The ***Environment and Heritage Legislation Amendment Bill (No 2) 2000/1*** **(the Bill);** ***Australian Heritage Council Bill 2000/1***

Honourable members, here are eight good reasons why, in good conscience, you must reject the Bill.

The Bill:

- **will seriously damage the reconciliation process;**
- **will place Australia in breach of its international obligations;**
- **is constitutionally flawed;**
- **fails to implement the COAG agreement and will lead to conflict and litigation;**
- **is substantially incomplete and seriously flawed;**
- **will not provide effective protection for heritage;**
- **fails to meet the needs of business; and**
- **is not as good as other options.**

1. The Bill will seriously damage the reconciliation process with the Indigenous people of Australia

A fundamental flaw in the Bill is its failure properly to address the needs of Indigenous people. A central part of the Bill is its provision for listing of places of national heritage value (national list) and commonwealth heritage value (commonwealth list). The sanctions (criminal and civil) and other Commonwealth obligations with respect of management and conservation agreements and funding only apply to places on those lists.

The decisions made by the Minister on the initial establishment of these lists, would be the most important stage of operation of the proposed Act. If enacted, the Bill would provide the Minister with a broad and largely unfettered discretion whether or not to enter a place on either of these lists (clauses 324B(2) and 341B(2) '…a place may only be included if...'. Whilst the Minister must be satisfied of the existence of values to list place, a world of decision making exists in the word 'may'. The same applies to emergency listing (eg cl 324E(1)). On what ground would the Minister make a decision to refuse to list a place, when satisfied that values *do* exist? The Bill does not say. Please consider this: if satisfied of indigenous heritage values of a place, on what basis would the Minister reject its listing under 324B(2)? On national interest grounds? On the basis of the financial loss to the proponent? How will the Minister against the financial interests of others balance the needs of Indigenous heritage? This is the fundamental question at the heart of the legislation. The Bill presently invites litigation.

This Bill would simply impose no statutory obligation on the Minister, when making the decision as regards entry of a place either list, to consult with Indigenous people. The Bill (clauses 324F(6) and 341F(6) refer) makes abundantly clear that the Minister need not consult the Australian Heritage Council and therefore the proposed Director of

Indigenous Heritage (cl 2(2) and schedule 2). Furthermore, no provision is made for consultation in the absence of passage of the *Aboriginal and Torres Strait Islander Heritage Protection Bill 2000/1*. It would appear that this is a rather obvious attempt to 'tack' the passage of the Bill to another. If the ATSIHP Bill 2000 is not passed there is no proper provision at all for consultation with Indigenous people. Honourable members will be aware of the provisions of the Constitution preventing one Bill from being 'tacked' to another tax Bill (s. 55). This was put there by our founding fathers for good reasons. Tacking with respect to any Bill is an abuse of the Parliamentary and democratic process, if not unconstitutional in the broad sense. For these reasons alone, the Bill should be rejected.

Another very important flaw in the Bill from the Indigenous perspective is its definition of 'indigenous heritage value' that requires for the listing of a place that it be 'of particular significance to indigenous persons in accordance with their traditions'. Which indigenous people? How many? If this was meant to require unanimous opinion as it would seem, then this is an entirely improper definition and inconsistent with other Commonwealth indigenous heritage protection legislation. Many indigenous people live in isolated communities. A large part of the Indigenous heritage of Australia is of local significance to Indigenous people in a particular area. White men or women in Canberra may be able to arrive at a short list of places they think all Aborigines would consider important, but this is not a proper process. Hence the definition of 'Aboriginal tradition' in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) (s3 refers) which allows for protection of places of particular significance in terms of the traditions held by 'Aboriginals generally' *and* 'a particular community or group of Aboriginals'.

