



**National  
EDO  
Network**

## **NATIONAL ENVIRONMENTAL DEFENDER'S OFFICE NETWORK**

**SUBMISSION TO THE SENATE STANDING  
COMMITTEE ON THE ENVIRONMENT,  
COMMUNICATION INFORMATION  
TECHNOLOGY & THE ARTS REFERENCES  
COMMITTEE INQUIRY INTO THE  
HERITAGE AMENDMENTS.**

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## **SUBMISSION BY THE NATIONAL ENVIRONMENTAL DEFENDER'S OFFICE NETWORK ('EDO NETWORK') ON SENATE INQUIRY TO THE HERITAGE AMENDMENTS**

### **Introduction**

In December last year the following Bills were referred to the Environment, Communications, Information Technology and the Arts References Committee for its inquiry and report.

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

This submission, on behalf of the National Environmental Defender's Office Network (**'EDO Network'**) is made in response to the Committee's call for written submissions on these Bills.

The EDO Network consists of nine independent specialist community legal centres, located in each capital city in Australia (plus one in Cairns, North Queensland), all of which are committed to assisting the community to protect the environment through law.

Since its establishment in 1995, the EDO Network has developed an effective voice in each State and Territory on a range of public interest environmental law and policy issues. The lead office of the EDO Network, the NSW EDO, has been providing such a voice since 1985.

The most significant example of this in recent times has been the role of the Network in acting for all of Australia's peak environment groups, at both the State and National levels, on the passage of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act') and in commenting since then on a range of issues arising from the implementation of the Act, such as the Regulations and the Commonwealth/State bilateral agreements.

### **Summary**

Ultimately, the extent to which the proposed new national heritage conservation scheme will succeed will depend upon the strength of the legislation (that is, whether it is consistent, co-ordinated, integrated and accountable), has adequate powers, the integrity of the administrative framework that supports it and the commitment of those involved in administering it.

Whilst the EDO Network acknowledges the Government's concern to reform the existing heritage conservation regime provided for under the *Australian Heritage Commission Act 1975*, we have major concerns about the appropriateness and effectiveness of streamlining heritage issues through the establishment of a new scheme within the framework provided for by the *Environment Protection and Biodiversity Conservation Act 1999*. There needs to be some acknowledgement and accommodation within this framework of the achievements and extensive expertise gained in the heritage area over the last 25 years.

In particular, the EDO network is concerned about:

- The abandonment of the Register of the National Estate, which, in the absence of effective transitional provisions, will leave approximately 13,000 heritage places without any protection.
- The proposed structure, composition, functions and resourcing of the proposed Australian Heritage Council, in particular, the effective downgrading of the Australian Heritage Commission ('the Commission') from an independent decision making body to a purely advisory one;
- The absence of any Commonwealth leadership role in monitoring and coordinating State/Territory heritage protection regimes;
- The discretion given to the Minister for the Environment in relation to various decision making processes under the Act resulting in the potential for decisions to be influenced by the political process;
- The need for increased public participation in the listing process and in the development of management plans for heritage properties;
- Inadequate checks on Commonwealth agencies in relation to proposals to develop Commonwealth properties;
- The need to adopt clear and appropriate heritage terminology to support the aims of the new scheme and ensure comprehensive protection for heritage properties;
- The need to negotiate with Indigenous communities in relation to the establishment of measures which adequately and appropriately address Indigenous concerns and needs.

The following more detailed comments are provided below. However, this submission does not attempt to deal exhaustively with all the issues raised by the amendments. Rather, the EDO Network has chosen to focus on those issues of major concern.

## **1 Environment and Heritage Legislation Amendment Bill (No 2) 2000**

### **Schedule 3 Transitional Provision: Places include in the Registrar of the National Estate**

Clause 1 of the Transitional Provisions allows items listed on the Registrar of the National Estate to be included in the Commonwealth Heritage List, subject to the Minister's discretion, so long as the place is within a Commonwealth Area.

It is understood that there approximately 625 Commonwealth places on the Registrar of the National Estate, out of the total of over 13,000 places.

However, the amendments do not make it clear what level of protection the Commonwealth Government intends to grant to places currently listed on the Registrar of the National Estate that are not Commonwealth properties. The amendments do not provide any clear structures which would guarantee the existence of State heritage schemes (including registers and determining bodies) of equivalent strength which would ensure the protection of those places which, whilst not considered to have national heritage values, have historic/cultural/natural/Indigenous values which are recognised at State level.

Effectively then, the abandonment of the Register of the National Estate will leave approximately 13,000 heritage places without any protection.

Clause 10 of the *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000* (Cth) provides that the regulations may prescribe arrangements to deal with any issues of a transitional nature that may arise as a result of the repeal of the *Australian Heritage Commission Act 1975* (Cth). Simply relying on regulations to resolve this critical issue is not satisfactory, given the obvious public concern over the fate of the Register of the National Estate.

These places were listed because the Australian Heritage Commission made a formal determination that they had aesthetic, historic, scientific or social significance or other special value *for future generations* as well as for the present community, not just because they did not enjoy State protection. While the National Estate will remain a non-statutory list available over the internet, it would be disastrous if all listings that are not on Commonwealth properties were to be discarded and lose their protection, pending the commencement of fresh ( and lengthy) national heritage assessments for the purpose of the new statutory list.

Accordingly, an adequate transitional system should be established to protect listings on the Register of the National Estate until such time as State/Territory regulatory systems of equivalent strength have been established which ensure that heritage places which are not on Commonwealth areas are properly assessed and can be given appropriate and effective protection at State/Territory level.

