

**SUBMISSION TO THE SENATE ENVIRONMENT, COMMUNICATIONS,  
INFORMATION TECHNOLOGY AND THE ARTS REFERENCES  
COMMITTEE**

**Environment and Heritage Legislation Amendment Bill (No. 2) 2000  
Australian Heritage Council Bill 2000  
Australian Heritage Council (Consequential and Transitional Provisions) Bill  
2000.**

This submission is made as a joint submission by a number of former Chairpersons and Commissioners of the Australian Heritage Commission whose span of appointment covers the 25 years of the Commission's existence. In order of date of appointment the signatories are:

Professor Emeritus David Yencken AO, inaugural Chair of the Commission 1975 to 1981, Patron of the Australian Conservation Foundation, former Chair of Australia ICOMOS and representative for Australia on the World Heritage Committee;

Professor Emeritus John Mulvaney AO, CMG, Acting Chair of the Commission 1981 to 1982, former Chair of the Australian Institute of Aboriginal Studies;

Dr Joe Baker, OBE, FTSE Chair of the Commission 1984 to 1985, Commissioner for the Environment ACT, Executive of the international Scientific Committee On Problems of the Environment and Chief Scientist, Department of Primary Industry, Queensland

Joan Domicelj AM, Commissioner 1982 to 1986, former Vice President International Council on Monuments and Sites (ICOMOS Paris) and council member of the International Council for the Conservation and Restoration of Cultural Property (Rome);

Associate Professor Bruce Davis AM, Chair of the Commission 1985 to 1987, Chair of the National Parks and Wildlife Advisory Council and Commissioner Resource Planning and Development Commission (Tasmania);

Simon Molesworth AM, QC, Commissioner from 1987 to 1992, President of the Environment Institute of Australia and a board member of the Australian Council of National Trusts since 1987 and former Chair of the National Trust of Australia (Victoria) from 1986 to 2000;

Dr Wendy McCarthy AO, Chair of the Commission from 1995 to 1998, Chancellor of the University of Canberra, former Deputy Chair of the Australian Broadcasting Commission.

The submission is in four parts:

- key changes to Commonwealth legislation proposed
- provisions that strengthen and those that weaken existing Commonwealth legislation
- principles that should inform any changes to Commonwealth legislation
- recommendations for amendment to the present bills

### **Key changes to Commonwealth heritage legislation proposed**

1. The Australian Heritage Commission Act will be repealed and replaced by:
  - The Environment and Heritage Legislation Amendment Bill (No 2) 2000 which primarily deals with the procedures for listing and protection offered by inclusion in the two new heritage lists
  - The Australian Heritage Council Bill 2000 which describes the functions and powers of the proposed new Council
  - Other consequential changes to legislation
2. The Australian Heritage Commission will be replaced by the Australian Heritage Council.
3. The functions and powers of the Australian Heritage Council will be significantly different from those of the Australian Heritage Commission. The Commission's functions are *inter alia*, of its own motion, 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.
4. The Register of the National Estate will be abolished as a statutory list (although it may be retained as an inventory) and replaced by two new and smaller lists:
  - The National Heritage List of places which have national heritage values
  - The Commonwealth Heritage List for Commonwealth property onlyThe Register of the National Estate currently contains approximately 13,000 places. It could be expected that only a few hundred places might be included in each of the new Lists. The National Heritage List might be smaller still.
5. The role of the proposed new Council and the Minister in relation to entering and removing places onto the heritage lists will be very different from the role of the Australian Heritage Commission and the Minister under the present Australian Heritage Commission Act. As noted above, whereas previously the Commission had

the responsibility of deciding which places should be included on or removed from the Register of the National Estate, under the new bills the Minister alone has the powers to enter or remove places on the Lists and the Council's role is solely to advise the Minister.

6. The protection for places on the two new lists is different from the protection for places on the Register of the National Estate which is confined to the provisions of Section 30 of the Australian Heritage Commission Act which enjoins all Commonwealth agencies not to take any actions which might adversely affect a listed place unless there are no prudent or feasible alternatives. There are increased powers for both proposed lists and particularly for the National Heritage List. For the National Heritage List, Commonwealth agencies are bound, with the threat of fines, not to take any action that has or is likely to have a significant impact on the heritage values of the place. Individuals and corporations are also bound with similar threat of fines and in some instances gaol, where the place is a Commonwealth place, when the place is one where the Commonwealth has obligations under the international Biodiversity Convention, and where the place has indigenous heritage values. Related to places on the Commonwealth Heritage List, the Minister has to be consulted about any action that might have a significant impact on the place. The Minister also has the responsibility to ensure that there is a plan of management for Commonwealth owned places on the National Heritage list. Other agencies have responsibility for plans of management for places listed on the Commonwealth Heritage List and have to consult the Minister related to them.

(Please note that this is a simplified description to make the main changes proposed as transparent as possible.)

### **The provisions that strengthen and weaken existing heritage legislation**

From the above it can be seen that there are provisions in the new bills that both strengthen and weaken the existing legislation.

#### ***Provisions that strengthen existing legislation***

The main provisions that strengthen existing legislation are those that strengthen the protection offered by inclusion on the new lists. These are as generally described in 6 above. These are important advances on the protection currently offered to places on the existing Register of the National Estate. The Commonwealth also assumes responsibility for funding and managing places of national significance and Commonwealth heritage places.

