

AUSTRALIAN COUNCIL OF NATIONAL TRUSTS

Submission to the

**Senate Environment, Communications, Information Technology and
the Arts References Committee**

**Environment & Heritage Legislation Amendment Bill 2000, Australian
Heritage Council Bill and Australian Heritage Council (Consequential
& Transitional Provisions) Bill 2000**



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SUMMARY

The Australian Council of National Trusts (ACNT) welcomes the fact that with this legislation the Commonwealth will for the first time assume responsibility for managing some of Australia's significant heritage places and will also identify and protect Commonwealth-owned heritage places. The ACNT notes however that no funding commitment has been provided.

The ACNT also supports the concept of legislation which protects both heritage values and heritage property. There are other positive features of this legislation but in order to significantly improve it, the ACNT, in this submission, aims to alert the Committee to areas of major concern.

Major concerns and reservations that the ACNT wishes to emphasise are:

- **flaws in the proposed National Heritage List and the need to extend the future use of the Register of the National Estate (RNE);**
- **support for a Commonwealth Heritage List notwithstanding serious flaws in the process;**
- **the need to increase the powers and responsibilities of the Australian Heritage Council;**
- **a requirement for public consultation and ongoing support for community education and involvement, including by way of an advisory Forum;**
- **the need for Commonwealth funding to support heritage conservation generally;**
- **the need for more explicit or appropriate heritage terminology, including in the Act's title.**

In addition, it is reasonable to question how well these Bills appear to implement the purposes as outlined in public briefings given during 2000 by the Australian & World Heritage Group of Environment Australia and by the Minister for the Environment and Heritage. As explained the Bills are intended to:

- **amend the *Environment Protection and Biodiversity Conservation Act 1999* to implement the heritage reforms agreed in 1997 by the Council of Australian Governments (COAG);**
- **repeal (and replace) the *Australian Heritage Commission Act 1975*;**
- **respond to *A Report by the Committee of Review—Commonwealth Owned Heritage Properties 1996* (the Schofield Report).**

The Minister stated in his Second Reading Speech that with this new legislation 'the Government is demonstrating its commitment to ongoing national leadership in relation to heritage conservation [and] ... delivers on community expectations in relation to what a contemporary heritage regime should provide for the nation'. This is only partly true. For example, the Commonwealth list proposals will leave the management of Commonwealth heritage properties seriously lagging behind state regimes, and falls well short of answering community concern about the management of these places, as recorded in the Government's own Review in 1996.

In summary, the legislation does not deal with the issues outlined above, nor does it effectively implement the changes and responses proposed by the Minister, as described above, and it omits key aspects of the *Australian Heritage Commission Act of 1975*.

National Heritage List and Register of the National Estate

As previously expressed to the Minister, the ACNT has 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.

While the National Trust is philosophically opposed to the concept of a National List, it is essential that the listing criteria for national heritage places be released for public comment concurrently with the legislation, and it is preferable for these criteria to be included in the legislation.

The ACNT also queries the need to start the assessment process again, which is long and costly. Further problems are anticipated, as under the proposed legislation Commonwealth heritage funding will be restricted to listed places (unlike funding for the natural environment) and listing will depend upon Ministerial approval.

The ACNT welcomes the intention to retain the RNE, but urges a more significant role than that proposed. The RNE represents a remarkable quarter-century collaboration between Commonwealth and State/Territory and local governments and voluntary and professional heritage organisations and historians that has identified thousands of Australia's significant natural and cultural heritage places and, in doing so, helped to protect them. Nothing of a similar grand scale is proposed in the replacement of the RNE process and so it is imperative that full use of its riches is made in compiling the National and Commonwealth Lists, in assisting States and Territories to add other RNE places to their own heritage registers, and in broadly promoting research, education and interpretation of Australia's heritage, including maintaining the RNE as an Inventory.

Specifically, the ACNT recommends further amendments to the legislation to require that:

- the RNE is used as an interim National Heritage List (definition of 'environment' in section 528 of the EPBC Act should be amended to include both heritage and RNE places);
- places should be transferred from the RNE to the new Commonwealth Heritage List (with a set timetable);
- the RNE is maintained in the long-term as an ongoing, on-line Inventory.

Management of listed places, other than those owned by the Commonwealth, would depend upon reaching agreement with the relevant State or Territory. The ACNT strongly doubts that this can be realised, as suggested by the government's experience in trying to reach agreement on nominating and managing world heritage areas. Would the bilateral agreements include the detail of individual management plans, and how would the Commonwealth ensure compliance after the agreement has been signed?

