

**Submission to the Australian Senate ECITA References Committee on the establishment of a new Commonwealth heritage regime by the Environment and Heritage Legislation Amendment Bill (no. 2) 2000, Australian Heritage Council Bill 2000, Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000.**

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.

Heritage places were listed in the Commonwealth's Register of the National Estate, the major output of the *Australian Heritage Commission Act 1975*, but powers to protect those places have been very limited. Many RNE listed places are now covered by State, Territory and local government heritage legislation. For Commonwealth owned places with heritage values the managing authorities were not required to act on the AHC's advice, only to seek it which is totally unsatisfactory. This was addressed in the Schofield Committee report and it is pleasing to see some of that committee's recommendations enacted in the proposed new legislation.

The new legislation positively addresses:

- A national and international role for Commonwealth heritage places,
- Establishment of a national heritage places list and a Commonwealth places list with protection and management of places on that list consistent with Commonwealth constitutional powers,
- Management standards established through the national and Commonwealth heritage places management principles,
- Management regimes for national heritage places through bilateral agreements with States or Territories.

However, there are deficiencies with regard to the role and status of the new Australian Heritage Council, and the continuing role of the RNE.

These may have arisen in part because the new bills derive from making heritage provisions to fit the model outlined in the existing overarching *Environment Protection and Biodiversity Conservation Act 1999* but this is not entirely relevant especially to the cultural values of places which are more socially determined than scientific as is the case with natural heritage and biodiversity.

**Comments on provisions in the Australian Heritage Council Bill:**

This Bill involves a number of complex provisions which are not appropriate to administering a heritage conservation process. A key feature of the lengthy history provided by Commonwealth and State heritage legislation is the successful operation of expert, decision-making councils without the close involvement of ministers.

This Bill seems needs to be strengthened in the following:

#### Functions –section 5

- Improve the independence of the Australian Heritage Council and give it an initiating role, not just a reactionary role as determined by the Minister in 5(a) and (b);
- Allow the AHC to provide heritage conservation advice to any person or organisation, not just the Minister; it should be able to perform this function without the Minister having requested it to act. The AHC should have the power to initiate advice (as in section 7(a) of the existing AHC Act 1975), otherwise it becomes merely a reactionary body to Ministerial interest or lack of interest.
- Provide it with a comprehensive advising role with regard to heritage matters not just those listed in section 5 (C); for example, the monitoring role should cover all listed heritage places, especially given Commonwealth State of Environment reporting responsibilities.
- Give the Council a decision-making role with regard to listing places on the National and Commonwealth Heritage Lists, not just nominating them as in section 5 (d). This means that decisions on heritage values of a place based on the new criteria should be made by the expert AHC, not by the Minister on AHC advice. Alternatively if the Minister has the power to decide on listing or not listing a place he should give the reasons both for or against –that is, make it transparent that it was decided not to list for reasons other than its heritage significance.

#### Appointment of members –section 7

- Appointments should be by Governor –in –Council as statutory appointees as in the current AHC Act, s.12(2) rather than Ministerial appointees as in section 7(1);
- Members should have heritage qualifications as well as expertise and/or experience in heritage conservation practice –as in section 7(3). The current Ministerial committees under the EPBC Act have expert advisors who are among the best qualified in the country in their fields of biodiversity study.

### **Environment and Heritage Legislation Amendment Bill**

Again this Bill involves a number of complex provisions which are not appropriate to cultural heritage given the successful operation of much of the existing Commonwealth and State heritage legislation. The Bill fails to draw and build upon the best aspects of these other models. It is important to remember the Australian Heritage Commission and Register of the National Estate have operated for 25 years, especially with regard to identification of Commonwealth heritage places. Many of the provisions of the Bill seem to ignore the successful and simple aspects of the existing legislation, and the latter are replaced with cumbersome or unnecessary provisions. (Although the penalties are a useful new deterrent!)

The Bill can be improved by having the AHC make decisions about listing and protection instead of the Minister.

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.