**Recommendation 1:** *That an adequate transitional system be established to protect listings on the Register of the National Estate until such time as State/Territory regulatory systems of equivalent strength have been established which ensure that heritage places which are not on Commonwealth areas are properly assessed and can be given appropriate and effective protection at State/Territory level.*

## Sections 324F/341F Assessments by the Australian Heritage Council

Heritage listings made under a national scheme will inevitably have implications for State interests, and political controversies are likely to occur over certain nominations, as has happened with World Heritage nominations such as the Tasmanian Wilderness and the Wet Tropics of Queensland.

The Government is faced with two options: either to keep heritage in the political arena, or allow heritage issues to be dealt with by an independent body with expertise in the area.

The amendments have chosen the first option. Instead of an independent Commission, there is to be established a Council with advisory powers only. Ultimately, all substantive decisions such as the decision to accept and determine nominations, are in the control of the Minister, and therefore the political process.

In the long term, best-practice heritage protection will not be achieved by political processes. Exposure to the politics of the day will ultimately make fragile heritage places vulnerable to development pressures and undermine heritage conservation goals. The credibility and integrity of the new national scheme will also be placed at risk. This is one of the most important failings of the proposed new scheme.

The importance of retaining a truly independent national heritage advisory body has been stated many times during the public consultation process leading up to these amendments.

For instance, section 5.1.1 of the *National Heritage Convention (1998)* states that:

*'Most stakeholders want the Commission to provide national leadership in heritage identification, conservation and presentation, co-ordinate and facilitate the identification of Australia's heritage places, coordinate, facilitate and promote best heritage practice, and be a national advocate for heritage'*

Page 11 of the *National Strategy for Australia's Heritage Places (1999)* also states that:

*'The Commonwealth will also maintain an independent statutory body to advise on its heritage responsibilities'*

Despite this, the Commonwealth Government's Heritage amendments fail to establish a truly independent statutory body as consistently advised to stakeholders over the past few years, and as is claimed in the Second Reading Speech.

Significant constraints on the independence of the Council are contained in the following amendments:

- Ss 324H/341H: The decision whether to include a place in the National/Commonwealth Heritage List is ultimately the Minister's.
- Ss 324F(6)/341F(6), which states that the Council must not undertake an assessment of a place's National/Commonwealth Heritage Values unless the Minister asks it to do so.
- Ss 324F(6)/341F(6): if someone nominates a place for National Heritage status to the Minister, yet the Minister for whatever reason decides not to forward the nomination to the Council, the Council is not permitted to undertake any assessment of that place's National Heritage Values.
- The absence of power to monitor and coordinate responsibility for heritage across all levels of government and provide advice as it sees fit, or upon request, to State and local authorities regarding heritage issues.

Such restrictions may also make it difficult for the Council to attract and retain persons with the necessary heritage experience.

Accordingly, the powers of the Australian Heritage Council should be expanded to make it a truly independent body. The Council should be able to make determinations on whether to include places within the National/Commonwealth Heritage Lists and receive and consider (whether on a preliminary basis or otherwise) all nominations received by the Minister, similar to the powers enjoyed by the Australian Heritage Commission.

In accordance with the *National Strategy for Australia's Heritage Places (1989)*, the Council should also be empowered to monitor and coordinate responsibility for heritage across all levels of government.

Given that the heritage reforms are designed to dissolve the National Estate and devolve primary responsibility for heritage management to State and Local Government, the Council should be empowered to provide advice as it sees fit, or upon request, to State and local authorities on heritage issues.

There will be a need for such expertise and advice, as many State and local authorities may struggle to meet their heritage responsibilities under the proposed new scheme.

**Recommendation 2:** *Sections 324F(6)/341F(6) should be deleted. The Council should be able to provide the Minister with any advice relating to a National or Commonwealth heritage place. The Council should be empowered to monitor and coordinate heritage across all levels of government and be able to provide advice as it sees fit or upon request to State and Local Government on heritage issues.*

## National Standards

The establishment of a comprehensive and coherent conservation scheme, for both natural and cultural heritage, has always been constrained by the complexity of the division of constitutional powers between the Commonwealth and States.

Following the Review by the Council of Australian Governments (COAG) the Commonwealth has decided to confine its role to the protection of places of *national* heritage significance. In doing so, it has absolved itself of any responsibility for monitoring and co-ordinating State/Territory heritage schemes as well as Commonwealth compliance with these schemes, despite part (g) of the COAG Agreement which states:

*'Agree to increased compliance Commonwealth and State departments, statutory authorities, agencies, business enterprises and tenants with the relevant State's environment and planning [including heritage] laws'.*

Indeed, one of the outcomes from COAG 1996 was agreement for identifying criteria, standards and guidelines, as appropriate for the protection of heritage by each level of government.

The concern to ensure that the Commonwealth remains active in setting standards and monitoring heritage protection has also been stated in recent years a number of important consultations and reviews relating to Commonwealth heritage, including the *National Heritage Convention (1998)* and the *National Strategy for Australia's Heritage Places (1999)*.

For instance, page 11 of the *National Strategy for Australia's Heritage Places (1999)* it is recommended that the Commonwealth develop and implement agreed national standards for all Australia's heritage places (Appendix A to Strategy). Page 13 also recommends that Governments annually review the extent to which their existing systems meet the national standards.

Public expectations that the Commonwealth will take the lead in the development and implementation of national standards and policies for conservation issues, as has been done in other areas such as family law, finance and competition, also needs to be acknowledged and respected.