The ACNT supports the inclusion of the National Heritage List as a matter of national environment significance (15B) but questions what constitutes a 'significant impact'. (This should be defined in the regulations under section 524B of the EPBC Act.) What does 'significant impact' mean in terms of the protection of cultural heritage properties? The legislation implies that 'significant impact' will be defined in terms of current environmental impact on the natural environment and therefore large-scale physical impacts will act as national triggers. This is not appropriate for cultural heritage places which are, unlike natural places, non-renewable, and where any destruction of historical fabric, no matter how minor, involves permanent loss. Also, 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.

'Significant impact' should be redefined to take into account the difference between natural and cultural heritage places. There should be a different system set in place that reflects current best practice planning permission for changes to heritage properties.

Finally, the legislation should provide for the review of the National Heritage List every five or seven years rather than 10 years.

Commonwealth Heritage List

An extensive component of Australia's national heritage is in public ownership, under the stewardship of the Commonwealth Government and its agencies. Invaluable places such as customs houses and post offices in all states, natural areas, and defence land-holdings are examples. The Australian people are the owners of these heritage properties and the Commonwealth has a responsibility to conserve and sustain these assets. The absence of formal protection mechanisms for many of these properties has been a major concern to the National Trust.

The proposal to establish a Commonwealth Heritage List is strongly supported, as are the intentions to prescribe the responsibilities of the relevant management agencies, and to ensure ministerial oversight of actions affecting listed properties. The ACNT endorses the proposal that listing should require agencies to ensure that adequate heritage protection is maintained after the sale or lease of Commonwealth properties. An important reservation is that the Australian Heritage Council, rather than the Minister, should determine the places which are to be listed.

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. (These concerns are also noted in the ACNT's separate submission to the Inquiry into the disposal of Defence properties by the Senate Foreign Affairs, Defence and Trade References Committee.)

The National Trust has repeatedly sought the Commonwealth's response to the 1996 *Report by the Committee of Review-Commonwealth owned heritage properties*

(Schofield Report) and has been as repeatedly assured that the new heritage legislation represents the government's final response to the report.

The National Trust believes that few of the key recommendations in the Schofield Report are answered in the proposed legislation and there is a need to strengthen the legislation to reflect the report's recommendations. In particular, stricter controls are required to protect heritage values of properties on Commonwealth land after sale or lease, including not only covenants but also permits and other mechanisms, such as heritage agreements for monitoring and continuing to preserve heritage values after disposal.

Further, if implemented without amendment, this legislation may actually weaken existing protections and will seriously lag behind best practice in identifying and managing government heritage property, as established in states such as Western Australia and NSW. The inadequacy of this legislation is thrown into clear relief by comparing its provisions with specific recommendations from the Schofield Report (as summarised, in italics). Of particular importance are:

Recommendations 1-3: The Commonwealth implements a three-year program to fully identify and list its heritage estate and condition, considers introducing the same for natural heritage assets, using standard survey methodologies, and requires its entities to develop and maintain internal Heritage Asset Registers. There is no requirement nor timetable for Commonwealth agencies to identify their heritage properties or to develop Heritage Asset Registers or inventories (by contrast, this is a requirement in the EPBC Act). The Schofield report had a definite timetable for identifying heritage properties. This process should be carried out by the Commonwealth and its agencies and not left to state/territory agencies to address, often a long time after disposal by the Commonwealth. In the absence of any concrete proposal to identify Commonwealth heritage properties there is no provision for the automatic transfer of Commonwealth places to the new list from the existing RNE or state/territory lists, although a total of 625 such properties on heritage registers were identified by the Schofield Report (p 18).

The new legislation must ensure that Commonwealth entities are required to maintain and repair heritage places in their control.

As previously stated, interpretation of 'significant impact' will not take into account 'minor' (but permanent) changes to the physical fabric of historical structures that will cumulatively destroy their heritage values. These 'minor' changes will be far more frequent in Commonwealth-owned heritage property than so-called 'significant' impacts, just as they are for heritage property in private or state ownership, which is subject to planning control.

Alerting the Minister to 'significant impact' also depends largely on underlying state heritage systems but what happens with heritage places and precincts where there are no state systems, for example in Commonwealth territories such as Christmas Island?

The definition of 'action' is much tighter than in Section 30 of the *Australian Heritage Commission Act*. Under section 30 the definition of 'action' is broader and includes such actions as 'disposal' but in the Bill physical actions only are implied. 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.

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. Therefore, the Bill should require Commonwealth agencies to seek advice from the Australian Heritage Council (as done at present with the Commission) and to follow through with assessment and nomination for listing on state/territory or local heritage registers as well as the Commonwealth List.

Australian Heritage Council

The ACNT supports the establishment of an Australian Heritage Council (AHC) by legislation but has an overriding concern that the Council should represent the nation's best conservation skills, and that it should be demonstrably independent in its manner of appointment and operation. 'Best-practice', as emphasised at the National Heritage Convention (HERCON) in 1998, adopts the principle of clear separation of expert and political (management) roles in listing.

