

Australia ICOMOS

SUBMISSION TO THE SENATE COMMITTEE INQUIRY INTO THE ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT BILL (NO.2) 2000 AND THE AUSTRALIAN HERITAGE COUNCIL BILL 2000

SUMMARY

The introduction of the two heritage Bills provides an opportunity to recast and enhance the Commonwealth's heritage regime. There are a number of welcome features in the Bills such as the possibility of improving the conservation of national heritage places. However, these changes come at a cost, especially the loss of the integrated and inclusive Register of the National Estate.

The positive aspects of the Bills can be improved and many of their deficiencies can be overcome or at least ameliorated. Accordingly, Australia ICOMOS proposes a large number of changes. In suggesting these changes, it is important to recognise the 25 year history of the successful operation of heritage legislation in Australia. Many of the changes draw upon this history rather than accepting the approach based on the EPBC Act.

Major changes relate to:

- strengthening the role of the Australian Heritage Council;
 - having the Council make decisions instead of the Minister with regard to the national and Commonwealth heritage lists;
 - improving the independence of the Council and give it an initiating role, not just a reactionary role as determined by the Minister;
 - providing the Council with a comprehensive advisory role with regard to heritage matters, including an ability to provide reports to the Minister and Parliament;
 - strengthening the heritage qualifications of Council members, and ensuring at least one is an Indigenous Australian;
- retaining the Register of the National Estate for certain purposes, and giving legislative support for the maintenance and development of a national heritage places database;
- making absolutely clear that heritage places are defined as part of the environment;
- making a clear separation between identifying heritage places and their management;
- using the broader definition of action from the AHC Act 1975;
- improving public involvement/consultation, transparency and accountability; and
- implementing key recommendations from the Schofield report regarding Commonwealth heritage places.

The amendment Bill refers to national and Commonwealth criteria and management principles. These should be publicly released prior to consideration of the Bill by the Parliament.

STRUCTURE OF THIS SUBMISSION

This submission is comprised of the following sections:

- an introduction to Australia ICOMOS;
- general comments about the bills;
- major comments on each of the bills;
- Australia ICOMOS legislation objectives (Attachment A);
- an annotated version of the Environment and Heritage Legislation Amendment Bill (No.2) 2000 indicating how some of Australia ICOMOS suggestions could be implemented (Attachment B); and
- a similarly annotated version of the Australian Heritage Council Bill 2000 (Attachment C).

INTRODUCTION TO AUSTRALIA ICOMOS

Australia ICOMOS is the national committee of the International Council on Monuments and Sites (ICOMOS), a non-government organisation of practitioners recognised for its leading inter-disciplinary role in promoting expertise in the conservation of cultural heritage. ICOMOS is a key adviser to UNESCO, indeed under the World Heritage Convention (1972) the World Heritage Committee is required to consult with ICOMOS on matters regarding World cultural heritage.

Australia ICOMOS was formed in 1976 to promote the application of sound theory, methodology and scientific techniques to the conservation of cultural heritage places. Its most far-reaching activity has been the preparation and promotion of The Burra Charter (The Australia ICOMOS Charter for Places of Cultural Significance). Australia ICOMOS has a broad membership of cultural heritage practitioners working in Australia and overseas.

In commenting on the proposed legislation, Australia ICOMOS has drawn upon a set of objectives for heritage legislation which it prepared some years ago. A copy of these objectives are reproduced at Attachment A.

GENERAL COMMENTS ABOUT THE BILLS

Alternative models for the heritage legislation – EPBC Act or Existing heritage legislation

The drafting of this Bill closely follows the model provided in the EPBC Act. While this may be a strength on one view, it ignores the 25 year history of the AHC Act and a similar lengthy experience provided by State heritage legislation, and the EPBC model involves a number of complex provisions which are not appropriate to heritage.

The EPBC Act model may be suitable for environmental and biodiversity matters but this does not mean that it is either suitable or superior to the lessons provided by specific heritage legislation which has had the benefit of decades of operation. 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.

Reviewing the Bill in the context of the model provided by the EPBC Act leads to a level of agreement with its provisions. However, when reviewed in the context of 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.

These comments seek to introduce the best features of existing Commonwealth and State heritage legislation, and where necessary to develop them further.