It is therefore disappointing that the Heritage Amendments are silent on this issue. This is despite the claim made in the Second Reading Speech to the *Environment and Heritage Legislation Amendment Bill (No.2) 2000* that:

*'This national scheme harnesses the strengths of our Federation by providing for Commonwealth leadership while also respecting the role of the States in delivering on-ground management of heritage places'*

Because of the need for national co-ordination in some matters, and the inadequacies in certain State/Territory laws, it is appropriate and necessary for the Commonwealth to take a leadership role in heritage conservation.

Specifically, the Commonwealth should seek to stay involved in coordinating and monitoring heritage protection and management on a nation wide basis.

Accordingly, standards along the lines of the *Draft National Heritage Standards* (see *National Strategy for Australia's Heritage Places (1999)*), should be included in regulations, and form the basis for any bilateral agreement under Part 3 of the EPBC Act. Section 51A should be amended accordingly.

**Recommendation 3:** *The Commonwealth should take a leadership role in coordinating and monitoring heritage protection and management on a nation-wide basis. Minimum standards of heritage protection for State Governments should be formulated and prescribed by regulation. These should form the basis for any bilateral agreement under Part 3 of the EPBC Act. Section 51A should be amended accordingly.*

### **Definition of 'national heritage values'**

Fundamental to the success of any new legislative scheme is the adoption of concepts which support the aims of the legislation.

Under the proposed amendments, only national/Commonwealth heritage 'values' will be protected, rather than the property itself.

The concept of 'values', as opposed to physical property, is a nebulous one. In restricting the protection afforded to heritage sites to their 'values' only, there is the risk that minor changes to the property, whilst not of themselves having a significant impact, will gradually erode the heritage values of the site, long before their significance as a whole is realised.

As an aside, the World Heritage Convention protects natural and cultural heritage which is of outstanding value. It does not provide that protection should be limited to only the outstanding 'values' of the property.

Under the current definition contained in the EPBC Act, 'world heritage values' are defined to be the natural and cultural heritage contained in the property. This definition is inadequate and imprecise and will lead to lack of certainty as to what values are, whether values are impacted, and if so, whether the impact is significant.

Accordingly, both the 'properties' and 'values' of a heritage site, including national, Commonwealth and World, should be protected.

Whilst we note that it is the intention of the Government to prescribe the criteria for determining National or Commonwealth heritage 'values' in the regulations (ss 324C,



341C), for the sake of clarity and certainty these should be included in the Act itself and a draft made available for public comment, prior to their introduction into Parliament.

In defining a set of values, particular attention should be paid to the need to include intangible cultural heritage which is not capable of physical embodiment, such as singing of songs, stories and spiritual attachments. Such things have not received adequate protection under current heritage and intellectual property legislation.

A further concern is that the draft guidelines for determining national heritage significance contained in the *National Strategy for Australia's Heritage Places (1999)* suggest that only 'outstanding' sites of national significance will qualify for the National Heritage List. If such a high standard is set, only a very few sites apart from iconic sites like the Sydney's Opera House, or Melbourne's Flinder's Street Train Station, will be able to qualify for protection.

The Heritage amendments will keep in place a separate system for movable cultural heritage (*Protection of Movable Cultural Heritage Act 1986 (Cth)*), underwater cultural heritage (*Historic Shipwrecks Act 1976 (Cth)*), and Indigenous heritage (*Aboriginal and Torres Strait Islander Heritage Protection Act 1994 (Cth)*). We further note that indigenous heritage may also be protected under the heritage amendments, as well as the *Protection of Movable Cultural Heritage Act 1986 (Cth)*. Consideration should be given to the appropriateness of including movable cultural heritage, underwater heritage and Indigenous heritage within the proposed new national scheme and/or the development of mechanisms for ensuring a coordinated approach to these areas. Public consultation should be sought on this issue.

***Recommendation 4:*** *'national heritage properties' as well as 'national heritage values' should be protected by the amendments. 'National heritage values' should be defined as widely as possible to allow intangible cultural heritage values to be protected as well as places other than a small number of iconic sites. The criteria for determining national heritage values should be specified in the legislation and a draft released for public comment, prior to their introduction into Parliament.*

### **Section 15B Determining 'significance'**

Section 15B requires a Commonwealth approval for actions that are likely to have a 'significant' impact on national heritage values.

However, no guidance is provided as to the interpretation of 'significance' thereby leaving this critical assessment to the subjective discretion of the Minister for the Environment. The system for assessing significant impacts on other matters of national environmental significance under the EPBC Act, which is done by reference to Administrative Guidelines, has no statutory force, no certainty for stakeholders and provides the Minister with too broad a discretion in making determinations.

This is of particular concern in relation to the determination of 'significance' in relation to cultural heritage values, which, because of their more abstract nature, can be more difficult to determine than say, impacts on natural heritage. Such impacts, whilst maybe not so apparent, are just as real and destructive.

Accordingly, specific guidelines for determining significance in the context of national and Commonwealth heritage properties should be formulated. In order to ensure clarity and certainty for all stakeholders, such guidelines should be placed in the Regulations and a draft of the guidelines be made available for public comment. Specific efforts should be made to negotiate guidelines/criteria for determining 'significance' that have resonance with Indigenous communities.

**Recommendation 5:** *That guidelines for determining 'significance' of impacts on cultural heritage be placed in the regulations, and a draft be made available for public comments.*

### **Section 15C Offences**

Proposed s.15C (Offences relating to National Heritage places) as currently drafted may give rise to the situation where, despite being in breach of the conditions of an approval, a developer is able to rely upon the mere holding of the approval as a defence to taking an action which will have a significant impact on the national heritage values of a property.