As Black CJ said in effect, in a case before the Federal Court under the ATSHP Act, places of particular significance to all or a group of Aboriginal people are of significance to all Australians, since Indigenous heritage is a very special part of the heritage of all Australians. This Bill will in effect provide for the 'proactive' protection by the Commonwealth by way of management and conservation plans, assistance and funding ('proactive protection' - the only and very worthwhile positive advance made in this legislation) but of only a very small number of Indigenous places, with a decision made by the Minister himself with a broad unfettered discretion and with no obligation to consult Indigenous people and with any consultation which the Minister may (or may not call for) depending on the passage of the ATSIHP Bill. Unfortunately, the Bill for that Act is also fatally flawed since it too fails to provide properly for the 'proactive' protection of places of significance both to all, or a particular community or group of, Aboriginals. Hence its stalled passage.

In short, the Indigenous people of Australia will not have any meaningful say, or the final say, as regards entry of places on the list. This is their birthright. The number of places that the Commonwealth would be required 'proactively' to protect, manage and fund would be very small. If a group of Indigenous people wants or opposes the listing of a place and the Minister does not agree, their likely recourse will be to seek protective declarations under the ATSIHP Act (or its replacement). Since the same Minister

presently makes decisions under that Act personally, this gives rise to a fundamental conflict of interest. How could the Minister bring a 'fresh mind' to an application under the ATSIHP Act 1984 or its replacement, having already decided on the significance of place earlier under another Act? This is another very serious drafting flaw, inviting litigation.

2. The Bill will place Australia in breach of its international obligations

Failing properly to consult Indigenous people; failing to afford them rights in deciding if a place of particular significance to them according to their tradition is listed or not and restricting the number of their significant places to be protected by the Commonwealth to a small handful of places; will be seen by the international community for what it is. It is an abrogation of the Constitutional responsibility for the protection of Indigenous people conferred on the Commonwealth by the people by the 1967 referendum. It is direct or indirect racial discrimination. Indigenous people have as special relationship with their land and culture. Treating a special case the same as all other cases is direct or indirect discrimination. International law and Australian domestic law has long recognised this. Hence, the 'special measures' exemptions in the *Racial Discrimination Act 1975* (s.8 (1)).

Aboriginal heritage is a special case requiring special measures. Failure to recognise and respect this is a failure by Australia to comply with the obligations undertaken in, and the spirit of, the *International Covenant on the Elimination of all forms of Racial Discrimination* (especially Article 5) and the *Intentional Covenant on Civil and Political Rights* (ICCPR) to which Australia is party (especially articles 26 and 27). Article 27 of the ICCPR says: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Article 26 of the ICCPR says that rights shall be enjoyed equally and without discrimination (direct or indirect). Can you in good conscience say the spirit of these Articles are given effect to by this Bill?

By discriminating as it does, the Bill also arguably breaches Articles 1(1), 2(2), 3 and 15 of the *International Covenant on Economic, Social and Cultural Rights* and the general principles of international law such as those of preventing unequal treatment and providing for self-determination; it contradicts the spirit and words of articles 6, 7 and 27 of the *Universal Declaration on Human Rights*.

It even breaches the spirit and express terms of the Commonwealth's own domestic *Racial Discrimination Act 1975* and ought properly to have been made an express exception to that Act in order to be legally valid (s.10(1) refers).

3. The Bill is constitutionally flawed

Any reasonably competent constitutional lawyer would warn the Commonwealth against seeking to rely solely on the disparate range of powers available to the Commonwealth to

protect places of primarily of historic value (rather than Indigenous or natural heritage value). For example, what constitutional power would the Commonwealth rely on when seeking to protect (using a somewhat imperfect example) an important place of historic value alone such as the Sydney Harbour Bridge? With respect to many historic places, the full extent of the 'corporations power' has not yet been conclusively determined by the High Court and would be inapplicable in many cases. The 'external affairs power' would be unavailable. These are the pillars upon which most Commonwealth environment protection legislation stands. The 'implied national power' is unavailable for this purpose. The 'trade and commerce power' on the basis of, say protection of tourism, although arguable is presently merely speculation and unlikely according to existing interpretations of the High Court to succeed.

