

# **AUSTRALIAN COUNCIL OF NATIONAL TRUSTS**

## **SUBMISSION TO THE SENATE COMMITTEE EXAMINING THE EPBC AMENDING BILL 2006**

### **INTRODUCTION**

This submission is made by the Australian Council of National Trusts, the peak body representing the voice and interests of the Australian National Trust movement and its 80 000 members. A more complete description of the Australian National Trust movement appears at Attachment 1. The National Trust has been engaged in the development and scrutiny of federal heritage legislation since the development of the original Australian Heritage Commission Act in 1975. The Trust participated in the work of the Hope Committee that established the basis for Federal legislation for heritage protection and the majority of early listings on the Register of the National Estate were based on the National Trusts' own registers.

We therefore make these comments from a position of long involvement in the issues of national heritage policies

### **EXECUTIVE SUMMARY**

The main points we wish to draw to the Committee's attention are

#### **The Timeframe**

- It is not possible to understand the full impact of all the provisions of the Bill in the very limited timeframe that has been allowed and make a comprehensive submission on the Bill to the Committee.
- The total lack of public consultation about the Bill not only reflects poorly on the government but it will further disengage the community from the vital national issues covered by the legislation

#### **Decline in national leadership**

- The COAG division of our heritage into 3 elements is arbitrary and we question if it works in practice. Because this is one of the underpinning principles of the legislation, it is a vital issue

- The Federal Government should be demonstrating national leadership in the protection of our cultural heritage in the same way that it funds and protects natural heritage through the NHT
- The repeal of the Register of the National Estate is a sign of the abrogation of national heritage responsibilities

### **The Abolition of the RNE**

- The Explanatory Memorandum provides no rationale for the abolition of the statutory provisions of the Register of the National Estate. It is a major change that will affect both Federal and State/Territory decisions in the area of heritage protection.
- The Bill provides no alternatives and shows a lack of Commonwealth Government commitment to protecting the national estate.

### **The New Heritage Listing Process**

- The new process is a real move away from the established best practice for heritage conservation. In particular it affords the Minister total discretion regarding the scope of the NHL and the timing of the assessment of places for the NHL. This can lead to delays and the side-lining of inconvenient nominations.
- The new processes lack transparency with respect to ministerial decisions and the reasons for those decisions. There is a real need for an initiative to expand the NHL to take over as the pre-eminent heritage list if the RNE is to be abolished
- The minister has over-riding discretionary powers with respect to emergency listing
- The stated objectives of the amendments do not fill us with confidence regarding the commitment to protect the national heritage. They are more geared to assist development

### **Undertakings for Damages**

- The Explanatory Memorandum states that this change is designed to bring the EPBC Act into line with other Commonwealth legislation. However, the EPBC Act is not like other legislation. Challenges to its provisions are made **in the public interest**. And the public should be able to challenge decisions

### **The New Section 158A**

- This section sets a decision in concrete and does now allow new, relevant information about the heritage significance of a place to be taken into account after the original decision has been taken.

## **Our concerns in more detail follow**

### **1 Further decline in national leadership**

(i) The Bill will see a further retreat from a leadership position by the current government in heritage protection. The Parliament should be passing legislation that protects our national heritage. This is not being done through the current Act or the amending Bill. The fact that only 33 places have been entered on the National Heritage List to date is a testament to the difficulties inherent in the current Act and we do not believe will be corrected by the Bill.

(ii) The Federal Government is active in protecting the natural resources of the nation through the multi billion dollar Natural Heritage Trust. Why can it not legislate and fund a similar approach to the protection of our cultural heritage resources? In addition, we believe that this Bill will do little to build on and complement this investment by the NHT.

(iii) We argue that it has not been demonstrated that the three-tiered approach based on the COAG agreement of 1997 has worked. It sounds like a practicable approach but we are not aware of any evidence that it is working in reality. It is now nearly 10 years since the COAG agreement and we question whether the arrangement has been reviewed as to its effectiveness in protecting our national heritage? Whilst it might be convenient for the Federal Government to deny any responsibility for places that are not assessed as being nationally significant, can we be sure that the States and Territories are fulfilling their part of the bargain with respect to the development of a nationally integrated heritage system?