Accordingly, s.15C should be amended to provide that the defence of holding an approval under Part 9 of the Act only applies where the development or action is taken *in accordance* with the approval. In other words for the defence to apply, the developer must not be in breach of the approval (for instance, s 98 of the *National Parks and Wildlife Act 1974* (NSW)).

Section 15C also provides that national heritage values and places can be removed from the National/Commonwealth Heritage List if the Minister is satisfied that the place no longer has certain National/Commonwealth heritage values. In order to prevent the possibility that heritage places will be allowed to deteriorate to the point that they risk losing their heritage protection, the legislation should make it an offence to not maintain, upkeep and repair any aspect of a place relating to National/Commonwealth heritage values.

Likewise, it should be an offence to make significant modifications to a place nominated for its National/Commonwealth heritage values, pending a determination by the Minister.

**Recommendation 6:** *To provide a valid defence for an offence against national heritage, an action should not be in breach of an approval. In order to protect heritage places and objects from deterioration, the legislation should make failure to maintain and repair a National/Commonwealth heritage place an offence. Likewise, the making of significant modifications to a nominated place pending a determination by the Minister should also be made an offence.*

## **Sections 324D/341D Nomination of places**

Public participation in the nomination process is essential if the process is to have credibility and integrity. Likewise, procedures for making heritage determinations should be independent of the political process and be made on the basis of heritage expertise.

Under ss 324D & 341D, the public may nominate a place for inclusion in the National/Commonwealth Heritage List. The nomination, however, may be rejected by the Minister for no reason, and without any consideration by the Australian Heritage Council. At the very least, the Council should be able to make a preliminary assessment of the merits of a nomination, prior to any determination by the Minister.

Nominations should be forwarded as a matter of course to the Australian Heritage Council as an independent body with expertise in heritage for their consideration of the nomination's merits. Nominations should be forwarded to the Council within 10 business days of the Minister receiving the nomination. This approach is consistent with that taken in relation to the nomination process for threatened species under the EPBC Act.

Alternatively, a nomination should only be rejected by the Minister without further consideration if in the Minister's opinion it is vexatious, frivolous or not made in good faith.

**Recommendation 7:** *Nominations should be forwarded as a matter of course by the Minister to the Australian Heritage Council for their consideration. Nominations must be forwarded to the Council within 10 business days of the Minister receiving the nomination.*

## **Sections 324G/341G Requirement to invite public comments**

Under ss 324G(2)(b) and 341G(2)(b), the Minister is only required to invite public comments on nominations that the Minister has determined warrant assessment by the Australian Heritage Council. As a result, nominations may be rejected without there being any public scrutiny of this process.

Also, the notice to invite public comments under ss 324G(2)/341G(2) only takes place after completion of an assessment by the Australian Heritage Council. This process can take up to 12 months.

In the meantime, the Council is only required to make 'reasonable efforts' during its assessment to notify the owner of the property and any indigenous persons with rights or interest in the place (s 324F(2)/341F(2)).

As recommended in relation to ss 324D/341D, all nominations should be forwarded to the Australian Heritage Council for its consideration. Upon receipt of a nomination, Council should be required to advertise the referral and invite the public to make comments on the merits of the nomination.

Alternatively, the notification requirements under s 324F/341F during the assessment period should be expanded. The Council should be required at the commencement of the assessment process to publish an advertisement inviting public comments on the heritage value of the property. Specific efforts should be made to inform relevant Indigenous communities about nominations and seek their input.

**Recommendation 8:** *The Council should be required to advertise the receipt of nominations for listing and invite public comment on the merits of the nomination. Alternatively, the Council should invite public comments on the merits of a nomination at the commencement of the assessment process provided for under ss 324/341F.*

**Sections 324G(4)/341G(4) 'any person with appropriate qualifications or expertise...'**

Sections 324G(4)/341G(4) allows the Minister to ask any person (with appropriate qualifications or expertise) to assess the merits of any comments received by the Minister on a proposed place for the National Heritage List. This provision is unnecessary and highly discretionary.

There is no sound policy reason that the Network is aware of that would explain why the Australian Heritage Council, as '*an independent statutory body to advise on the Commonwealth's heritage responsibilities*' should not be primarily responsible for this function. By creating an ability to bypass the Council, this provision has the ability to undermine the Council's role.

It would also potentially allow the Minister to ask, for example, the proponent or their consultants to assess the merits of the comments received, if the Minister deemed that they had 'appropriate qualifications or expertise'. This is clearly unacceptable.

Given the potential resource implications of such requests for the Council, the Council should have the ability to seek advice from persons with appropriate qualifications or expertise in heritage on the merits of any comments received by the Minister, as it sees fit.

**Recommendation 9:** *delete '...or a person with appropriate qualifications and expertise' from ss 324G(4)/341G(4) and include a power enabling the Council to seek advice from persons with appropriate qualifications or expertise in heritage in relation to such requests.*

**Sections 324H/341H Decision whether to include a place in the National/Commonwealth Heritage List**

The process of determining matters for listing should be, and be seen to be, independent from the political process. The best way for this to occur is to give the final decision in the listing process to the Council, which comprises people with the appropriate professional qualifications.

Alternatively, the Minister could be given the power to 'call in' certain listing decisions in specified circumstances.

In the interests of certainty, determinations for listing should be made within a definite and tight time frame, say 6 months from when an assessment of the merits of the nomination is made, instead of 'within a reasonable time after considering any comments that comply with ss 324G/341G'.