Any State or Territory government wishing to oppose the listing of a place for historic values alone would be able to do so with reasonable prospects of success in many cases. Moreover any disaffected Sate Government could easily avoid the corporations power by passing legislation to determine the legal status of a place to be other than a corporation. The High Court's current interpretation of the just terms compensation provisions (s.51 (xxxi)) of the Constitution (the High Court decision in *Newcrest v Cth* (1997) 190 CLR at 573 being only one example in which the Commonwealth was held liable to pay compensation) will effectively deter the Commonwealth from intervening to protect places on the national list, because when it does so it may be liable for compensation. In short, the protection the Bill provides is illusory.

4. The Bill fails to implement the Council of Australian Government Agreement on the Environment (COAG Agreement)

Although I was not privy in any way to the negotiations, the Bill is plainly the product of failed negotiations with the States and Territories. Speaking as a person of strong centralist convictions, I must concede, as any reasonable person must, that a co-operative federalist approach is the only sensible course for the management of Australia's environment (including Indigenous heritage). The Bill fails to provide in any meaningful way for State or Territory representation, let alone empowerment in the decision making process. Given the arguably inadequate nature of the Commonwealth's constitutional powers over the environment, this is a recipe for future lack of action or instability, conflict and litigation.

5. The bill is substantially incomplete

The Honourable members are hereby presented with a Bill that relies almost entirely for its central operative provisions to be made by regulations. The real definition of 'heritage values', the basis upon which a decision will be made to list a place or remove from either list, is left entirely to subordinate legislation, as are the 'heritage management principles'. What of the concern expressed by this and former governments of all persuasions (and which gave rise to the now lapsed *Legislative Instruments Bill*) that substantive law be made by a Bill for an Act and properly considered by both Houses of Parliament and not hidden in subordinate legislation? This should concern members of

both Houses of all political persuasions. This alone is reason enough to deny the Bill passage in its current form.

6. The protection the Bill affords is illusory

Notwithstanding the fact that the Commonwealth may be liable for just terms compensation if it should ever intervene to protect a national list place, this Bill would restrict the Commonwealth's role and responsibility with respects to the national estate from the current say 14,000 or so places, to a smaller, and as yet undetermined, number. How many places would be protected? Which ones? All that the Bill makes clear is that the Register of the National Estate (RNE) will no longer exist as a functional and meaningful entity. The RNE without recognition in a Commonwealth statute and the imperatives of sections 28 and 30 of the *Heritage Commission Act 1975* (which oblige Commonwealth entities to take advice and not to take any action adversely affecting the national estate unless there is no feasible and prudent alternative) is essentially meaningless.

Honourable members this is the most important aspect of the Bill. I urge you, do not underestimate the importance of the tasks professionally completed for so many years by the Australian Heritage Commission: those of assessment, identification, listing, promotion, education about, and assistance in the management of, Australia's national estate. Status as part of the national estate alone is a powerful mechanism. In a truly civil society, sanctions are but the smallest part of the rule of law.

I also urge you not to let your vote on this issue be 'bought' by agreement to amendments to 'cure' what are in effect obvious defects in the legislation. Clearly the time limits on the review of management plans (cl 341V), reviewing and reporting on the Commonwealth lists (cl 341ZB) are too long. Clearly, the Minister should be obliged to consult with the Heritage Council before making any decision to list or not. Clearly, consultation with Indigenous people must be an obligation. The Minister should be obliged not only to consult but also 'have regard to' these opinions when making his decision. But even these amendments would still leave the Minister with a broad unfettered final say over whether or not to list a place. This is the primary aim of the Bill. The aforementioned appear to me to be obvious 'bargaining chips'.

I ask you to search your conscience and decide if you can really countenance the 'trade off' between the withdrawal by the Commonwealth of responsibility and involvement with the large number of important heritage places which are the national estate, for a proactive protection by questionable constitutional powers decided by a broad unfettered discretion of a very small number of places. Those 'icon' places are precisely those in least need of Commonwealth protection. These places are generally prized tourism assets. In fact any protection of these places by the Commonwealth is more likely to result in duplication than remove it. It is the places on the RNE which are at the margins that are most endangered.

