

# **AUSTRALIA ICOMOS**

## **SUBMISSION ON THE ENVIRONMENT AND HERITAGE LEGISLATION AMENDMENT BILL (No. 1) 2006 ON BEHALF OF AUSTRALIA ICOMOS**

27 October 2006

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The following submission outlines Australia ICOMOS's role, and concentrates on a number of key concerns in the amendments—the demise of the RNE and various issues in relation to the process of identifying and listing National and Commonwealth Heritage places. While the submission focuses on what we see as negatives, Australia ICOMOS is aware that many of the other amendments resolve problems in the administration of the Act, and are intended to allow a greater proportion of staff time to be spent on the core business of the act rather than on the administrative processes.

Australia ICOMOS regrets the very short timeframe available to consider and comment on the amendments. Given their length and complexity, this is most unfortunate and may result in a poor outcome.

Australia ICOMOS also notes there are a wide range of other issues and problems with the operations of the EPBC Act which are not addressed by these amendments. This is also disappointing, but we hope these issues will yet be addressed.

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## **1. BACKGROUND TO AUSTRALIA ICOMOS**

The International Council on Monuments and Sites (ICOMOS) is an association of professionals throughout the world that currently bring together over 7500 members, established under the auspices of UNESCO in 1965.

ICOMOS works for the conservation and protection of cultural heritage places. It is the only global non-government organisation of this kind, which is dedicated to promoting the application of theory, methodology, and scientific techniques to the conservation of the architectural and archaeological heritage. It is closely linked to UNESCO, particularly in its role under the World Heritage Convention 1972, as UNESCO's principle adviser on cultural matters related to World Heritage. National Committees of ICOMOS, numbering some 100 countries, carry on the work of the organization at a regional and national level. (for more information see [www.icomos.org](http://www.icomos.org))

Australia ICOMOS was formed in 1976, and currently has approximately 400 members, being professionals involved in the cultural heritage field. It elects an executive committee of fifteen members who are responsible for carrying to national programs and participating in decisions of ICOMOS as an international organisation.

Internationally, Australia ICOMOS is on the advisory Committee, has a member of the International Executive Committee, is involved with the International Scientific Committees and attends the triennial General Assembly. Our members participate in a range of conservation activities including site visits, training, conferences and meetings.

The work of Australia ICOMOS is guided by the principles enshrined in the *Australia ICOMOS Charter for Places of Cultural Significance* (known as *The Burra Charter*), adopted in 1979 and most recently revised in 1999. *The Burra Charter* has been adopted very widely by heritage professionals and governments alike as the common standard for cultural heritage conservation planning and work. (for more see [www.icomos.org/australia/](http://www.icomos.org/australia/))

## **2. THE DEMISE OF THE REGISTER OF THE NATIONAL ESTATE**

The Bill amends the *Australian Heritage Council Act 2003* to repeal the Register of the National Estate (RNE) and removes all reference to it, and removes the obligation in s.391A of the *EPBC Act* for the Minister to have regard to the RNE when making decisions.

Australia ICOMOS is concerned that these amendments ignores the role played by the RNE in State and local government processes, and potentially puts at jeopardy heritage places that have not as yet been formally entered into State or local government registers and lists. State and local government processes currently apply to both registered places **and** places in the RNE when considering the impacts of proposals on heritage. The five year delayed implementation period is, we anticipate, insufficient to enable the States and local government to upgrade their registers and lists to give adequate protection to all of those places currently protected by reference to their RNE status under the EPBC Act.

Another dimension to this issue is that the Australian Government could provide financial and other assistance to help with the transfer of places to State and local government heritage lists. Regrettably, resources for heritage within the Australian Government seem very limited and so this option is highly unlikely, even if it were considered. It is suspected the demise of the RNE is something that has not been negotiated with the States and local government, and so a planned and orderly approach to this issue does not yet exist.

