Submission to the Senate Environment, Communications, Information Technology & the Arts References Committee Inquiry into:

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

To: The Secretary
Senate Environment, Communications, Information Technology
& the Arts References Committee
S1.57
Parliament House Canberra ACT 2600

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Summary

In this centenary of federation, the real value that Australia places on its heritage will be determined by the legislative framework passed by the Commonwealth Parliament after consideration of the Environment and Heritage Legislation Amendment Bill 2 (EHLAB2) and the Australian Heritage Council Bill. The Bills, as they stand, incorporate some of the positive aspects of the Environment Protection and Biodiversity Conservation Act (EPBC Act) but also many of its more negative aspects.

In summary, crucial strengths and weaknesses of the existing and the proposed Commonwealth legislative arrangements for heritage are as follows:

Existing arrangements (Australian Heritage Commission Act)

Strengths

- a national register of Australia's heritage established (the Register of the National Estate) that includes places from across the whole heritage spectrum and at all levels of significance (ie down to local significance level). The Register of the National Estate is used by all levels of government in Australia as the first point of reference to see whether a place has heritage significance and what are those heritage values,
- the Australian Heritage Commission (AHC) is an independent body,
- the Register is compiled by the AHC taking into account heritage values only,
- the AHC has wide ranging powers to report, advise, research, promote, educate, present, and train people on heritage matters.

Weaknesses

- the powers of the AHC are restricted to the actions of Commonwealth agencies and do not apply beyond this limitation,
- there are no penalty provisions for non-compliance and it is the action Minister or agency who decides on the appropriateness of the proposed action, the alternatives available and how to modify (if at all) the action,
- there is no requirement for management planning.

Proposed arrangements

Strengths

- there are provisions for the Commonwealth to manage and protect heritage places entered on a national heritage list,
- there are penalty provisions that apply to any person or agency taking actions that will have a significant impact on the heritage values of places on either the national heritage list or the Commonwealth heritage list,
- it is the Commonwealth Environment Minister who considers and decides on the nature and impact of the proposed actions.

Weaknesses

- the national heritage list is compiled by the Minister and not an independent body,
- the existing heritage list (the Register of the National Estate) ceases to have any statutory meaning,
- the scope and size of the new heritage list is unknown (it may be as small as 50 places) and the criteria have not been released,
- the definition of what is an "action" is considerably reduced from its meaning under the existing AHC Act. This stems from similar restrictions that apply under the EPBC Act,
- The threshhold test is one of significant impact on values and does not require consideration of prudent and feasible aternatives,
- Regional forest areas are excluded

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. This limitation of working within the present arrangements provided by the EPBC Act needs to be kept in mind when considering the following points. Also, many of the lessons learnt over a quarter of a century of experience in Commonwealth heritage protection have been ignored in the proposed Bills.

This submission highlights important and necessary amendments to the Heritage Bills that will ensure the Commonwealth takes its appropriate role of national leadership in maintaining and protecting Australia's heritage for future generations. These include:

1. the decisions on heritage listing, a technical decision, must continue to be made by a technical, professional, expert and independent body - the Australian Heritage Council - and not the Minister.
2. the need to continue with the development and use of the Register of the National Estate (the RNE).
3. the need to include those Commonwealth actions that previously were covered under the AHC Act but are not covered under the proposed arrangements. Such actions include the making of Commonwealth decisions on grants. Under the EPBC Act, certain actions, including the making of grants are excluded (see Section 524A, EPBC Act).
4. the need to ensure that the Council is an expert, independent and technical body with clear, proactive functions.
5. the need to ensure that EHLAB2 gives protection to the place including associated values and not just the heritage values of the place. The current test of preventing adverse effects should not be replaced with a lower "significant impact" test.
6. the need to better identify and protect Commonwealth heritage places, particularly in relation to their sale or disposal.
7. the need to tighten up Commonwealth management of its own heritage places, for it to be accountable to State laws and to release proposed management principles.
8. the removal of the capacity to delegate approval powers and ensuring that state assessment procedures are at least the same standard as for the Commonwealth

Without significant amendment the legislation cannot be supported.