(iv) This retreat from a position of national leadership is further evidenced by the proposed scrapping of the statutory basis of the Register of the National Estate.

### **2 The Bill-process and general objectives**

(i) The Bill is 409 pages long, amending an Act which in turn is over 600 pages in length. The time given to read, discuss and dialogue within our organization the bill and its implications and to make comment is patently inadequate. More time should be afforded to community organizations to

carry out the necessary internal processes to arrive at a concluded view on the Bill. We are at a loss to understand what the hurry is.

The lack of effective community consultation runs very much against the original intention when the Act was developed. The Act was heralded at the time of its introduction for the significant increase in public participation that it contained. The current Bill and the speed with which it is being fast tracked into law fails to meet this test

(ii) Good legislation is simple, transparent in its objectives and processes and able to be understood by non-technical practitioners in the subject matter area. This Bill meets none of these tests. The Bill and the interplay with the Act it amends sets up a system that is complex, confusing and convoluted.

(iii) The bill does not represent and reflect best practice heritage conservation. The nation deserves the best law to protect our precious national heritage. We should expect no less. However, what does the Explanatory memorandum say regarding the objectives of the Bill? It states that the first 2 objectives of the bill are

- To reduce processing time and costs for development interests
- To provide an enhanced ability to deal with large scale projects.

Is this the test that the government sets for best practice heritage law?

(iv) Best practice heritage legislation should separate the 2 distinct steps that inevitably occur with a heritage place. This best practice stems from the wisdom of the original Heritage Commission Act and has been now underpinned by the ICOMOS Burra Charter, a charter that sets out best practice and is widely accepted by practitioners and heritage agencies.

**Step One** is to define the significance of the place in question. There should be a clear boundary that contains the elements of heritage significance, with the significance being in turn summarised by a statement of significance. The sole criterion for this decision about the place and its extent is one of heritage significance.

**Step 2** is to consider the impact of any development on the place and its heritage significance. This does not mean that development that might damage that significance cannot occur. What it does mean is that the

decision maker must take this significance into account and the decision is made and explained in a transparent and accountable way.

The system under the current Act does not reflect best practice. The Bill seems to mandate a situation where the decision to identify and list a place – an easier political decision-can be made based on compromise. This will minimise or avoid the more difficult political decision to allow damage to take place to a listed place. We argue that this is a further decline in this best practice approach. It would be consistent with best practice if the AHC were given the statutory responsibility to compile a National heritage List and that this becomes a separate exercise

### **3 The Register of the National Estate**

(i) The Bill sees the statutory death of the Register of the National Estate. The Register has been compiled over the past 25 years by the Commonwealth and is a national treasure. It holds details of over 13 000 places of heritage significance, many of which are not protected by other legislation. Although its powers are limited the Register needs to be retained and sustained. To assist the Committee a paper on the Register prepared by the national Cultural heritage Forum is attached at attachment 2

(ii) The Register has a proud and effective history. Without the work of the Heritage Commission and the Register iconic places such as the Wet Tropics of Queensland, South West Tasmania and the national estate forests of Tasmania, New South Wales and Victoria, Willandra Lakes and other nationally significant places would not have been identified and protected. No word of reason as to why the Register is being abandoned to become an archive gathering dust has been found in the EM or the second reading speech.

(iii) The Register's strength was particularly apparent in the way in which it engaged the community in all States and Territories in identifying and learning more about their heritage. It should remain an effective tool for community heritage education. There is nothing in the Bill that recognises the strength of the Register as an educative resource. Ironically this is at a time when the Federal government seems to be intent on reaching into our local education systems on such matters as curriculum development and generating a debate about our history. What a resource the Register would be in such a debate!

(iv) If the Register does cease to be a statutory document, there should be established a priority process to move places from the Register to both the NHL and the Commonwealth heritage List

#### **4 The Listing Process**

(i) Item 550 significantly changes the heritage assessment process and substantially replaces or modifies section 324 of the EPBC Act. The Minister has an almost absolute discretion about what is and is not assessed and when. There is provision for nominations outside the themes, however this is subject to the Minister's approval.