This is especially important to prevent long time delays which would allow the property owner of the place under consideration to engage in pre-emptory conduct that may jeopardise the heritage values of the property.

In the interests of transparency and accountability, the Minister should also be required to publish his/her reasons for not including a place in the National/Commonwealth Heritage List.

**Recommendation 10:** *The final decision for listing should reside with the Council, possibly with the Minister having a 'call-in' power. Determinations for listing should be made within 6 months of an assessment of the merits of the nomination being made. The Council/Minister should publish reasons for not including a place in the National/Commonwealth Heritage List.*

### **Sections 324J/341J Removal of places or national/Commonwealth heritage values from the National/Commonwealth Heritage List**

Public comments on the proposed removal of a place from the National/Commonwealth Heritage List should also be sought before any such determination is made.

**Recommendation 11:** *Include a requirement to seek public comment before removing National/Commonwealth heritage values or places from the List.*

### **Sections 324K/341K Minister must consider advice of the Australian Heritage Council**

In the interests of certainty, the Australian Heritage Council should also be given a minimum time frame, say 12 months, within which to respond to a request for advice from the Minister regarding the removal of a place to the National/Commonwealth Heritage List (ss 324K(2)/341K(2)).

To manage these time constraints more effectively, membership of the Council should be expanded and adequate resources provided (see comments below).

**Recommendation 12:** *The Council should respond within a specified time period (say 12 months) to a request for advice from the Minister regarding the removal of a place from the National/Commonwealth Heritage List.*

### **Sections 324N/341N Certain Information may be kept confidential**

The necessity in some instances of withholding certain information about a place in order to properly protect that place's heritage value is acknowledged, for instance, where it is feared that publication of the place's precise location may lead to the destruction or theft of valuable archeological or scientific records.

The use of this provision should, however, be carefully monitored by the Australian Heritage Council as there is always the potential for it to be exploited or used improperly to prevent full and active public participation in heritage management.

**Recommendation 13 :** *The operation and implementation of ss 324N/341N be monitored and reviewed by the Australian Heritage Council.*

### **Sections 324P/341P: Duty not to disclose assessments or advice**

Public participation in and scrutiny of the heritage protection nomination process is essential if the process is to have credibility. It is also consistent with object 3(d) of the Act, which refers to the need to '*promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples*'. It should therefore be mandatory for assessments of the Council to be published, prior to a final determination being made.

**Recommendation 14:** *Council assessments should be required to be published under ss 324P/341P, prior to a final determination being made.*

### **Sections 324Q/341Q Management Plans for national/Commonwealth heritage places**

Since Federation, the Commonwealth has acquired, built and operated a broad range of properties such as post offices, dockyards, airfields and government offices which have significant value to State/Territory history, Australia's colonial heritage generally, federal defence values and natural heritage values. These places also serve as a community focal point for many people, especially in small rural towns. Community concern over the future of these assets has been heightened by the Commonwealth's disposal of Australian Defence Organisation ('ADO') properties in recent years. This concern has culminated in the establishment in September 2000, of the Senate Foreign Affairs, Defence and Trade References Committee Inquiry into the disposal of ADO properties.

The public has an essential role to play in protecting heritage areas on Commonwealth lands. The importance of this role is already acknowledged in object 3(d) of the EPBC Act. Despite this, there is no provision for public participation in the preparation of management plans.

Accordingly, the amendments should include a process for public consultation on draft management plans for National Heritage places in Commonwealth areas. Specific efforts should be made to negotiate appropriate management plans with relevant Indigenous communities.

**Recommendation 15:** *The amendments should include a process for public consultation on draft management plans for National Heritage places in Commonwealth areas.*

No minimum time period is specified for the preparation of management plans. These are to be set out in the regulations. The EDO Network supports the completion of management plans for National Heritage places in Commonwealth areas within a discrete time frame, say, two years from the date on which the place is included in the Commonwealth Heritage List, rather than an undetermined period prescribed in the regulations under s 324Q(1).

We note that for World Heritage areas, plans of management must be made 'as soon as practicable' after the property is included in the World Heritage List (s 316 EPBC Act).

**Recommendation 16:** *Management plans should be completed within two years from the date on which the place is included in the Commonwealth Heritage List.*

### **Section 324S/341S Compliance with plans by the Commonwealth or Commonwealth agencies**

These sections provide that the Commonwealth or a Commonwealth agency must not contravene National or Commonwealth Heritage management plans, but do not provide any sanction for non-compliance. An appropriate penalty, such as say 500 penalty units, should be included for Commonwealth non-compliance with a management plan

**Recommendation 17:** *Amend ss 324S and 341S to include a penalty of 500 penalty units for failure to comply with heritage management plans.*

### **Section 324U/341V Review of management plans at least every seven years**

Plans of management for World Heritage areas must be reviewed every 5 years (s 319 EPBC Act). On the other hand, management plans for national and Commonwealth heritage places are proposed to be reviewed every seven years. This time period is too long.

The current time period for review of Plans of Management for Commonwealth areas under ss 324U/341V should be reduced from seven to five years, in line with World Heritage management plans.

**Recommendation 18:** *The time period for review of plans of management for Commonwealth areas under s 324U should be reduced from seven to five years*

### **Sections 324W/341W National/Commonwealth Heritage Management Principles**

Section 324W(2) states that the regulations may prescribe obligations to implement or give effect to the National Heritage Management Principles. The Principles themselves must be published in the Gazette by the Minister under ss (1). It would appear that the Principles will have administrative force only.