Introduction

In examining the proposed Commonwealth legislation to amend the existing heritage legislation (the Australian Heritage Commission Act 1975 [AHC Act]), it is important and necessary to consider the following:

- the existing AHC Act, its strengths, its weaknesses and the experience gained through 25 years of its operation;
- experience gained through the development and operation during over 20 years of State and Territory heritage legislation; and
- the Commonwealth's Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act), which came into force on 16 July 2000 and was intended to cover heritage at a future date, its strengths and weaknesses and its appropriateness as a legislative vehicle for heritage.

The first two points, while seeming obvious, deserve further discussion. This is because the Environment and Heritage Legislation Amendment Bill 2 (EHLAB2) and the Australian Heritage Council Bill (AHCB) do not include some of the proven and recognised successes of the AHC Act and its operation. Many of these were discussed at length and supported at the Commonwealth's National Heritage Convention held in 1998. Another point is that the EPBC Act, being designed to cover biodiversity, World Heritage, threatened species, wetlands of international importance etc, does require special analysis and special amendments if it is to cover heritage. This is because heritage 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 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.

The Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) came into force on 16 July 2000 and replaced the following Commonwealth statutes:

- Environment Protection (Impact of Proposals) Act 1974,
- World Heritage Properties Conservation Act 1983,
- National Parks and Wildlife Conservation Act 1975,
- Whale Protection Act 1980, and
- Endangered Species Protection Act 1992.

The EPBC Act focuses on two of the three major topics that it was initially intended to address - Environmental Impact Assessment and the Conservation of Biodiversity The delay in introducing heritage amendments was because consultations on these issues were still in progress with the States. The States have since decided that they do not wish to continue discussions with the Commonwealth on heritage legislation or the national list.

The EPBC Act represents a significant change in the approach of the Commonwealth to the environment. The 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 as triggers for the 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).

The Act also provides that:

- a person must not take an action on Commonwealth land that has, will have or is likely to have a significant impact on the environment (S26),
- a person must not take an action outside Commonwealth land that has, will have or is likely to have a significant impact on Commonwealth land (S26),
- the Commonwealth (including a Commonwealth agency or corporation) must not take an action that has, will have or is likely to have a significant impact on the environment anywhere in the world (S28).

An "action" includes a project, development, undertaking or activity. However, a decision to grant an authorisation (eg a permit or a licence) or to provide funding is not an action (S523 - 524B). These latter exclusions exempted a range of actions previously covered under the EPIP Act, one of the backward steps within the EPBC Act. These actions are also included under the present AHC Act.

In relation to the assessment and approval process the Commonwealth may, through bilateral agreements, delegate to the States the responsibility for conducting assessments (assessment bilateral) and, in certain circumstances, the responsibility for deciding whether to grant approval (approval bilateral).

"Environment" as defined in the Act (S528) includes:
(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).

In comparing this definition with that of the national estate in the AHC Act it can be argued that they overlap and not only for the natural environment/heritage/national estate, but also for the cultural environment/heritage/national estate (see (c) above).

Two important and positive changes to Commonwealth legislation with the passage of the EPBC Act are that it places Commonwealth decisions on environmental issues with the Environment Minister (rather than the action Minister) and up front of the approval processes. There are some important decisions excluded from needing approval, in addition to those relating to authorisation and funding. An action does not need approval if it is taken in accordance with Regional Forest Agreements (RFAs) or a plan for managing the Great Barrier Reef.

The exemption relating to RFAs should be removed as the RFAs in most states were the result of severely flawed processes.

The EPBC Act and the proposed heritage legislation require critical amendments to adequately incorporate heritage and the lessons learnt on heritage protection and legislation over the past 25 years in Australia and overseas.