The ACNT recommends that:

- membership of the AHC be independent of political influence;
- members must be people with qualifications and/or experience in heritage conservation in a range of designated areas, including natural and cultural heritage, Indigenous heritage, history and law;
- membership will include nominees of peak conservation bodies, both community-based organisations and statutory committees at state level (in the AHC Bill, change the wording of part 3, 7, 3, so that one of each of the two members from each type of heritage area is a nominee from relevant conservation groups);
- the Chairman to be elected by the membership.

The responsibilities of the AHC should include both decisive and advisory functions:

- the Council should decide which places are to be placed on the National Heritage List, and to determine the criteria on which these decisions will be made;
- it should determine which places will be placed on the Commonwealth Heritage List;
- it should impose requirements on Commonwealth agencies on heritage matters (succeeding section 30) and on their responsibilities for managing places on the Commonwealth List;

- it should have responsibility for setting up and supporting a regular National Heritage Forum (see *Public consultation*, below);
- it should advise the Minister on policy, including:
 - recommendations of the Heritage Forum
 - programs for education on heritage
 - management of the national heritage
 - funding priorities for heritage conservation
 - other matters of national or international heritage importance referred to it by the Minister, or which it considers itself to be of importance;
- coordinate activities with State/Territory government agencies and other interested parties;
- administer grant funding and other Commonwealth support.

The Council's role with respect to the listing process must be improved. The Minister should ask the AHC for an assessment before deciding to list a place; and a definite timeframe should be specified in which the Minister must decide to list or not list a place.

Apart from its listing roles, the AHC should have a much stronger role in providing national leadership and coordination in heritage matters. 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.

The current *Australian Heritage Commission Act* should be closely scrutinised to ensure that the relevant provisions (excluding listing) are maintained in the replacement legislation. Provisions in the existing Bill are extremely unsatisfactory.

Public consultation and community education

A national heritage regime will depend for its ultimate success on the support of Australian communities. Hence, all government strategies should implement mechanisms for informing, resourcing and working in partnership with those communities. In fact, these Bills imply there will be a greatly expanded role for local communities, not only in assuming additional responsibility for identifying and protecting places of local/regional heritage significance (that may have formerly been included on the RNE) but also in relation to the proposed National and Commonwealth Lists. They will be expected to prepare nominations for places proposed for the National List and act as watchdogs for how places on both lists are managed, as well as, more generally, keeping watch on Commonwealth actions that may affect other heritage-listed places.

Despite this, the legislation does not require public consultation or Commonwealth support for community education and involvement in the new heritage regime. In particular the Australian Heritage Council (AHC) Bill should retain Section 8 in the *Australian Heritage Commission Act*, that is: The new Council 'shall, in the performance of its functions ... consult with Departments and authorities of the

Commonwealth and of the States, local government authorities and community and other organizations ...’.

There should also be a stronger emphasis in the legislation overall on the cooperative role that will be played between the Commonwealth and both government and non-government community groups in identifying and protecting heritage places in Australia; and a recognition on the necessity of ongoing public education by the Commonwealth in the amended EPBC Act and the expanded roles of community groups.

In a country of the size of Australia it can be difficult to properly involve the community in formulating national heritage policy. There are, however, effective models: the first national heritage convention (HERCON) held in Canberra in 1998; and the smaller, but ongoing, National Cultural Heritage Forum (NCHF). Both demonstrate the value of forums representing a broad spectrum of heritage ‘stakeholders’, and show that consensus can be reached on heritage issues of national importance.

The ACNT recommends that:

- a National Heritage Forum be established, on the model of, or as an extension of, the present NCHF;
- membership to be widely inclusive of heritage organisations and authorities representative of the natural and cultural heritage, and of both pre-European and post-European settlement;
- forum meetings be convened biennially, and smaller NCHF more frequently to consider major heritage issues;
- forums be responsible for providing advice and recommendations to Commonwealth government both on matters referred by government, and on such other matters as it may consider appropriate;
- responsibility for setting up and supporting the forums and acting on their advice should be included amongst the roles of the Australian Heritage Council.

Commonwealth funding

There is no provision for Commonwealth funding for Australia’s heritage other than for places included on the National and the Commonwealth Heritage Lists. This is a serious omission and contrast with the specific provision for National Estate Grant funding (NEGP) in the *Australian Heritage Commission Act*.

The ACNT is particularly concerned about this omission and therefore the future of the Cultural Heritage Projects Program (CHPP) that has replaced the NEGP. 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. The Commonwealth should maintain funding (not simply for places on its own lists) and also explore options for increasing resources for heritage generally, including from outside government.