Recommendation 1: The substantial and successful history of Commonwealth and State heritage legislation over 25 years should be used as the basis for new Commonwealth heritage legislation, in preference to the model provided by the existing EPBC Act provisions.

A comprehensive approach to heritage

In previous submissions to the Government about the new Commonwealth heritage regime, Australia ICOMOS has raised concerns about the shift from a comprehensive approach to heritage, characterised by the concept of the National Estate, to an approach based on national heritage significance. Australia ICOMOS still believes that the integrated concept of the National Estate is a powerful, important and world-leading concept.

The amendment Bill, together with the repealing of the AHC Act 1975 will bring about this narrowing of focus, and Australia ICOMOS is concerned that this step:

- moves away from the good practice of the past;
- reflects a unintegrated approach to heritage; and
- is not adequately replaced by a mixture of the new Commonwealth regime and activities at State, territory and local government levels.

Key suggestions for change to both Bills attempt to retain some key features of a broad-ranging and integrated approach to heritage. These include a broad role for the new Council and the retention, to some extent, of the Register of the National Estate.

Recommendation 2: The new Commonwealth heritage regime should retain a broad-ranging and integrated approach to heritage, as exemplified by the concept of the National Estate; a broad role for the new Council; and retention, to some extent, of the Register of the National Estate.

Separation of identification from management

A major issue in heritage conservation is the need to clearly separate identifying heritage places and values from their management. Past experience warns that where these matters are dealt with together, management issues can cloud or otherwise influence decisions about whether a place has certain heritage values, or any value at all.

Both the Australia ICOMOS Burra Charter (Article 6.1) and the Australian Heritage Places Principles (Principle 7), developed by the 1998 National Heritage Convention, recommend the clear separation of identification and management.

At a number of points in the amendment Bill, this separation should be more clearly expressed.

Recommendation 3: In accordance with recognised good practice, decisions about the identification of heritage places and values should be made independently of management decisions, and this should be clearly expressed in the amendment Bill.

Complexity of the proposed heritage legislation

One of the Australia ICOMOS objectives for heritage legislation states that any heritage Act should be simple to operate and simple to understand (Objective 1).

The proposed heritage amendments to the EPBC Act:

- will add some 50 pages to an Act which is already over 500 pages long;
- the heritage amendments are not stand-alone but are integrated with the other provisions of the Act in a somewhat complex way, and the Act is already complex; and
- the Australian Heritage Council Bill is a separate piece of legislation dealing with aspects of the overall Commonwealth heritage regime.

All of this seems contrary to the objective of simplicity. On the other hand, the amendment Bill is an attempt to integrate heritage with other environmental provisions.

Recommendation 4: In accordance with the objective of an Act which is simple to operate and understand, the value of creating one separate and stand-alone heritage Act should be considered.

MAJOR COMMENTS ON EACH OF THE BILLS

Environment and Heritage Legislation Amendment Bill

This Bill contains a number of welcome initiatives which could lead to the more effective conservation of places of national and Commonwealth heritage value. However, there are a range of changes that should be made to substantially improve its operation.

The Bill can be improved in three major ways:

- by having the Australian Heritage Council make decisions instead of the Minister;
- by implementing key recommendations from the Schofield report regarding Commonwealth heritage places, such as:
 - giving positive direction to Commonwealth agencies to conserve heritage places, rather than merely rely on prohibitions;
 - require agencies to identify heritage places and maintain an inventory;
 - develop a heritage strategy for their heritage places; and
- by using the definition of action from the AHC Act 1975 with regard to the protection of national and Commonwealth heritage places, with the addition of the failure to take action and wilful neglect.

This issue of the role of the Council and the Minister is discussed in more detail below. In addition, there are a number of other proposed changes dealing with:

- making absolutely clear that heritage places are defined as part of the environment;
- ensuring a clear separation of identification and management decisions;
- consideration of both values and places, rather than just values;
- the deletion of provisions which seem unnecessary or overly prescriptive;
- strengthening the role of the Australian Heritage Council;
- improving public involvement/consultation, transparency and accountability;
- retaining the Register of the National Estate for certain purposes, and giving legislative support for the maintenance and development of a national heritage places database;
- making a clear separation between identifying heritage places and their management; and
- make clear that the disposal of a Commonwealth heritage place is an action subject to the protective provisions of the Act.