The major amendments that need to be made to EHLAB2 and AHCB to ensure the Commonwealth continues to play a leadership role in heritage protection and has best practice heritage legislation include:

1. **the decisions on heritage listing, a technical decision, must continue to be made by a technical, professional, expert and independent body - the Australian Heritage Council - and not the Minister.**

The Australian Heritage Commission model, having operated for over 25 years, shows the value and sense in this approach. It avoids the Minister becoming embroiled in technical debates, potentially fought out in public, over heritage values. 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. Again, this public appeals process should not involve a Ministerial decision.

It is very important that there is a clear separation of responsibilities between listing decisions as against management decisions or political decisions. It is not appropriate for the Minister to make the decision on whether or nor to list a place and then to be the person responsible for making the decision on whether a proposed action is significant and would adversely affect the place. It will be, and should be, the Minister who makes the decisions on actions affecting heritage places. This is the appropriate and timely circumstance for Ministerial involvement.

The credibility of the Australian Heritage Council will, to a large extent, be dependent on the quality of this list and the decisions it makes regarding entry of places onto the list. These decisions, based on clearly defined criteria, by a technically based Council must be taken outside the sphere of politics. For the sake of public credibility and support, also, it is imperative that the listing decision is by an independent body, free of political pressure or influence.

A discussion paper, published by the Australian Heritage Commission in February 1997, Australia's National Heritage - options for identifying heritage places of national significance sets out details on the merits and inadequacies of different approaches.

For the option of 'Decision on assessment of significance and decision on listing made by an independent advisory body' it states:

> An independent advisory body is well placed to ensure that scientific evidence and professional advice on the heritage significance of a place are the primary consideration in the designation process. In other words, the heritage significance of a place is the main criterion for listing. An independent advisory body is also likely to receive greater support from the community and provide credibility to the identification and assessment process.
>
> This option is effectively the status quo for the Australian Heritage Commission. This system has proved to be both appropriate and effective for

> the national estate listing process, which has a high degree of independence from management and political considerations.

For the option of 'Decision on assessment of significance made by an independent advisory body, and decision on listing made by Commonwealth Minister' it 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.

Bearing in mind that the options being considered were for a list of places of national heritage significance (ie a national list), the arguments for the involvement of a Minister in the establishment and further development of a list of all heritage places (the RNE), have even less credibility. It should also be borne in mind that this was the result of deliberations from a process set up by the Commonwealth Minister and using the best heritage personnel in Australia.

The 1996 Report by Hon Elizabeth Evatt, AC, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 made the same point. Recommendations 6.4, 8.1, 8.5 and 8.7 follow:

> *6.4 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.*
>
> *8.1 The question whether an area or site should be considered an area or site of particular significance according to Aboriginal tradition should be regarded as a subjective issue to be determined on the basis of an assessment of the degree of intensity of belief and feeling of Aboriginal people about that area or site and its significance.*
>
> *8.5 The issue of significance should be considered separately from the question of site protection.*
>
> *8.7 The opinion or conclusions of the agency recommended in Chapter 11 as to the significance of a site should be binding on the Minister.*

If the Minister is to be involved at all in the decision to list, the Minister could be given the right to direct the Australian Heritage Council to list a place (similar to provisions under the previous Section 25 of the AHC Act 1975 e.g the listing of Fraser Island undr the Fraser Government and Section 31 of the Victorian Heritage Building Act 1981) and/or seek a review by the Australian Heritage Council of its proposed decision to list/not list a place. The Minister's powers should extend no further in relation to the establishment of the heritage list(s).

Of equal importance is the need to make it absolutely clear that the provisions of the EPBC Act relating to the Commonwealth apply to all places listed in the RNE. 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".

Although not argued for or supported in this paper, decisions on selecting places from a fully functional and operating RNE (specifically included under Sections 26 and 28 of the EPBC Act), to comprise a "national heritage list" could be undertaken by the Minister. But why? The arguments presented against this approach still apply. Indeed, the arguments against having a national list at all are very strong.

