Sophie Chapple, Environmental Legislation Coordinator (WWF and HIS)

Association of Mining and Exploration Companies (Inc)

- Mr George Savell, Chief Executive
- Mr Alan Layton, Executive Officer

Australian Conservation Foundation

- Dr Warren Nicholls
- Mr John Connor, Campaign Director

Canberra – Wednesday, 7 March 2001

South Australian Government, Department of Environment & Heritage

- Ms Leanne Burch, A/g Director Environmental Policy
- Mr Lindsay Best, A/g Director of National Parks & Wildlife
- Mr Andrew Johnson, Group Manager, Strategic & Environmental Services, Sustainable Resources, Primary Industry and Resources, SA

Australian Council of National Trusts

- Mr Simon Molesworthy, QC
- Dr Susan Marsden, National Conservation Manager

Australia ICOMOS

- The Hon Dr Barry Jones, AO, Member, Executive Council
- Ms Jyoti Somerville, Vice President
- Mr Duncan Marshall, Adviser

ATSIC

- Mr Geoff Clark, Chairman
- Mr Preston Thomas, Commissioner for Culture
- Mr Lichaz Wieslaw, Policy Adviser

Australian Heritage Commission

- Mr Peter King, Chairman
- Mr Brian Babington, Deputy Executive Director

Environment Australia

- Mr Bruce Leaver, Executive Director of the Australian Heritage Commission and Head, Australia and World Heritage Group
- Dr Matasha McConchie, Senior Policy Officer

APPENDIX 3

TABLED DOCUMENTS

Canberra – Wednesday, 7 March 2001

Commissioner Preston Thomas, ATSIC

- Draft Declaration on the Rights of Indigenous Peoples
- UNDP – Indigenous Peoples, Resource Centre: Documents – Declarations from http://www.undp.org/csopp/CSO/NewFiles/ipdocdec.html

Mr Peter King, Australian Heritage Commission

- Australian Heritage Commission, 'A National Future for Australia's Heritage', *Discussion Paper*, dated August 1996.

APPENDIX 4

DRAFT CRITERIA FOR NATURAL HERITAGE LIST PLACES

1.1 A national heritage place must be of symbolic, exemplary or unique significance to Australia.

1.2 Without limiting the generality of 1.1, the heritage values of a national heritage place will satisfy at least one of the following to the highest degree:

1.2.1 the place is of national importance in the past course or present pattern of nature or cultures in Australia;

1.2.2 the place has the potential to make a contribution of national importance to the understanding of Australia's history or environment;

1.2.3 the place is recognised as being of national importance for its landmark or aesthetic quality, social, spiritual or other cultural associations;

1.2.4 the place is a representative example with the principal characteristics of a class of places or environments of national importance to Australia;

1.2.5 the place is of national importance as an uncommon aspect of the history, cultures or environments of Australia;

1.2.6 the place has special associations with the life or works of a person or group important to Australia;

1.2.7 the place demonstrates creative or technical excellence of national importance.

Definitions:

Exemplary to Australia means the place is a typical or illustrative example of a type, pattern or process distinctive of Australia.

Symbolic to Australia means the place represents or recalls an object, event, idea or process that is recognised as important by the Australian people.

Unique to Australia means the place is the only one of, or the best or last remaining example of a particular type in Australia.

Heritage Value has the meaning given by the definition of heritage value in section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* as amended, ie:

> *heritage value* of a place included the place's natural and cultural environment having aesthetic, historic, scientific, or social significance, for current and future generations of Australians.

APPENDIX 5

HERITAGE LISTING POWERS IN STATES AND TERRITORIES

Table provided by Environment Australia.

	FINAL LISTING DECISION	STATE / TERRITORY ACT	SUMMARY OF LISTING PROCESS
	Ministerial Decision		
NSW	Minister	*Heritage Act 1977* – s.32	1. Heritage Council undertakes preliminary assessment of the nomination; 2. If prima facie significance, Council assesses place and makes recommendation to Minister; 3. Minister may refer nomination to Ministerial Review Panel or Committee of Inquiry; 4. Minister determines whether listing will proceed, decision is final with no objection process.
NT	Minister	*Heritage Conservation Act 1996 – s. 26*	1. Council assesses eligible nominations, seeks and considers comments; enters conflict resolution if required; 2. Forwards recommendation to Minister; 3. Minister may declare a place as part of NT heritage or refuse to make the declaration giving reasons in writing to the Council.
WA	Minister	*Heritage of Western Australia Act 1990* – s.47(1)(a)	1. Council advises Minister on entry of places in Register; 2. Minister directs entry of place in Register.
	Parliamentary Decision		
ACT	Legislative Assembly	*Land (Planning and Environment) Act 1991* – s.17 *et al*.	1. Council assesses place, considers comments, proceeds to Interim Registration level; 2. AAT decides on appeals if any; 3. Interim Registered Plan submitted to ACT Planning Authority for agreement to include in Draft Variation to Territory Plan; 4. Draft Variation considered by Executive of ACT Government and placed before the Legislative Assembly for final approval.

	FINAL LISTING DECISION	STATE / TERRITORY ACT	SUMMARY OF LISTING PROCESS
	Council with Minister's Determination		
SA	Heritage Authority, Ministerial direction	*Heritage Act 1993* – s.18	1. Authority provisionally registers places, confirms entry; 2. Minister may direct the Authority not to confirm place if it is contrary to the public interest.
VIC	Heritage Council, Ministerial direction	*Historic Cultural Heritage Act 1995* – s.27	1. Executive Director makes recommendation about registering heritage place; 2. Council determines which place to add to Register; 3. Minister may direct Council to refer recommendation to Minister for determination.
	Council		
QLD	Heritage Council	*Queensland Heritage Act 1992* – s.30	1. Council assesses and decides listing at its discretion; 2. Objections period after gazettal notification; reporting by Ministerially appointed independent assessor; 3. Council considers assessor's report and decides.
TAS	Heritage Council	*Historic Cultural Heritage Act 1995* – s.15	1. Council Staff assessment put to Council sub-committee for recommended listing; 2. Full Council endorsement required for provisional registration.

APPENDIX 6

REGISTER OF THE NATIONAL ESTATE – CURRENT STATISTICS

Overview (as of 7/3/2001)

Total places on RNE	13194 (12774 Register plus 420 Interim List)
Comprising:	
Natural	2345 (2035 Registered + 310 Interim Listed)
Indigenous	914 (896 Registered + 18 Interim Listed)
Historic	9935 (9843 Registered + 92 Interim Listed)

Nominations received

Backlog	**7092** (as of 7/3/2001)
comprising:	3012 (nominations awaiting assessment)
	2752 (nominations not assessable – insufficient data)
	1311 (nominations in areas already registered)
	17 (nominations in areas already interim-listed)

Assessable place nominations

- 1992/93 336 places nominated and entered on database
- 1993/94 234
- 1994/95 163
- 1995/96 142
- 1996/97 237
- 1997/98 77
- 1998/99 67
- 1999/00 97

Section 30

Referrals in past 3 years

- 1997/98 594
- 1998/99 1100
- 1999/00 1432

1999/00 Major sources of S.30 referrals

- Environment Australia 1073
- Department of Defence 56
- Department of Transport 114
- Department of Finance and Administration 39
- Department Industry Science and Resources 38
- Department of the Treasury 31
- Others 38

Number of Commonwealth places in RNE

- Owned 789
- Leased 74

[*Sources*: Australian Heritage Commission Annual Reports (various from 1991-92 – 1999-00); Register of the National Estate Database]