In particular, it is important to remember the Australian Heritage Commission and Register of the National Estate have operated for 25 years, especially with regard to 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.

An example of how these changes could be made is provided at Attachment B, which also notes a number of minor changes that should be made. Comments are provided in the attachment supporting the proposed changes.

Recommendation 5: The following key changes to the Environment and Heritage Legislation Amendment Bill should be made:

- (a) by having the Australian Heritage Council make decisions instead of the Minister;***
- (b) by implementing key recommendations from the Schofield report regarding Commonwealth heritage places, such as:***
 - (i) giving positive direction to Commonwealth agencies to conserve heritage places, rather than merely rely on prohibitions;***
 - (ii) require agencies to identify heritage places and maintain an inventory;***
 - (iii) develop a heritage strategy for their heritage places;***
- (c) by using the definition of action from the AHC Act 1975 with regard to the protection of national and Commonwealth heritage places, with the addition of the failure to take action and wilful neglect;***
- (d) making absolutely clear that heritage places are defined as part of the environment;***
- (e) ensuring a clear separation of identification and management decisions;***
- (f) consideration of both values and places, rather than just values;***
- (g) the deletion of provisions which seem unnecessary or overly prescriptive;***
- (h) strengthening the role of the Australian Heritage Council;***
- (i) improving public involvement/consultation, transparency and accountability;***
- (j) retaining the Register of the National Estate for certain purposes, and giving legislative support for the maintenance and development of a national heritage places database;***

- (k) *making a clear separation between identifying heritage places and their management; and*
- (l) *make clear that the disposal of a Commonwealth heritage place is an action subject to the protective provisions of the Act.*

The Bill refers to several key documents which have yet to be released. These are the national and Commonwealth criteria and management principles. These should be released for public comment prior to consideration of the Bill by Parliament. The Commonwealth criteria should be the same as the current National Estate criteria.

Recommendation 6: The Government should release for public comment the national and Commonwealth criteria and management principles, prior to consideration of the Bill by the Parliament.

Recommendation 7: The Commonwealth criteria should be the same as the current National Estate criteria.

Proposed change to the Listing and Protection/Conservation powers from the Minister to the Australian Heritage Council

Perhaps the most important suggestion for change to the amendment Bill relates to the listing and protection powers: giving these powers to the Council and not the Minister.

There is a long history in Australia of such decisions being made by expert heritage councils rather than Ministers. Most of the State or Territory heritage councils currently make listing decisions which have significant conservation ramifications similar to those to be imposed by the proposed national heritage listing. Many also make decisions on development applications. A summary of decision-making is presented in the table below. The work of State heritage councils involves hundreds if not thousands of listing and development decisions each year. With such a strong and successful history it seems entirely unnecessary for the Commonwealth Minister to make such decisions, and much more appropriate for the expert Australian Heritage Council to make the decisions under the new regime.

There seems absolutely no reason why the Minister should be involved in decisions regarding the proposed Commonwealth Heritage List. As the list broadly parallels the Register of the National Estate, the Council should continue the role played by the Australian Heritage Commission with regard to 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 bodies such as the State heritage councils, and ministerial involvement seems unnecessary and inappropriate.

As noted above, one reason why the amendment Bill provides for the Minister to make all the decisions is that this follows the pattern established by the EPBC Act. However, the argument made above is that this is the wrong model to draw on – the 25 years of heritage

legislation demonstrates listing and development decisions can and should be taken by expert heritage councils, not Ministers.

Table 1. Comparison of Heritage Decision Making

Jurisdiction	Listing decision by	Approval of works by
Commonwealth (AHC)	Commission	Agencies with advice from AHC
Australian Capital Territory	Legislative Assembly	Territory Planner
New South Wales	Heritage Council	Heritage Council
Northern Territory	Minister	Minister
Queensland	Heritage Council	Heritage Council for private property, it only advises the relevant Minister in the case of government property
South Australia	Heritage Authority	Local councils or Development Assessment Commission
Tasmania	Heritage Council	Heritage Council
Victoria	Executive Director or Heritage Council	Executive Director or Heritage Council
Western Australia	Minister	Decision-making authority (eg local council) subject to agreement of Heritage Council

Australian Heritage Council Bill

Australia ICOMOS welcomes the continuation of an expert statutory heritage advisory body in the form of the Council. The existing Australian Heritage Commission has made a tremendous and highly important contribution to heritage conservation in Australia.