These include:

- the fact that graded lists, or selective lists, have not worked in the past. The National Trusts explored this approach decades ago and found it wanting;

- the significance of how many places are to be selected for the "national list". Is it 50 or 100 or 1,000 or 5,000? Whatever it is, it is arbitrary. The simplest approach is to include all places in the RNE (some 12,000 - 13,000). This is not at all excessive or ridiculous. In England and Wales they have over 440,000 places (in 1996) on their national heritage buildings list of places having statutory protection and access to a grants program at the national level. And in the USA, the National Register of Historic Sites has over 60,000 places (in 1996). This Register, compiled by the Keeper of the Register (not the Minister) is for places of local, state and national significance.

- Under Section 106 of the US *National Historic Preservation Act 1966*, Federal agencies are required to consider the adverse impacts of their activities on any place included on the register. And, proposed works on these places have access to funding from a Federal Government assistance program;

- the difficult (impossible?) issue of comparing places with each other. This is difficult enough within a theme (eg Federation buildings) of a sub-set (eg historic) of the heritage. But how is it to be conducted across themes and across heritage sub-sets (eg historic vs indigenous)?

- the impossibility of comparing indigenous places for selection to a higher-order national list. The issue of how to handle indigenous heritage was canvassed widely by Australian Heritage Commission staff in the recent Australia-wide tour to discuss and promote the impending Bill. The view presented was that indigenous places would be covered by treating them in the same section as Commonwealth places, as "places of Constitutional interest to the Commonwealth". While this might have had merit, it is not found anywhere in the Bill. Without such an approach, the protection of indigenous places needs the retention of the RNE. Because indigenous places are under-represented in the RNE, this is another argument for the absolute necessity to continue to develop and add to the RNE as a dynamic, evolving entity with a strong Commonwealth commitment to protect places listed in it.

The only argument for a national list would revolve around places on such a list having the benefit of added protection through formal management arrangements and access to financial assistance. But, the requirement for having management

plans for national heritage places (other than those in Commonwealth areas) is weak (see paragraph 324V of the EHLAB2) and tied to national heritage management principles that have not been released. The issue may be best resolved if all places presently in the Register of the National Estate are automatically placed on the "national heritage list" and given the protection under the EPBC Act of places of "national environmental significance". This would acknowledge the work of the former AHC and provide instant protection to the approximately 13 000 places that have passed the AHC's assessment processes.

2. the need to continue with the development and use of the Register of the National Estate (the RNE).

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.

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 a heritage place, needs to maintain and update the RNE as a national, heritage list, ie a heritage 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).

It should not be seen as a "national heritage" list, ie those places having national significance. This defeats the original role of the Australian Heritage Commission - a role fully supported across the political spectrum - the role of providing the Commonwealth with advice on when its actions may have an impact on a place that has heritage significance.

Because the RNE is not complete, and by definition will never be complete, it is both important and appropriate that the Council continues to develop the RNE as the national list of significant Australian heritage places. This becomes critical when it is realised and recognised that the State lists are not, in any foreseeable future and without major legislative and administrative changes, going to cover the list of places and types of places included in the RNE.

Without the RNE, or a Commonwealth list of heritage places significant at the local, State and national level, many places will not have heritage recognition.

An example is those natural 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.

So, until, and if, the States compile an inventory of heritage that encompasses all the places and types of places included in the RNE, the RNE needs to continue to operate and be developed.

This is not to say that the Council cannot rely on and use the State listing processes when appropriate. Indeed, when the Council considers that State identifying, assessment and listing arrangements are entirely appropriate and suitable for a particular theme of heritage, then the Council may decide to adopt such listings without going through its own full assessment processes. The degree of confidence to adopt this process will need to be very high.

In summary, development of the RNE must continue to be a Commonwealth responsibility.

It is salutary, at this stage, to refer to the communique of the National Heritage Convention or HERCON (comprising as it did Australia's leading heritage officials, professionals and practitioners, Indigenous, community and industry leaders) which agreed in 1998:

- that 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 standards setting for the conservation of all heritage places at whatever level they are managed*; (italics added).

A tangential issue regarding the RNE is that if 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.