Again with the Commonwealth List there seems no reason why the Minister should be involved in decisions regarding it, and as it broadly parallels the concept of the Register of the National Estate, the Council should continue the role played by the Australian Heritage Commission with regard to the listing. The Environment and Heritage Legislation Amendment Bill changes the protective regime for Commonwealth heritage places, and the new Council should also exercise the powers provided, not the Minister. This is an enhancement of the existing powers/role, and the Council should continue the work of the Commission. These are expert matters which parallel the successful work of other heritage agencies and the level of detailed ministerial involvement seems unnecessary and inappropriate.

However this is contentious, and there are arguments for and against the independence of the AHC versus its purely advisory role to a Minister focussed on assessments and public consultation.

#### AHC HAVING LISTING POWERS

Arguments for:

- seen to be independent;
- decisions solely on heritage merits;
- public confidence;
- outcomes not influenced by politics;
- mirrors tradition of Australian Heritage Commission.

Arguments against:

- EPBC protection has major enforcement, social and economic ramifications (cf RNE) including on the Government administration of its own properties;
- such decisions should be made by elected Government accountable to electorate and Parliament;
- Government should own such decisions and own budget implications;
- Key issues of federal-state relations involved.

There are problems in giving to a new Australian Heritage Council the range of powers which this Act has. This would give the Heritage Council powers which the Minister has in respect to the rest of this act regarding threatened species, biodiversity conservation etc. While the powers that follow from a national heritage listing are much stronger than for a National Estate listing in the new Act there stills should be a clear separation of identification and recognition of places for their heritage value, and on decisions about their conservation or otherwise which takes a whole range of other factors besides heritage values into account. The Heritage Council should be involved in the fullest possible way in identification of national heritage values and this is an independent and public process.

Irrespective of the outcome for this central plank of the legislation there are still matters in the detail of the Bill which should be addressed as follows.

## **Comments on provisions in the Environment and Heritage Legislation Amendment Bill:**

Schedule 1 – As the Bill will be the major piece of legislation dealing with heritage in the Commonwealth it should have the word **‘heritage’** in its title. There are provisions in the existing EPBC Act which encourages cooperation at all levels, and for all types of biodiversity value. These positive and encouraging aspects, are simply not present for **heritage** with the overall effect of firstly completely minimising the place of heritage in this Bill, and secondly giving the clear impression that the only heritage the Minister or the Commonwealth is interested in is that listed on a National List or on the Commonwealth list. This is in very clear contrast to the attitude which the Bill takes to the natural environment.

Section 15B –the approvals process could be simplified if the AHC made the decisions.

Before section 34 new sections will be needed to deal with provisions affecting heritage places but not covered in the EPBC Act.

In section 324A, all actions and decisions should, in general, be taken by the AHC rather than the Minister. However, the Minister should have the power to ‘call in’ any contentious cases.

In section 324H national heritage listing decisions should only be made on the basis of the values of the place not on its management. This needs an explicit statement here as it is essential to good heritage conservation practice. And regarding removal of places from the National List in s. 324J while defence or security reasons may override conservation, they seem irrelevant in deciding whether or not a place has heritage value. If any exemption is needed for defence or security, it should be provided with regard to management, not identification.

There is no need for confidentiality of information to be legislated for in s. 324N –managing authorities have usually been able to keep threatened locations secret for the time of the threats without legislation which can be seen as unnecessarily heavy handed.

Section 324U –plans should be reviewed every 5 years to be consistent with other plan reviews in other jurisdictions. Again in s.324Z, a 10 year reporting period is far too long and significantly does not relate to the 5 year State of the Environment reporting period, so therefore a 5 year period would be much more appropriate.

Many of the comments above relate to provisions for places on the National List in Division 1A and they apply also to Commonwealth places in Division 3A. However, in s. 341Q (4) the agency must take the advice received and act on it –otherwise it perpetuates the weakness in the current AHC Act.

Subdivision E relates to the Obligations of Commonwealth agencies and should better reflect the recommendations of the Schofield Committee report regarding Commonwealth-owned heritage properties. Therefore section 341X should state that Commonwealth agencies must:

- 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;
- 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.
- Commonwealth agencies will review their inventories at least every 5 years.