The development of a comprehensive and appropriate set of principles is essential for the effective and consistent development, implementation and review of management plans, and other processes under the proposed scheme. It is essential, that the process of developing such principles be open public scrutiny and comment and that the Principles have legal status. Specific efforts should be made to negotiate appropriate management principles with Indigenous communities.

The Principles should be made by regulation, similar to the World Heritage Management Principles under s 323 of the EPBC Act. In this regard, we note the Commonwealth Government's assurance to the World Heritage Committee in November 2000 that Australia was introducing National Heritage amendments to give nationally significant sites an equivalent level of protection enjoyed by World heritage sites.

The drafting of the Principles and related regulations under ss 324W/341W should be subject to comments by the Council. They should also be consistent with the principles of Ecologically Sustainable Development (ESD).

**Recommendation 19:** *The National/Commonwealth Heritage Management principles should be made by regulation, and a draft released for public comment.*

### **Sections 324X/341Z: Sale or lease of national/Commonwealth places**

The Australian people should be regarded as the owners of national/Commonwealth Heritage places with the Commonwealth Government as the responsible custodian. These places serve as a continuous physical link to our national, State and colonial history and often contain considerable natural heritage significance.

Given the trends towards corporatisation/privatisation of Commonwealth property, and community concern over the inappropriate disposal of such properties, the National Heritage Management Principles (as well as Commonwealth Heritage Management



Principles under s 341W) should address best-practice methods of introducing private rights on properties with Commonwealth or National Heritage values.

Whilst ss 324X/341Z provides that the Commonwealth must include a covenant to protect heritage values whenever it executes a contract for the sale or lease of Commonwealth land involving heritage, past experience has shown that this method does not offer effective protection in the long term. The obligations outlined in ss 324X/341Z represent the least effective means of heritage protection over Commonwealth lands. The Australian Heritage Commission's preferences for disposal of Commonwealth properties with heritage values are (in descending order):

- long term lease;
- freehold sale to a State Body for conservation purposes;
- freehold sale to a Local Authority, private body with adequate protection under State Heritage Laws;
- a covenant in perpetuity on freehold sale.

(1996 Commonwealth Report by the Committee of Review- *Commonwealth owned Heritage Properties- A Presence for the Past* ('Schofield report').

Accordingly, ss 324X and 341Z should be amended to require that any National or Commonwealth heritage place that is the subject of a sale or lease by the Commonwealth be subject to adequate heritage listing under State heritage legislation. Alternatively, the Commonwealth must take all reasonable steps to ensure that the place is protected by a State heritage listing.

In addition, a Commonwealth agency must not execute the sale of a Commonwealth or National heritage place unless it is satisfied that there are no reasonable and prudent alternatives to disposing of the property in accordance with the hierarchy of options outlined above.

Any Commonwealth agency which proposes any of the above options must invite the Council to make comments on the sale or lease.

Any funds generated from the sale of the Commonwealth land that includes National or Commonwealth Heritage values should be included in a trust fund to be used for the purchase of natural or cultural heritage properties.

**Recommendation 20:** *Any sale or lease of a Commonwealth/National heritage place be subject to adequate State heritage listing.*

**Recommendation 21:** *A Commonwealth agency must not execute the sale of a Commonwealth or National heritage place unless it is satisfied that there are no reasonable and prudent alternatives to disposing of the property in accordance with the following hierarchy of options:*

- *long term lease;*
- *freehold sale to a State Body for conservation purposes;*
- *freehold sale to a Local Authority, private body with adequate protection under State Heritage Laws;*
- *a covenant in perpetuity on freehold sale.*

**Recommendation 22** : *The Commonwealth should set up a statutory trust fund into which monies generated from sale of Commonwealth/National heritage places are to be deposited. This trust fund should be used for purchase of heritage properties.*

### **Sections 324Z/341ZB Reviewing and reporting on the National/Commonwealth Heritage List**

Section 6 of Part A of the Draft National Heritage Standards, contained in the National Strategy for Australia's Heritage Places (1999), states that:

*'Heritage Legislation will provide for regular public reporting about heritage places'*

The review period of ten years which is provided for under ss 324Z/341ZB is excessive and it is both necessary and appropriate that lists be reviewed more frequently. At a maximum, the Lists should be reviewed every five years, consistent with the timeframe for the State of the Environment reports under s 516B of the EPBC Act.

A set of principles should be included in the regulations to provide a basis and guide for any review under ss 324Z/341ZB. For instance, the *Australian Charter for the Conservation of Places of Natural Heritage Significance* (last revised 1988, 'Burra Charter'), and the *Australian Natural Heritage Charter for Conservation of Places of Natural Heritage Significance (1996)*.

The Australian Heritage Council, as opposed to the Minister, should also be required to report annually on its activities. In particular, the Council should be required to report on:

- Details of nominations referred to the Council, including details of Council's assessments and final determinations.
- The extent and nature of the sale of Commonwealth properties, and the impact on heritage values.
- Strategic issues and indirect impacts upon National/Commonwealth Heritage Values. For instance, impacts brought on by Commonwealth, State and local environmental planning and development processes.
- Australia's compliance with the World Heritage Convention.
- The effectiveness of and compliance with heritage standards across the nation.

- The effectiveness of heritage protection under any bilateral agreement with States and Territories.

The Council's annual report should be tabled in Parliament.

