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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.

The Environment and Heritage Legislation Amendment Bill (no.2)

General comments.

This Bill has a number of excellent features, and should strengthen the heritage conservation regime in Australia if effectively implemented, and if augmented by some of the suggestions made below. It provides for Australia's heritage the considerable powers contained in the Environment Protection and Biodiversity Conservation Act 1999, and it articulates clearly Commonwealth responsibilities for heritage within its own domain. It unites heritage and the environment under one legislative umbrella, and through this mechanism it is hoped will encourage integrated assessment and management of the natural and cultural environment. 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. However it is pleasing to note that the powers which the Commonwealth does have are fully used, with respect to the historic environment in this proposed legislation.

I think the most serious problem with the proposed legislation is the lack of independence of the Australian Heritage Council. This could be a fatal flaw for the effectiveness and credibility of the new regime. It is essential that decisions about the heritage value of places are made by an independent body, and that this be clearly seen to be done. This is not the case with the present proposals. The major problem is that the Council does not have the power to make independent public statements about whether places meet the technical criteria for listing on the National or Commonwealth List. There are several reasons for this but the most important is that the Council cannot consider the assessment of a place without a referral from the Minister.

I do not in fact fear that under the present regime the Minister would decline to refer potentially controversial cases based on operation of the Environmental Protection and Biodiversity Act to date and on my experience as Executive Director of the Australian Heritage Commission during the period. However if we look back over the 25 years of the life of the Australian Heritage Commission, we will find many occasions on which the Commission clashed with the government on this issue. Notable amongst these issues are arguments about the recognition of some of the most important natural heritage places in Australia which are now on the World heritage List. In my experience if the Minister of the time had had the choice of referring these places for assessment to the Australian Heritage Commission he/she would certainly not have done so. It was in large part due to the Commission's dogged and often controversial pursuit of National Estate Listing of old growth forest areas that the regional forest assessment processes were finally undertaken, with the result of a much more balanced resource management outcome than in the past. Also the comparative comprehensiveness and rigour of the process of assessment for the Register of the National Estate has made it the basis for heritage registers in most States and Territories. This is because the scope and the processes of assessment have been independent. It is vital that both the independence and scope of advice of the new Council be widened considerably.

I have some experience in these issues as the former Executive Director of the Australian Heritage Commission and Head of the Australian and World Heritage Branch of Environment Australia. I was responsible for the initial work on the proposed new regime and I have given some thought to the new legislation and its implementation. It is on the basis of this experience that I make the following comments and suggestions.

Heritage and Biodiversity Conservation in the Bill - a marked contrast.

One of the strengths of the Bill is that it does provide that many of the powers of the Environment Protection and Biodiversity Conservation Act will apply to natural and cultural heritage, if, as I understand to be the case, the definition of environment in that Act encompasses heritage. However, the new Bill proposes changing the EPBC Act in a minimal way only to include heritage. A consequence of this is that while there was a great deal of effort in drafting the Environment Protection and Biodiversity Conservation Act to emphasize the importance of cooperation at all levels in the conservation of biodiversity these positive and encouraging aspects of the Act have not been carried forward into the Bill to apply to heritage. This tends to minimise the place of heritage in the proposed new Act, and overall gives the clear impression that the only heritage the Commonwealth is interested in or assumes any responsibility for is that listed on the National List or on the Commonwealth List. A good example of this are the proposed changes to **Section 1-3 -- Objects of the Act. Paragraph (1)** The proposal is to add **(ca) to provide for the protection and conservation of heritage**. This objective is further defined and limited under **Paragraph (2) (fa)** as - **includes provisions to identify places for inclusion in the National Heritage list and Commonwealth Heritage List and to enhance the protection, conservation and presentation of those places**. There's nothing wrong with these changes in themselves, but they are in marked contrast to the

positively fulsome list of **Objects of the Act** which apply to biodiversity and natural resources—see for instance **3(1) (b), (c), (f) and (g)**.

I am aware, as I have mentioned above, that there are significant limits in the Commonwealth's powers to protect historic places (though this does not apply to indigenous places or to most natural places). I am also aware that the Commonwealth is not seeking, nor should it seek, to extend its powers over regional and local land management issues. However one of the reasons why this issue is important is that any National List will clearly be only the proverbial tip of the iceberg. 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. In reality, as opposed to sometimes necessary bureaucratic and political practise, Australia's heritage does not fall neatly into national, state and local levels of significance. It is really not possible to effectively protect our National Heritage in its cultural and historic context without providing leadership for best practice in the conservation of heritage generally. In a way, protection of a small group of elite sites in isolation is rather like trying to protect a small group of endangered species without encouraging the protection of biodiversity generally by all levels of government.