While containing some positive aspects, this Bill needs to be strengthened in a number of areas. Key changes that should be made include:

- improving the independence of the Council and give it an initiating role, not just a reactionary role as determined by the Minister;
- allowing it to provide advice to any person or organisation, not just the Minister;
- providing it with a comprehensive advisory role with regard to heritage matters, including an ability to provide reports to the Minister and Parliament;
- giving the Council a decision-making role with regard to listing places on the National and Commonwealth Heritage Lists;
- strengthening the heritage qualifications of members, and ensuring at least one is an Indigenous Australian;
- making Commonwealth employees ineligible for appointment to the Council; and
- allowing for the possible creation of sub-committees to assist the Council with its work.

It is important to stress that the Council should have a broad role in heritage matters.

An example of how these changes could be made is provided at Attachment C, which also notes a number of minor changes that should be made. Comments are provided in the attachment supporting the proposed changes.

Recommendation 8: The following key changes to the Australian Heritage Council Bill should be made:

- (a) improving the independence of the Council and give it an initiating role, not just a reactionary role as determined by the Minister;***
- (b) allowing the Council to provide advice to any person or organisation, not just the Minister;***
- (c) providing it with a comprehensive advisory role with regard to heritage matters, including an ability to provide reports to the Minister and Parliament;***
- (d) giving the Council a decision-making role with regard to listing places on the National and Commonwealth Heritage Lists;***
- (e) strengthening the heritage qualifications of members, and ensuring at least one is an Indigenous Australian;***
- (f) making Commonwealth employees ineligible for appointment to the Council; and***
- (g) allowing for the possible creation of sub-committees to assist the Council with its work.***

Attachment A: Australia ICOMOS Legislation Objectives

AUSTRALIA ICOMOS OBJECTIVES FOR HERITAGE LEGISLATION

1. An Act which is simple to operate and simple to understand.

- Cumbersome laws and procedures will not protect places,
- Equitable system for review of Heritage Authority decisions required,
- No formal legal appeal on issues of cultural significance (as distinct from rights of appeal on planning or development applications).

2. Conservation by agreement should be the primary aim (as opposed to conservation by compulsion) whilst maintaining the required standards and conditions.

- Act should provide for Heritage Agreements attached to land title and binding subsequent owners,
- Heritage Agreements should receive financial incentives such as reduction or waiving of land tax or local government rates,
- Act should provide for professional, practical and financial assistance,
- Responsible Minister should be empowered to waive provisions of other laws if this would help encourage conservation.

3. Adequate powers to list and protect the cultural environment.

- A comprehensive register of heritage places serves as an early warning system if coupled with referral to the Heritage Authority,
- Must provide for adequate sanctions - severe penalties - to ensure compliance,
- Penalties need not be financial - loss of development rights is an alternative.

4. The provision of a wide range of services and functions to advise the Government and to assist in the conservation of the cultural environment.

- The Heritage Authority should be able to give advice and supply information,
- The Authority should support research, training, promotion and interpretation of places,
- The Authority should advise on financial assistance to owners,
- The Authority should not own or manage property itself.

5. Adequate professional staffing and proper administrative backup.

- The Heritage Authority should be responsible to Minister,
- The Authority should have a Chief Executive to manage the professional and administrative staff.

6. The Minister responsible for the Act must receive the best possible advice.

- The Heritage Authority must be a representative body of informed members with appropriate skills,
- Majority of members should have skills in conservation: ie archaeologists, conservation architects, historians, planners, etc,
- Representatives of other interests may be included but not so as to make the Authority too large to be workable.

7. Conservation provisions should be treated as an integral part of the regular planning system albeit administered by a specialist branch.

- Delegation to local government may be needed but should be carefully administered by the Heritage Authority.

Heritage Administration

The above objectives envisage a heritage administration system, the main components of which are:

- A Heritage Authority with power to identify and list heritage places,
- A Register of heritage places, judged against criteria,
- A non-legal review process for objections to listing (ie to significance),
- Listing on Register would require approval for changes to a place,
- Legal appeals against planning decisions,
- Stop Work Orders to control unauthorised works,
- Penalties or sanctions to ensure compliance with control provisions,
- Heritage Agreements provide flexible management opportunities,
- Financial incentives and technical assistance are essential tools.