**Recommendation 23:** *The review period under ss 324Z/341ZB be reduced to 5 years.*

**Recommendation 24:** *A set of principles should be included in the regulations to provide a basis and guide for any review under ss 324Z/341ZB.*

**Recommendation 25:** *That the Australian Heritage Council be required to report annually on details of nominations received by the Council, Council's assessments and determinations, the effect of any sale of Commonwealth properties on heritage values, strategic issues and indirect impacts upon National/Commonwealth Heritage Values, Australia's compliance with the World Heritage Convention, the effectiveness and compliance with heritage standards across the nation, the effectiveness of heritage protection under any bilateral agreement with States and Territories.*

### **Distinction between Commonwealth Heritage Place and National Heritage Place in Commonwealth Areas**

Presumably, the difference between a Commonwealth Heritage Place and National Heritage Place in a Commonwealth Area is that one relies on National Heritage Values whilst the other relies on Commonwealth Heritage Values. Since both sets of values are yet to be prescribed in regulations, it is not possible at this stage to comment on the difference between these two categories of places and the implications of this distinction for heritage protection.

### **The scheme for Commonwealth Heritage places**

The scheme for listing of a Commonwealth heritage place (ss 341A-341ZB) is in similar terms to the scheme for the listing of National Heritage Place (324A-324Z). Where possible, we have referred to both schemes.

Additionally we make the following comments regarding Commonwealth heritage.

### **Commonwealth lands**

Sections 26 and 28 of the EPBC Act provide a trigger for approval for Commonwealth actions that are likely to have a significant impact on the environment. The definition of 'Environment' under s 528 does not specifically include 'heritage'. Although this may be implied, any uncertainty would be removed through the inclusion of the word 'heritage' in ss 26 and 28 and in s 528(d) of the EPBC Act.

**Recommendation 26:** *Include the word 'heritage' in ss 26 and 28 and 528(d) of the EPBC Act.*

## **Section 341X Obligation to assist the Minister and the Australian Heritage Council**

Under s 341X, a Commonwealth agency must take all reasonable steps to assist the Minister and the Australian Heritage Council in the identification and assessment of Commonwealth heritage values.

This duty extends to not only places listed on the Commonwealth heritage list, but also places that might have one or more Commonwealth heritage values.

In addition, any Commonwealth Agency that owns or controls a place that has or might have any heritage values should be required to inform the Australian Heritage Council of the details. Given that a complete inventory of Commonwealth places with heritage values has not been done, identification by such agencies of actual or potential Commonwealth heritage properties will assist in their protection.

**Recommendation 27:** *Any Commonwealth Agency that owns or controls a place that has or might have any heritage value must inform the Australian Heritage Council of the details.*

## **Sections 341R/341Y: Accrediting management plans for Commonwealth heritage places, Requirement to ask Minister for advice**

Section 341Y states that before a Commonwealth Agency takes an action that has, will have or is likely to have a significant impact on a Commonwealth heritage place, the Agency must ask the Minister for advice about taking the action.

Section 341R allows the Minister to accredit a management plan for managing a Commonwealth heritage place which has been prepared by a Commonwealth Agency. The purpose of the accreditation is to allow the agency to take certain actions without being required to seek the advice of the Minister under s 341Y.

Since 1989, the Commonwealth Government has devolved responsibility for its property use from one central agency to several agencies. These individual agencies have their own goals and targets, prescribed policies and financial concerns, and it has been demonstrated that heritage preservation has not been a consistent priority<sup>1</sup>. (1996 Commonwealth Report by the Committee of Review- Commonwealth owned Heritage Properties- A Presence for the Past ('Schofield report').

Regardless of the existence of an accredited management plan, allowing Commonwealth Agencies to determine, unchecked, their own actions over Commonwealth heritage properties will not lead to the effective or optimal levels of heritage protection. Instead,

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<sup>1</sup> The Schofield report further notes that for a number of years the Commonwealth has not been providing consistent directives to its departments on preserving heritage.

the Minister should retain responsibility for ensuring that any actions taken are consistent with the goals of heritage protection.

Ultimately, it is the Minister who is responsible for the effective and appropriate management of national/Commonwealth heritage properties.

Provided the provisions of s.28 of the EPBC Act apply to Commonwealth heritage places, there is no need for s 341Y and it can therefore be deleted.

Agencies would remain bound by management plans under s 341R, but if an action was likely to significantly affect a Commonwealth heritage place, it would become a 'controlled action' under the EPBC Act. Section 341R would remain useful in controlling actions on Commonwealth heritage places which do not have a 'significant impact'. These smaller impacts are important as they may cumulatively have a very large impact on heritage values.

The Australian Heritage Council should be the responsible body for accrediting management plans for managing Commonwealth heritage places under s 341R.

**Recommendation 28:** *Provided the provisions of s.28 of the EPBC Act apply to Commonwealth heritage places, there is no need for s 341Y and it can therefore be deleted. The Council should be made the responsible authority for accrediting management plans under s 341R.*

If, however, if the Senate Committee determines that individual Commonwealth agencies retain substantive control over Commonwealth heritage, the following alternative suggestion is made.

Section 341Y is a poor substitute to the provisions contained in the *Australian Heritage Commission Act 1975* (Cth), which contained a three step process: consider alternatives, minimise impact, and consult.

Section 30(1) of that Act requires each Minister responsible for a Commonwealth department or authority to give directions to ensure that no action of the department adversely affects the National Estate, unless satisfied that there is no reasonable and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse affect will be taken.

Under subs (2), an authority of the Commonwealth could not take an action that adversely affected the National Estate unless the authority was satisfied that there was no reasonable and prudent alternative. Under subs (3), a Commonwealth agency before taking any such action that may significantly affect the National Estate had to inform the Australian Heritage Commission of the proposed action and give the Commission a reasonable opportunity to consider and comment on it.