3. the need to include those Commonwealth actions that previously were covered under the AHC Act but are not covered under the proposed arrangements. Such actions include the making of Commonwealth decisions on grants. Under the EPBC Act, certain actions, including the making of grants are excluded (see Section 524A, EPBC Act).

Funding decisions regularly impact on places included in the RNE. Often the grants are well intended but history shows that many less than satisfactory and potentially damaging proposals have been amended and resulted in very positive outcomes through consideration and advice by the Australian Heritage Commission.

The provision to include the making of grants an "action" under the EPBC Act will result in better heritage outcomes for the Commonwealth in its funding programs. This will happen in two major types of grants 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 an heritage nature will be assessed by an 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.

Under Section 30 (4) of the present AHC Act, Commonwealth actions include not only grant funding but also approval of programs, recommendations on direct financial assistance, the issue of a licence or the granting of a permission. Such actions should, for best practice, be covered under the provisions for heritage in the EPBC Act.

While Commonwealth financial assistance for national heritage places is alluded to at paragraph 324Y of the Bill, there are no commitments for a program, with adequate funding, such as the former National Estate Grants Program. This requires attention if best practise and a continuing Commonwealth leadership role in heritage matters is to be adopted. The funding must also be at an appropriate level if the Council is to achieve any worthwhile and lasting results.

And when this is provided, why should financial assistance be restricted to “national heritage” places when many heritage places (identified by inclusion on the RNE) are not and may never be on the national heritage list or State lists and therefore denied access to Commonwealth and/or State heritage funding programs?

4. the need to ensure that the Council is an expert, independent and technical body with clear, proactive functions.

To ensure that the Australian Heritage Council is not only independent but also technically equipped and has credibility and public confidence, it is essential that the technical requirements for appointments to the Council be strengthened. Also, the possible appointment of Commonwealth public servants needs to be addressed as the Council will be supported by a host of public servants and the Council needs to be comprised of people outside of and independent of the Commonwealth.

Similarly, the roles of the Council need to be expanded to include some of the functions already undertaken by the AHC.

The functions of the Australian Heritage Commission are set out at Section 7 (a) - (h) of the Australian Heritage Commission Act and include:

(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;

(d) to furnish advice and reports;

(e) to administer the National Estate Grants Program, being the program devised for the grant by the Commonwealth, of financial assistance to the States and internal Territories and to approved bodies for expenditure on National Estate projects;

(f) to further training and education in fields related to the conservation, improvement and presentation of the national estate;
(g) to make arrangements for the administration and control of places included in the national estate that are given or bequeathed to the Commission; and
(h) to organise and engage in research and investigation necessary for the performance of its other functions.

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. Its duties are far too important and technical to be restricted by requiring Ministerial directions before it can act. To do so would be a retrograde move, out of step with current best practice approaches and counter to the arrangements in most States.

5. the need to ensure that EHLAB2 gives protection to <u>the place</u> including associated values and not just the <u>heritage values of the place</u>. The current test of preventing adverse effects should not be replaced with a lower "significant impact" test.

This could be an even more critical issue when the outcomes of two Court cases presently under way are known. When it is only the <u>values</u> that are protected, a legal issue of what are the values and what is a "<u>significant</u> impact" becomes important.

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.

Indeed, there appears to be a confused approach in existing EHLAB2 which provides protection for Commonwealth heritage *places* at paragraph 341Y where it is the impact on the place that is referred to but the heritage *values* of a place on the national list.. To ensure the same level of protection is given to places of national heritage significance and also places on the RNE and other Commonwealth heritage lists, amendments to make the provisions consistent with paragraph 341Y will need to be made to paragraphs 4, 5, 13, 17, 19, and 20 of EHLAB2 and Sections 26 and 28 of the EPBC Act respectively. These amendments will result in an enhancement not a <u>diminution</u> in the level of Commonwealth protection as the existing AHC Act refers to the place (see Section 30 AHC Act, Attachment 2). To be consistent with sections of the EPBC Act, it is suggested that the term "heritage place, including associated values" is used.