Under section 341Y, Commonwealth agencies will prepare and maintain a heritage strategy for the management of their heritage places:

- The strategy will conform to guidelines provided by the Australian Heritage Council and provide for the maintenance of each heritage place, as well as address matters relating to the conservation and interpretation of places.
- Commonwealth agencies will review their strategies at least every 5 years.
- Commonwealth agencies will provide the Australian Heritage Council with a copy of their strategy.

Under section 341Z regarding sale or lease of Commonwealth heritage places, a decision to sell or lease a Commonwealth heritage place is an action subject to the section dealing with the requirement for approval of activities of Commonwealth agencies significantly affecting a Commonwealth heritage place. This subsection is needed to make absolutely clear that such actions are subject to the protective provisions of the Act.

In 33 Section 528 the reference to a place's significance to Australians is too general for some jurisdictions (given recent Court cases in Queensland) and should be more locally specific and inclusive by saying "...Australians or a part of the Australian community."

Again in 34 Section 528 use of the word 'traditions' denies indigenous peoples a heritage related to contemporary life and continuing traditions. This section should be expanded so that Indigenous interests can take a proactive role in using the Act to protect places of significance to them. This is in contrast to the current paradigm for Indigenous place protection where the Aboriginal Cultural Heritage Protection Act is only reactive and the Commonwealth role is one of last resort when State/Territory processes have failed.

**Register of the National Estate** –a new Division is required in the Act to accommodate retention of this tool rather than the transitional provision for six months in Schedule 3. Although it can be inferred from chapter 2 of the EPBC Act that the RNE could be retained as a requirement relating to matters of national environmental/heritage significance and specifically could be mentioned in section 25, it is not the case in this Bill. The operation of s. 28 of the EPBC Act also needs to cover places on the RNE.

There is a real problem with the disappearance of the Register of the National Estate. This problem is twofold. Firstly, many 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. Secondly, 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.

To solve the first problem part of the Act could include transition arrangements - proposals whereby places on the Register retain their level of protection until they have been assessed by the relevant state and the Commonwealth, and are agreed by both parties, to not have the values for which they were listed, or to be on a state Register, or to have some other effective protection through regulation or Commonwealth measures, which could include conservation agreements under the EPBC Act. Another and simpler alternative would be to make the register of the National Estate an indicator of significance under section 28 of the Act.

To solve the second problem a number of measures could be used. The national data base could be mentioned in the Act as a Commonwealth responsibility (this would provide some assurance of funding) and the data base could be described in such a way as to include the Register as it now stands, and other relevant registers. Further, the Register could be a first call for assessment of places for the National List. (This parallels the provisions for establishing the Commonwealth list).

The Act already mentions the idea of National Listing using a thematic approach. This could usefully be extended to read a regional and/ or thematic approach. Additionally, the Act could say 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. This would continue to provide a method of systematic comparative assessment of the places at a national scale.

It would be useful also to have provision for sub-committees of the heritage council, duly constituted and with a provision for qualifications, similar to the provisions in the Act for the biological diversity advisory committee -section 504, subsection 5 says that the Minister must ensure on this committee that at least five members possess scientific qualifications that the Minister thinks relevant to the performance of the committees functions. One could argue convincingly that since the main job of the heritage council is to assess significance, (and in fact it is not allowed to consider anything else in the Bill as it now stands), then it is crucial for rigour and credibility that the council members have relevant qualifications.

Although the protective role of the Register will largely be replaced by the amended EPBC Act, two important roles have been overlooked:

- the research role of the Register; and
- the persuasive conservation role played by registration on the RNE.

While these roles have been or may be replaced by the operation of State or Territory Government registers, this is not yet the case for both roles across all jurisdictions. In addition, States or Territories may, at times, be reluctant to recognise heritage places. Therefore this division proposes the retention of the Register to potentially undertake these two roles if there is no suitable replacement in all jurisdictions.