Alternatively, s 341Y(2) should be amended as follows:

- Delete s 341Y and insert provisions to the following effect:
- A Commonwealth Agency should not take an action that is likely to have a significant impact on a Commonwealth heritage place unless there is no reasonable alternative;
- If there is no reasonable alternative the Commonwealth agency must take all reasonable steps to minimise the adverse impact;
- The Commonwealth agency should provide details to the Australian Heritage Council for its comment on the proposed action affecting a Commonwealth heritage place.
- The Australian Heritage Council can request the Minister to hold an inquiry into a matter relating to the Commonwealth estate.

By way of comparison, the *National Historic Preservation Act 1966 (US)*, which applies to all American historic properties, requires a federal agency to consider the effect of its undertakings or developments on any item included or eligible to be included in the US National Register<sup>2</sup>.

Also, regulations require the Agency to make an assessment of the property's historic significance, and consider ways to reduce or avoid adverse effects. An Agency must also consider comment made by an Advisory Council.<sup>3</sup>

**Alternative to Recommendation 28:** *Amend s 341Y to reflect a three step process: consider alternatives, minimise impact, and consult.*

- *that a Commonwealth Agency should not take an action that is likely to have a significant impact on a Commonwealth heritage place unless there is no reasonable alternative;*
- *If there is no reasonable alternative the Commonwealth agency must take all reasonable steps to minimise the adverse impact;*
- *the Commonwealth should provide details to the Australian Heritage Council for its comment on the proposed action affecting a Commonwealth heritage place.*
- *the Australian Heritage Council can request the Minister to hold an inquiry into a matter relating to the Commonwealth estate.*

## **Section 15C Offences relating to national heritage places**

Under s 15C, Commonwealth Agencies that 'enjoy the immunities of the Commonwealth' are exempted from the offence provisions relating to National Heritage places.

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<sup>2</sup> 16 USC 470f

<sup>3</sup> 36 CFR part 800

The EDO Network has several concerns with this provision:

- The intention behind the provision is ambiguous and may be construed in such a way as to make it inoperative (*Puntoriero v Water Administration Ministerial Corporation [1999] HCA 45*).
- It would appear that the intention of the provision is to restrict the ability of the Minister to prosecute a Commonwealth agency for offences relating to national heritage places. There is no sound policy reason why Commonwealth agencies which engage in activities which may damage heritage values, should enjoy immunity from prosecution as opposed to private bodies engaging in the same or similar conduct. If heritage obligations apply to the private sector, they should apply equally to Commonwealth agencies.
- Heritage values are a public asset, and such a provision is contrary to the spirit of the Act.
- This immunity does not accord with National Competition principles under the *National Competition Policy (1995)*, especially competitive neutrality. Essentially under competitive neutrality principles, government businesses are not to enjoy a competitive *advantage* simply as a result of public sector ownership. Immunity from prosecution would place Commonwealth agencies at an unfair advantage.

The phrase 'that does not enjoy the immunities of the Commonwealth' should be deleted from s 15C.

**Recommendation 29:** *Delete the phrase 'that does not enjoy the immunities of the Commonwealth' from s 15C.*

## **2 Australian Heritage Council Bill 2000**

### **Section 5 Functions**

Section 5 of this Bill limits the functions of the Council to advising the Minister and making assessments relating to heritage only upon request of the Minister. As discussed above, this is unnecessarily limited.

The Council should be given further independent powers (as recommended above) relating to:

- a requirement to publishing of advertisements relating to the nomination process;
- the ability to receive any nomination from the public for a National Heritage Place;

- power to furnish any advice on National or Commonwealth Heritage Places to the Minister, as the Council sees fit;
- a requirement to publish advertisements relating to draft management plans for Commonwealth Heritage Places
- the provision of advice to Commonwealth Agencies on a proposed action affecting a Commonwealth heritage place.
- the provision of advice to Commonwealth Agencies relating to the sale of Commonwealth properties with heritage values.
- The provision of advice to the Minister on heritage protection, education and funding priorities.

**Recommendation 30:** *The Council's powers should be expanded, in line with the recommendations contained in this submission.*

## **Section 7 Appointment of members**

In relation to the appointment of members, the following comments are made:

- The Council should include at least one member from a community or an environmental group with experience in natural heritage to represent community and environmental interests.
- The number of members of the Council should be greatly expanded, especially if the responsibilities of the Council are increased.
- The Chairperson should be elected by the Council, and should have 'substantial' experience or expertise concerning heritage, to prevent the possibility of political appointments.
- Appointment should be made, not just on the basis of heritage experience or expertise, but also a demonstrated commitment to the goals of heritage protection.

The EDO Network is also concerned that the appointment of public servants onto the Council may reduce its apparent and actual independence from the political process.

The Council should also be adequately resourced, in order that it can carry out its functions properly.

**Recommendation 31:** *The Council include at least one member from a community or an environmental group to represent community and environmental interests.*



**Recommendation 32:** *The number of members of the Council should be greatly expanded.*

**Recommendation 33:** *The Chairperson should be elected by the Council, and should have 'substantial' experience or expertise concerning heritage.*

**Recommendation 34:** *That appointments be made, not just on the basis of heritage experience or expertise, but also a demonstrated commitment to the goals of heritage protection.*

**Recommendation 35:** *That further consideration be given to the merits of including appointments of public servants to the Council.*

**Recommendation 36:** *The Council should also be adequately resourced, in order that it can carry out its functions properly.*

**Louise Blazejowska, Policy Director and  
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**On behalf of the National Environmental Defenders Office Network**