#### ***Provisions that weaken the existing legislation***

The main provisions that weaken existing legislation are:

- The substitution of two new Lists which together may include no more than a few hundred places for the existing Register which includes approximately 13,000 places.

- The emasculation of the powers of the proposed Heritage Council. The Council has no powers of its own other than to nominate places for the two Lists. All other functions are carried out on the request of the Minister or in response to an action initiated by the Minister.
- The shifting of responsibility for entering or removing places onto the two Lists from the Commission or Council, as independent professional bodies, to the Minister.
- The shift from assessment of impact on a national heritage place to assessment of the impact on the heritage value of a place may weaken the protection of the place, Two court cases pending will clarify this risk.

### **Principles that should inform any amendments to Commonwealth heritage legislation**

The principles include:

*Heritage protection in Australia needs a 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.*

Comment.

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.

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

Comment:

This is most likely to be achieved through a strong, independent national heritage body with wide responsibilities such as has been the Australian Heritage Commission.

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

Comment:

In all Western countries over the last thirty 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. The current Australian Register of the National Estate listings are limited by comparison. Protective provisions have also progressively increased. Those provisions in the new bills that weaken the existing legislation are all running counter to these trends.

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

Comment:

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 constitutional powers of the Commonwealth related to environment and heritage are much greater than previously thought. Justice Sackville has, for example, observed that

The Commonwealth could if it wished lay down mandatory environmental standards without committing itself to an elaborate process of consultation and intergovernmental cooperation.

It is therefore an appropriate time to strengthen the protection offered to places on the Register. The additional protection being offered to places on the proposed new Lists is welcomed. It is also likely that the Commonwealth could go further. There is already the precedent of the Commonwealth *Ozone Protection Act 1989* which is binding on parties within Commonwealth and State jurisdictions.

*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.*

For twenty five years the Commission has had this responsibility. In Victoria under a Coalition Government the Heritage Act was amended to transfer the responsibility for listing from the Minister to the Victorian Heritage Council with appropriate safeguards, despite the fact that the protective provisions are much stronger in the Victorian Act than under the proposed national legislation.

*Those parts of heritage systems that have worked well for a long time should not be lightly discarded.*

The Australian Heritage Commission - and its register and other responsibilities - has been in existence for 25 years. It has been reviewed many times by parliamentary and other committees which have all supported its continuation in its current form, sometimes with very minor amendments. No effective case has been mounted why the current Register should be abolished or the powers of the new Council so drastically curtailed. There is no reason why a National List should not be established as a supplement to the existing register and much stronger protective powers given to it. It would be a simple and effective change. In the US there is a comparable arrangement through the designation of a smaller list of National Landmarks or Monuments to supplement the much larger National Register of Historic Sites.

## **Recommendations**

1. The improvements to the protection offered to listed places in the new bills should be warmly welcomed. The acceptance of Commonwealth responsibility for the funding and management of Commonwealth heritage places should also be welcomed.
2. The bills in their current form should not, however, be passed.
3. The Register of the National Estate and current protection for places listed on it should be formally retained and properly maintained and developed as an ongoing responsibility. The Register has a unique role in Australia not duplicated by any State or Territory heritage lists. The preparation of the Register represents a remarkable collective effort from governments at all levels and from citizens and other bodies across Australia.
4. The proposed National Heritage List should be supported and should be drawn from the larger Register of the National Estate. The criteria for selection for the National List should, however, be open to public submission and discussion and should be prepared by the Heritage Council. Proposed protection offered for the National Heritage List and Commonwealth Heritage List under the new bills should be strengthened to the greatest degree possible.
5. Protection for Commonwealth places as proposed in the bill should apply immediately to all Commonwealth properties now on the Register of the National Estate. Key recommendations of the 1996 Schofield report on Commonwealth owned heritage properties have not been incorporated into the legislation and should be. An example is the recommendation that Commonwealth agencies are given specific timetables for preparing lists of their heritage properties. The procedures for disposal of heritage properties are also inadequate. There should be a requirement for compliance with State and Territory environment, planning and heritage laws as agreed by COAG.
6. The new Council should retain the current functions and powers of the Australian Heritage Commission. It should have the scope to act of its own motion related to listing, advice, education, training, promotion and research as under the Australian Heritage Commission Act. There should be provisions in the bill to ensure that membership of the Council is based on professional qualifications and experience and that the Council will be independent and not subject to undue political or bureaucratic influence.
7. Decisions to list or not to list should remain the responsibility of the Council.
8. There should be reference and commitment in the legislation to a grants program such as was the National Estate grants program (now the Cultural Heritage Projects Program) because of the immense past success of these programs. The Council,

should have the explicit responsibility of making general recommendations about the distribution of such grants. At the same time it is recommended that State or Territory heritage bodies should have the responsibility for the allocation of local grants.

9. The Environment Protection and Biodiversity Act was not designed for heritage protection and includes many provisions that may need amendment for the treatment of heritage places. An example is the definition of 'actions', which excludes from the definition grants and licences.
10. Other smaller changes may be necessary, for example to ensure that the change from an emphasis on impact on a place to the emphasis on the impact on the heritage value of place does not reduce the protection offered. Of crucial importance are the definitions and criteria for 'values' and 'principles' referred to in the legislation. These should be released for inspection and comment immediately.

#### Reference

R. Sackville 'Australian Environmental Law: Some Structural Issues', Opening Address, Conference on Commonwealth Environmental Impact Assessment, Sydney, 19 October 1995, p.16.

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