Without this provision, the new legislation will be significantly weaker than the provisions in the AHC Act.

To make use of the experience gained from the operation of the AHC Act it is also recommended that the term “significant impact” be replaced. The exact meaning of “significant” could be difficult to define and may get tangled in legal interpretation. The AHC Act uses the term “ adversely affects” (s.30(1)) and actions “that might affect to a significant extent” (s30(3)). If these terms are used in EHLAB2 then the history of the AHC Act gives some guidance and instruction on its interpretation. It has the advantage of having been successfully in use for over 25 years and subject to legal interpretation.

In addition, the AHC Act requires the consideration of prudent and feasible alternatives to the proposed action, such a consideration is a desirable aspect of proper assessment and should be retained.

A further problem with interpreting “significant impact” is that it does not or may not provide for cumulative impacts of a series of small or less-than-significant (incremental) impacts. 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 ora series of adjacent buildings or a series of developments along a stretch of coastline. It is recommended that definitions are written in to the Bill for “cumulative affects” as well as “adversely affects” and/or “significant impact”.

6. the need to better identify and protect Commonwealth heritage places, particularly in relation to their sale or disposal.

Under the AHC Act, Commonwealth actions are taken to include the sale or disposal of a property. This has been an important aspect of the Australian Heritage Commission's work.

The issue was also highlighted in the 1996 Commonwealth Report by the Committee of Review - Commonwealth owned heritage properties (The Schofield Report) - A Presence for the Past (see, in particular, recommendations 14 - 17 and 24).

Protection other than covenants (as proposed in the EHLAB2) need to be attached to disposal of Commonwealth heritage property. Experience with covenants is that they do not provide long-term protection. Prior to disposal, consultations should be held with the Australian Heritage Council and the property listed on the appropriate State/Territory/local heritage register A preferable alternative may be to lease rather than sell the property. Without stronger provisions relating to disposal of Commonwealth properties, existing arrangements under the EPBC Act will threaten heritage protection and result in a situation weaker than the existing one. A further concern relating to disposals is that the sale itself may not be considered a damaging action. One legal interpretation is that the action may be an "action at a distance" or the subsequent significant impact may be a "second hand" action and so not caught by the EPBC Act provisions.

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.

7. the need to tighten up Commonwealth management of its own heritage places, for it to be accountable to State laws and to release proposed management principles.

In addition to the amendments canvassed under point 6, the Commonwealth needs to be confident that it is properly managing its own heritage. As well as having Commonwealth departments and agencies identifying and listing their own heritage places, they should be subject to the same penalty provisions as apply to all other bodies. This is not the case under the present Bills.

Furthermore, the Commonwealth needs to be accountable to existing State and Territory laws. It is not clear that this will be the case.

The Commonwealth Heritage Management Principles need to be seen before comments can be made on the arrangements to apply to Commonwealth heritage property. Similarly, there are a number of other details that need to be tabled during the consideration of these Bills before the adequacy of the Bills can be fully assessed. These include the National and Commonwealth Heritage values and the National Heritage Management Principles. These should be released for public comment and subsequently incorporated in Regulations.

For Indigenous heritage places, the 1996 Report by Hon Elizabeth Evatt, AC, recommended that:

> *The Commonwealth Government should actively encourage the adoption of the Guidelines for the Protection, Management and Use of Aboriginal and Torres Strait Islander Cultural Heritage Places, developed by Department of Communication and the Arts (Cth) by all relevant Commonwealth, State and Territory agencies and by local authorities involved in land management and decisions concerning cultural heritage. (Recommendation 6.6).*

These guidelines should form the basis for the guidelines to be introduced, by Regulations, into the EPBC Act.

8. the removal of the capacity to delegate approval powers and ensuring that state assessment procedures are at least the same standard as for the Commonwealth

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.

Other

There is a need for further amendments, of a more minor manner. For these amendments and the reasoning behind them, it is proposed to make a detailed presentation to the Committee hearings.