We have seen no evidence that the Department of the Environment and Heritage (DEH) has undertaken any research and analysis of the likely impacts at the State and local level resulting from these amendments. The RNE still has a substantial value at the State and local levels. As the RNE was a creation of the Commonwealth and was actively embedded in the processes of the States and local governments, we believe the Commonwealth has an obligation to ensure that no heritage place is put at risk and no community valuing a heritage place is dis-empowered by amendments to the Act. We do not believe this assurance can be given by the Commonwealth.

One of the arguments put to Australia ICOMOS was that the abandonment of the RNE was to reduce duplication and confusion by limiting the number of heritage lists,

especially those having no legislative effect. We find it a specious argument in the light of the creation by the amendments of a new list with far less actual impact on heritage conservation outcomes—namely the 'List of Overseas Places of Historic Significance to Australia' (new part 15A).

There is another way of looking at the issue of the future of the RNE. What are the issues and the needs in heritage, and what role if any could the RNE play? This has been thought about for a long time and at various stages suggestions have been made about the substantial future role the RNE could play. It is a matter of profound regret that this approach and such suggestions appear to have played no part in the determined approach to get rid of the RNE.

It is also worth asking why not leave the RNE as a statutory list if indeed there is a commitment to retain it in a non-statutory form?

Part of the argument to get rid of the RNE has been the inclusion of places of state or local significance, and that these are properly the responsibility of other levels of government. It would be interesting to know whether the Australian Government is acting consistently in this matter compared to other environmental issues. Does the Australian Government only collect environmental data on nationally significant issues?

### **3. NATIONAL HERITAGE LISTING PROCEDURES**

The amendments change the listing procedures for the National Heritage List and the Commonwealth Heritage List. The major changes are to an annual nomination cycle based on identified themes, with substantial discretionary powers by the Minister to accept or reject nominations both before and after assessment by the Australian Heritage Council. The absence of statutory timeframes allows the delay or indefinite postponement of assessment and entry into the heritage lists. (s. 324JB-D, and 341E-J)

#### ***Inadequate separation of assessment and management considerations***

Australia ICOMOS's primary concern with the amendments is that they provide an inadequate separation between the process of assessment and listing and the consideration of downstream management decisions. The Minister has the power to add to or remove any place from the Priority Assessment List, after assessment by the AHC, having 'regard to any matters the Minister considers appropriate' (s.324JE(3)). Australia ICOMOS believes that the listing should be based solely on the assessment of the National Heritage values of a place.

While the AHC has the power in its own right to add places to the Priority Assessment List it considers meet the National Heritage criteria (s.324JB(2)(b) and (3)(b)), the Minister has the power to reject them on a range of matters not necessarily associated with heritage values (s.324JE(3) and 324JJ(5)(b)). Australia ICOMOS regards this as poor heritage identification practice.

#### ***Transparency of the Minister's decisions***

It is not clear if the Minister, in explaining his decision not to list a place to a nominator (s.324JJ(8)(b)(iii)), also has to provide an explanation to the AHC if he rejects a place recommended on the priority Assessment List by them on their own behalf, and if that explanation is a public document. Australia ICOMOS is concerned to maximise the transparency of the decision making processes of both the AHC and the Minister.

***Potential to limit community identification of National Heritage Places***

The amendments potentially limit the capacity of the community to identify and nominate places it believes are of national significance. While the themes determined by the Minister in any cycle are 'priority' themes for assessment under the Act, the as-yet unavailable regulations defining what has to be included in a nomination have the potential to make adherence to the themes virtually obligatory (combining s.324J(f) and 324JA(4)(b)), thus giving power to the Minister to reject nominations that don't comply.

Similarly, the power of the AHC to reject a nomination solely on the information contained within it (s.324JB(4)), without recourse to wider thematic comparison, sets up a scenario where sound nominations are rejected because the comparative work necessary to satisfy the NHL Criteria is not carried out. Potentially, resources for comparative studies may be restricted to the Minister's annual themes (reinforced by the capacity under s.324JB(2)(c) for the AHC to remove places from the Proposed Priority Assessment List on the basis of inadequate resources to assess), so some types of places not related to those themes may never receive proper consideration.