One of the excellent things about the Environment Protection and Biodiversity Conservation Act is that it provides a number of mechanisms for cooperative work in nature and biodiversity conservation between jurisdictions, and for the encouragement of public involvement in conservation **at all levels** as illustrated in the objects of the Act and in many of its provisions. This is not a matter of Commonwealth power, but rather of Commonwealth leadership. This Amendment simply does not extend this Commonwealth leadership to the area of heritage, in the same way and to the same degree that the 1999 Environment Protection Diversity Conservation Act did for biodiversity and the natural environment. For example, could not we **promote** the conservation of heritage as well as biodiversity in **(1)(c)** and in **(1) (f) and (g)** could we not recognise the role of indigenous people in the conservation of heritage, especially since they are the custodians of nearly 25% of Australia's landmass? Changes such as these (which are only examples), followed through in the body of the Bill would not impose new Commonwealth powers, or bind the Minister to a particular course of action, but they would provide encouragement and legislative strength to a Commonwealth government with the will to facilitate good, cooperative heritage management at all levels.

The Register of the National Estate.

In its initial submission to the Minister on this issue the Australian Heritage Commission proposed the phasing out of Commonwealth powers with respect to places on the Register, when these places were effectively protected under State or Territory law, and when that law and practice relating to the identification, assessment, conservation and

management of heritage places were accepted by the Commonwealth as meeting certain minimal standards. A fair amount of work was carried out on drafting these standards with cooperation between State and Commonwealth officials. However as is often the case in our Federation, agreement was not effectively reached, and in these circumstances the Commonwealth is acting, rightly I believe, to refine and strengthen the heritage regime at a national level. This means however that there remain some significant concerns with the potential disappearance of the Register of the National Estate. There are two major problems.

Firstly, many sites, especially natural sites and cultural sites of social value will fall through the net of protection because the states have no legislation or policy framework to protect them. In the past putting them on the Register of the National Estate was the only way of providing them with any recognition, though this admittedly provided minimal legal protection in many cases. These places, while in no way of national importance often make up the essential heritage fabric of local and regional communities. They have been selected and nominated by members of those communities because they are highly valued. They have been assessed as having importance using best practice methodology, which we can confidently say, is world class. The Commonwealth Government should not be seen to be washing its hands of these places when there are insufficient safeguards to protect them.

To solve this problem the Bill could include a transition arrangement proposal whereby places on the Register retain their present level of protection and recognition until they have been assessed by the relevant state or territory and the Commonwealth jointly, and 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 or regulation or other state or Commonwealth measures - which may of course include mechanisms such as conservation agreements under the proposed Environment and Heritage Act. Perhaps another and simpler alternative would be to make the Register of the National Estate a specific indicator of significance under section 28 of the proposed Act. I also endorse the proposal of Australia ICOMOS that additions continued to be made to the Register of the National Estate, specifically of places not protected or considered under a particular state or territory regime. If this is a land management problem for the states, which they have claimed in the past, they can redress it by providing protection themselves for the particular type of site.

Secondly, the failure at this stage to establish minimal nationally accepted assessment standards means that the Register of the National Estate is the only data base which is nationwide and which assesses places in comparable way at a national level. This is an extremely important tool in the assessment of Australia's heritage at all levels. This tool cost approximately half a billion dollars to develop, and its continued development will be an essential prerequisite for developing an effective and credible National List.

To solve the second problem a number of measures could be used. The Department of Environment and Heritage is developing, with the Minister's approval, a national heritage database, or inventory, which will be an electronic assemblage of all the statutory heritage lists in Australia, with access to them all by all contributors. It is hoped that this database will be a national resource, which in the course of time will be available to policy-makers, planners, the business community and the general public. The establishment of this database or inventory was a major recommendation by the Australian Heritage Commission as part of its reform agenda. However, it is not specifically mentioned in this Bill. I am aware that legislative fiat is not required for the establishment of this national database. I think however that it is of such important as to be worthy of a mention in the Act. Such a mention, empowering or enabling the Minister to create and maintain such a database, and perhaps listing its purposes would augment the Commonwealth's leadership position and would provide some assurance of continued funding and personnel to develop and run the database. I have no doubt of the present Minister's commitment to this project but my long experience as a heritage manager indicates this may not always be the view of future governments. The existence of legislation alone will not compel the continuation of the database in the circumstances, but it may assist. Such a database would partly take the place of the Register of the National Estate. The National database or inventory should be described in such a way in the new Act as to specifically include the Register of the National Estate itself as an integral part of the data base.