Consider this: the whole RNE could be the subject of Commonwealth responsibilities for protection, management and funding. In a properly constructed statute, allowing accreditation of and deferral to, proper State and Territory laws and processes in respect of individual projects; the needs of business, the States and Territories and the

Commonwealth can be met, without delay and duplication. The whole RNE could be protected by the Commonwealth as last resort only.

7. The Bill fails to meet the needs of business

The clearest message sent by business to State, Territory and Commonwealth Governments over a number of years is the need for investment certainty and security; and simplicity, efficiency and transparency of government legislation and processes. They need to be able to strike a binding agreement with relevant stakeholders as early as possible in the life of their proposal, which will allow for the achievement of their goals along with protection of heritage. This will provide them with the investment security they need to raise and commit capital. When governments are involved, they need simple, clear process and fair, quick and conclusive decisions. This legislation will not meet these needs. Instead the *Environment Protection and Biodiversity Conservation Act 1999* has added further complexity to the process. The Bill if enacted will simply add to this.

The Bill makes no or little provision or incentive for Indigenous stakeholders in particular (or other stakeholders) to be consulted and encouraged to be party to binding agreements with respect to management of places and projects. Any final decision as to protective intervention by governments should be structured according to whether such an agreement is in place and whether its terms have been breached. Individual project management plans which comply with general management and conservation agreements are what business needs. Rightly, their primary concern is with their own project and their shareholders; but responsible business also cares about heritage. It makes 'business sense' to do so. Project and general management plans and agreements should be the central focus of the legislation; instead the emphasis is merely on the creation of lists by Ministerial decision, and divisions of power between respective Governments (absent local government who are effectively left out).

The Commonwealth could appoint a heritage project officer tasked to ensure the speedy and effective implementation of significant projects in heritage terms both at State, Territory, local government and Commonwealth level. This would (assuming the parties need the need involvement of government in any particular project) facilitate and encourage a binding project management agreement with primary stakeholders and proponents. If necessary the project officer would help mediate (or contracting for the mediation of) disputes. In short, duplication of lists is not the problem, the problem is how well State and Territory Governments work together to speedily assess, assist in striking acceptable agreements between stakeholders and approve projects in advance. In short, the Bill is old thinking disguised as new. Business too has been sold short.

8. There are other more sensible options

I call on all members to urge the Government to complete the task at hand: the task of consulting properly with the State and Territory Governments and agreeing on an efficient system of protection of the Australian peoples' heritage.

At leat one viable option is to open. The Prime Minister should write to State and Territory Premiers requesting their agreement urgently to convene a National Heritage Council of State and Territory Heritage Ministers tasked to work co-operatively with the Commonwealth, to a deadline, and with equal say and voting power. Their task: to establish a list of national heritage places about which the relevant State or Territory in which the place exists, the Commonwealth and the Indigenous people to whom the place is particularly significant according to their tradition, all agree the Commonwealth should have special responsibility. This 'national heritage list' should be the basis of a referral of powers to the Commonwealth and/or State and Territories mirroring legislation. This would provide the firm constitutional and co-operative foundation essential to any future Commonwealth intervention to protect and manage heritage places. Proper management of these places should be the trigger for generous levels of Commonwealth funding. Failure to comply should result in the withholding of such funding. Even if the Council fails in its task, at the very least, the contentious and non-contentious listings would be identified which would be very useful when the Commonwealth comes to test its constitutional powers.

Decide slowly and wisely

Honourable members, take time to consider Australia's heritage. The Indigenous people of Australia have inhabited this continent for many thousands of years. Whilst I do not speak for them, I believe although once again disappointed, they will wait patiently, as they have been forced so long to do, for legislation that respects their wishes, meets their needs and empowers them in making decisions about the things they care so much about. I urge you to make whatever changes are needed to protect our heritage and to give effect to 'proactive' heritage protection, but make them slowly and carefully and with thought to the Indigenous people and to all our futures. Do not let the demands of today's Parliamentary timetable force mistakes. The present system will hold well, as it has held for over 25 years. Reject this Bill and replace it with another and better Act. Start the consultation process now.

Graham Hyde
Solicitor and Barrister

(These are my personal views and do not represent those of my employer. The legal statements should not be relied on as legal advice without consulting me.)