There is no recognition of the resources required to prepare a sound nomination, and the Australian Government appears to provide no funding assistance for such work. For example, there is no grant funding as was formerly available under the National Estate Grants Program, a program abolished some years ago. The Australian Government has assumed that the community would be fully willing to accept this burden, and it has then been surprised when poor quality nominations are provided. In addition, the Australian Government has prepared a series of thematic essays which could assist with nominations but these have never been released, with one exception, and there are no resources or timetable for their release. The Australian Government's approach is unbalanced.

***Emergency listing***

The emergency processes (s.324JK) are entirely at the discretion of the Minister, both at the time of the initial listing and at the time of review one year later. The Minister might achieve the de-listing of an initially-listed place, on whatever unstated grounds he chooses, by simply doing nothing and allowing the listing to lapse (324JQ(4)).

While Australia ICOMOS recognises that the assessment of a place in its full National Heritage context might take longer than the timeframes set in the existing arrangements (10 days), it believes the amendments introduce a lack of commitment to seriously consider emergency nominations, by giving the Minister overriding discretionary powers and avoiding any binding and reasonable timeframes for a thorough consideration of the values of a place.

All of the heritage listing processes within the EPBC Act result in ministerial decisions of one form or another. Such heritage decisions need to be underpinned by trust, credibility and transparency. There is unfortunately a strong perception that these decisions may be subject to political and non-heritage considerations, and this has seriously eroded the credibility of the Australian Government's heritage systems. The current amendments have not started this situation but none the less appear to entrench it.

#### **4. COMMONWEALTH HERITAGE LISTING PROCEDURES**

##### ***Nomination processes***

The Commonwealth Heritage List assessment is triggered by the Minister 'inviting people to nominate places for inclusion' (s.342H(1)).

Australia ICOMOS believes that the Commonwealth should have a more proactive approach to identifying and listing heritage properties owned and controlled by the Commonwealth. In the current arrangements, perpetuated in the amendments, the Commonwealth agencies have an obligation to identify in a Heritage Register those places appearing to have Commonwealth Heritage values (s.341ZB), but they are not obliged to nominate them to the Commonwealth Heritage Register, nor is the AHC obliged to do so. Hence many places with acknowledged heritage values owned by the Commonwealth are not protected by entry in the Commonwealth Heritage List.

We regard this as a half-hearted acknowledgement of the Commonwealth's commitment to protect heritage assets under its own control, which sets a poor example for the wider community. We would strongly advise a link be made between the identification of places in the agency Heritage Registers, and their nomination to the Commonwealth Heritage List, by the agency themselves, or by the AHC in receipt of the heritage registers.

##### ***Ministerial discretion***

As in the case of the National List processes, we believe the level of Ministerial discretion in rejecting nominations for the Commonwealth Heritage list are too broad. The Regulations could easily provide a basis for the Minister's rejection of public nominations on the grounds of inadequate information (s.341J(4)(b)), in situations (such as Defence land) where the public will not necessarily have access to that information.

At the point of final listing, the Minister may have regard to information and advice from any source, and presumably including advice on non-heritage grounds (s.341JI(5)(b)), and base a decision to not list a place on that advice. Australia ICOMOS regards this as poor heritage identification practice.

It is interesting to note that these and other changes to the Commonwealth Heritage listing process are driven by the desire for consistency with the National Heritage List. It is understood, however, that there have been none of the problems with the CHL as there have been with the NHL. Therefore, in one sense, there is actually no need for these changes based on demonstrated problems with the CHL.

***Emergency CHL listing***

As with the comments for the National Heritage List, Australia ICOMOS is concerned that the Minister might achieve the de-listing of an initially-listed place, on whatever unstated grounds he chooses, by simply doing nothing and allowing the listing to lapse (s.341JP(4)).