Additionally it is important that the Register of the National Estate be a tool used for the assessment of places for the National List. The Act should specify this, in parallel with the present proposed provisions for establishing the Commonwealth List. However the Register of the National Estate will cease to have this usefulness if it is fossilized in its present form. The Act proposes that a thematic approach be taken to assessment of places for the National List. This is an excellent provision, and I think it should be extended to read **thematic and regional**. This is because the development of a regional methodology in the forest assessment processes has provided a very good model for systematic assessment, and in many respects represents best practice in this area. It is also important to encourage systematic nationwide assessments of heritage places in order to provide comparative data at all levels into the future. In addition therefore I suggest that the Act could specifically direct that places assessed for national listing which are found to have heritage significance, but which do not reach the threshold of national significance, should be systematically added to the National Data Base or Inventory and referred to the states and territories for listing if they consider it appropriate. This would continue to provide a method of systematic nationwide assessment of heritage places, comparable to that established under National Estate listing processes which have proved so valuable.

Best Practice in Assessment and Listing Processes.

Under the present regime the Australian Heritage Commission has the sole power of assessment and listing of heritage places. The effect of listing under the new regime will be to provide greater protection to a smaller number of places. Partly for this reason the new regime proposes that this power should rest with the Minister, and gives the new

Heritage Council a strong advisory role. This proposal has both advantages and disadvantages from the point of view of achieving practical conservation for Places of National Significance. What is crucial for credibility of the new regime, and for it to be able to effectively act on behalf of Australians to conserve important elements of our heritage is that the reasons for the decisions made about heritage places are fully transparent and publicly available. 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. As an example, the Heritage Council might determine that a particular heritage place was of national significance or Commonwealth significance and so advise the Minister. The Minister however, may for pragmatic reasons decide that is not possible to conserve the place, or to conserve it to the extent which would protect all its values. He or she may therefore decline to list the place, or to carry out some subsequent action which would conserve it. It is crucial that these two sets of decisions are separate and the reasons for them are transparent so that there is no possibility that the second decision contaminates the first. It seems important to ensure that the provisions in the Bill are strong enough in this regard.

As I have outlined in my general comments there seems no doubt that the 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. The Council should not be constrained to conduct an assessment of all nominations made to it, but it should make the initial decision about which places to assess. The Australian Heritage Commission successfully evolved mechanisms for dealing with this issue, in its later years strategically targeting the nominations which it considered should be assessed.

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 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. In effect, there should be a publicly available List of places which the Council has recommended as being worthy of being placed on the National List or the Commonwealth List regardless of whether the Minister finally lists them or not. Secondly, in addition to the reasons for decisions made by the Minister being made public, it would add to the transparency of the process if the Act specified that he should state whether his reasons for a decision to List or not to List were based on significance assessment or on other factors, and if so what they were.

Is also of potential concern that the Minister can seek independent advice about the significance of places proposed for listing. This seems a reasonable provision, but care should be taken to prevent the possibility that this could be used to set up what might be effectively an alternate Council giving conflicting technical advice.

Indigenous Heritage Issues.

The Commonwealth government through the decisions made at the 1967 referendum has specific powers to make law with respect to Indigenous Australians. Because of this, it probably has more inherent power to protect places of indigenous heritage significance than places of historic or natural significance. There is however very little in this Bill which reflects this power, or what might be argued to be this responsibility. The Commonwealth Minister can, under the present proposals, make a list of Indigenous heritage places of national value, or protect such places if they are on the Commonwealth List. However, there 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. This is not say that Indigenous people will not nominate sites for the National List - we know from recent National Estate listing that they will, but by large the concept of a National List does not fit very well with most Indigenous sites, or with many Indigenous people's views about how sites should be conserved.