The ACNT recommends that the legislation specify that Commonwealth funding be provided in the following areas:

- for identifying, managing and interpreting places considered to be of national significance and for establishing and monitoring the Commonwealth List;
- once-off matching funding to help state/territory governments to expand heritage programs which comply with the national standards;
- Commonwealth coordination and monitoring responsibility covering all levels of government;
- establishing and operating the Australian Heritage Places Inventory;
- a continued and expanded CHPP and other Commonwealth incentives to owners/managers of places on *all* statutory lists, and to promote ‘cutting edge’ heritage research across the nation.

‘Heritage’ in the Act’s title and amendments

‘Heritage’ should be far more explicit in the amended Act, both in the title and its amendments. The title of the amended EPBC Act should be *Environment & Heritage Act*. The title should also reflect the Minister’s portfolio responsibilities and the title of the Department.

Much greater heed should also be taken of the different standards and values for heritage conservation, in particular cultural heritage, than is indicated in the present Bill, which in most instances merely adds, ‘and heritage’ to existing EPBC Act clauses.

As noted earlier, there is a need to redefine the terms ‘significant impact’ and ‘action’ which have very different meanings for cultural, as opposed to natural, environments.

IMPLEMENTING HERITAGE REFORMS AS AGREED BY COAG

The Minister’s Second Reading Speech stated that this legislation ‘will give effect to the outcomes of the 1997 Council of Australian Governments (COAG) Agreement on Commonwealth/State Roles and Responsibilities for the Environment’. However, this legislation only gives effect to part of that agreement. In particular, it omits part (g): ‘Agree to increased compliance by Commonwealth and State departments, statutory authorities, agencies, business enterprises and tenants with the relevant State’s environment and planning laws ...’

The focus of this legislation entirely on national heritage places of Commonwealth heritage places omits any reference to Commonwealth compliance with state/territory environment and planning laws (including heritage laws). In the briefings during 2000 this intention was clearly set out and widely appreciated. 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.

The Bill was to require that the Commonwealth must not take action that has a significant impact on the heritage values of: a place in a state/territory statutory heritage list; or a place proclaimed by the Minister in the *Gazette*. These are provisions crucial to the protection of identified and listed heritage places beyond the limited numbers that will be included on the National and Commonwealth Lists, and yet these provisions will merely bring Commonwealth entities into line with controls that already exist in relation to action taken by state governments or private entities.

It should be noted that this requirement is included in the EPBC Act and so the ACNT recommends that section 28 of the EPBC Act also specifically mention ‘heritage’ as well as ‘environment’.

OTHER MATTERS

Indigenous heritage

This legislation does not significantly improve the protection of Indigenous heritage and lags behind best practice in Australia. For example, by comparison with the Commonwealth (and this legislation) several states provide blanket protection for Indigenous heritage sites and immediate protection if a new archaeological site/material is uncovered.

Omissions from proposed Commonwealth heritage regime

The legislation was intended to put into effect the Commonwealth heritage regime outlined by the Minister and the Australian Heritage Commission. Significant elements are not included in this legislation, and these should be incorporated.

- ‘heritage’ encompassed in places on the National and Commonwealth Lists was to intended include movable heritage objects and documents;
- the Commonwealth List was to include Indigenous heritage places;
- Commonwealth actions must have no significant impact on environment *or heritage*.

EPBC Act Section 28 should be amended so that Commonwealth actions must have no significant impact on environment *or heritage*. S28(1) add after ‘environment’, ‘or heritage’, followed by ‘inside or outside the Australian jurisdiction’. An additional clause should specifically control any Commonwealth actions that might have significant impact on places that are listed on the current Register of the National Estate (RNE) and/or a State/Territory Government Register, or shipwrecks designated under the *Historic Shipwrecks Act 1976*.

National Heritage Management Principles and Values

Much of the detail of this legislation has been left to the associated regulations. National Heritage Values and National Heritage Management Principles are two specific matters that are to be dealt with through regulations. Both matters are fundamentally important to the legislation but neither is yet available for public comment. The National Trust recommends that the 'values' and 'principles' documents be released for public comment as soon as possible and that sufficient time should be allowed so that further amendments to the Bills can take heed of such public comment. In addition these regulations should be disallowable (as is the case with regulations under the EPBC Act), and not simply gazetted.

There are strong concerns about the precise nature of criteria for the National and Commonwealth Lists and management plans. Commonwealth List criteria should be the same as for the RNE. These considerations are of particular importance given National Trust reservations about a National List. There are also concerns about the identification and management of Commonwealth heritage properties (as discussed earlier) that may be dealt with mainly in the regulations.

*Australian Council of National Trusts
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