The Commonwealth has in place legislation aimed at protecting Indigenous places - The Aboriginal and Torres Strait Islander Heritage Protection Act - but this Act is very largely a reactive Act, which is aimed at protecting sites specifically threatened by destruction. It does not provide general provisions for the listing or protecting of such sites, though the states generally often argue that this is a Commonwealth responsibility. I am fully aware of the complexities of this issue but I think this is an opportunity to provide, within this Bill, for some more positive protection and management of Indigenous sites than will be offered by the concept of a National List. Limiting positive Commonwealth provisions and powers for Indigenous sites to those which are deemed to have National Significance (a very European concept) comparatively disadvantages the sites and their custodians.

I suggest a relatively simple amendment, which would 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. This should be backed up by extra provisions protecting these types of Commonwealth Places in the same way as Indigenous Places are accorded extra protection in accordance with Commonwealth constitutional powers and under the provisions for the National List. This would not constrain the Minister, may not often be used, but would allow for the creation of a nationwide list of Indigenous sites in cooperation with Indigenous people.

Commonwealth Responsibilities and the Schofield Report.

One of the major problems in Commonwealth leadership in the field of heritage conservation in the past has been the often-cavalier way in which the Commonwealth has dealt with its own heritage. 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. Section 30 of the Australian Heritage Commission Act has only partly prevented this situation which has in fact become worse with the economic rationalist policies of recent governments. I do not need to detail the situation which is very well outlined in the Schofield Report. The Schofield inquiry fully investigated these issues, and made a number of detailed recommendations. These recommendations, though accepted in principle by the government, had not yet been implemented, although the Schofield Report was actually commissioned by the last Labour government. The lack of implementation of this report, and the obvious neglect, wholesale dispersal, or indeed in some cases one might say deliberate vandalism, of certain Commonwealth authorities relating to their heritage is a major problem, not only because of the loss of significant heritage, but also because of the lack of credibility this creates for the Commonwealth at a state and territory level, and amongst the general public especially in regional Australia.

The present Bill make some improvements, especially in involving the Heritage Minister in these issues, but in my experience this does not go far enough. 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. Another very important basic issue is that a number of heritage properties, with natural, indigenous or historic values, are being destroyed or disposed of without recognition because there has never been a heritage survey conducted of most departments' and authorities' land holdings. This, along with basic minimal heritage conservation planning which is required in every other jurisdiction in Australia would go a long way to improving the situation. This is a very important issue, which needs addressing if the new legislative regime is to have credibility. I'm aware that others including Australia ICOMOS are dealing with this issue in their submission and I endorse their recommendations.

The Australian Heritage Council Bill 2000.

Scope of the Council's Responsibilities

The Australian Heritage Council Bill makes provision for the creation of the Australian Heritage Council which will replace the Australian Heritage Commission. The Heritage Commission has played a very important role not only in the creation of the register of the National Estate, but in the setting of best practice standards for heritage conservation in Australia and for playing a key role in conservation issues in Australia generally. For this to continue, the Australian Heritage Council needs to be given a greater role than envisaged in the Bill. It is crucial that the Council be able to give independent publicly available advice on various issues without it being specifically requested - that they are

given a proactive rather than merely a reactive role. A proactive role would be in line with best practice in other Australian jurisdictions, and internationally. Providing the Australian Heritage Council with such a role can only enhance the credibility of the regime and of the government of the day. Here also I endorse the submission of Australia ICOMOS

Qualifications of Council Members

I also consider that for the credibility of the Council its membership should be of the highest technical excellence. In the past this has not always been the case with the membership of the Australian Heritage Commission, due, alas to the tendency of some governments to appoint friends or supporters to what has appeared to be a sinecure. The Bill specifically prohibits the Council from considering issues other than significance in its recommendations on listing. It therefore seems only logical that the Council membership should be made up of a range of recognised experts from the natural and cultural heritage area. 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. The Environment Protection and Biodiversity Act contains what seems to be a relevant precedent in this regard in specifications for the appointment of the Biological Diversity Advisory Committee. **Part 19, paragraph 504 (5)** stipulates that at least five members of this Committee should possess scientific qualifications the Minister thinks relevant to the performance of the Committee's functions. A similar provision, stipulating relevant technical or tertiary rather than scientific would be seen to be appropriate in the case of the Council.

Conclusion

As I have said above I think this Bill has much to recommend it, and I hope that the Senate rectify its significant problems, with the changes outlined above, and taking into account suggestions made by key national heritage bodies such as Australia ICOMOS and the National Trust. I would like the opportunity to present this submission to the Senate Committee in person, to explain some of the issues further and to respond to Senator's questions as appropriate.

Yours sincerely

Sharon Sullivan