The Minister can totally disregard the AHC's recommendations and is not required to provide any reasons for any of his decisions. This is a most inefficient use of resources. If one of the aims of the Bill is to increase efficiency then it has failed.

(ii) The Minister can extend the time limit for nomination assessment to up to five years. This would seem to be a situation where development interests are not being provided with the certainty they are said to require and which the Bill is designed to deliver.

(iii) Whilst being proactive on the development of the NHL is to be encouraged, it is in great need of further refining. The concept of themes so far as it promotes greater recognition and protection of Australia's heritage is supported, with reservation. However the Bill provides no guidance or criteria regarding the selection of themes and the relationship between a particular theme and the priority for national heritage protection. It is important that the themes for nomination do not serve to restrict the listing of other important heritage places. Attention to a particular theme must necessarily occur at the expense of an alternative theme or places which fall outside the theme. When it becomes clear that a place is of national heritage significance it should be accorded a priority but this may not be possible if it does not fit within a particular theme.

(iv) In the final analysis the legislation will be judged by the coverage and effectiveness of the National Heritage List to protect heritage places. To date there are 33 places on the List. It could be argued that only a very few of these places actually need the added protection that National Listing brings. The majority would seem to adequately protected by other legislation and arrangements at State and local level and are so iconic that the risk of damaging action is extremely remote. It would be interesting to undertake an analysis of the costs of the processes to list these places and the added protection afforded by such national listing.

(v) The Register of the National Estate is in itself a valuable resource in the quest for a national list. Places in the Register each have a professionally prepared statement of significance that would, if interrogated, produce a much greater list of places that have already been assessed as having national significance. It is of concern that this valuable work is not made more of.

(vi) The NHL serves only a limited purpose if it is reserved for the most iconic sites that are under no threat. The aim of the Act should be to conserve the wide sweep of Australia's heritage. To do this the government must be prepared to defend more 'controversial' or less well-known sites, which are of no less importance to the history and heritage of the Australian Nation.

(vii) As an alternative to the current provision we suggest that regulations prescribe a number of heritage nominations that will be assessed each year. Of this quota a certain percentage may be allotted to the current theme and the rest left open.

(viii) It is envisaged that this would be an annual process so that nominations that were deemed as meriting assessment but left of the final list for that year could then reapply the next year. This would be a far more transparent and effective process, which recognises resource constraints but allows the public to continue to be involved in the process

(ix) We also suggest that once a place has been determined to merit a heritage assessment and has been accepted as a nomination, it will be afforded the same level of protection as places that have been included on the NHL. This status would remain until the Minister has made a final determination on whether or not the place should be included on the NHL.

(x) The current approach fails to consider the indirect impacts of listing, such as improved community awareness, that play a significant part in conservation. A central element of the EPBC Act has always been community involvement and public participation. To restrict this involvement will necessarily lead to subsequent disengagement with the process and the list itself.

## 5 Other list changes

(i) The Bill also allows World Heritage properties to be transferred across to the National Heritage List without the need for further assessment. This will increase efficiency and avoid duplication in the consideration of our World Heritage sites, such as Kakadu National Park or the Great Barrier Reef, on the list of places of most heritage significance to our nation. We support this amendment

## 6 Time Frames

(i) We note that in the 2005-2006 report on the EPBC Act appearing on the DEH website, it is reported that of the total of 44 assessment reports received by the Minister on NHL listing, his statutory decisions were late on 33 occasions. The reasons stated were **“Various reasons, principally timing of announcements to maximise publicity for heritage listing, but also pressure of ministerial business, overseas ministerial travel, legal issues and consideration of management implications of listing.”**

Similarly, of the 13 reports on Commonwealth heritage listings, his decisions were late on 10 occasions. The reasons stated were **“Various reasons, including pressure of ministerial business, overseas ministerial travel and legal issues”**.

It is doubtful that the administration of the Act in this area will be improved, given the Minister’s continuing heavy workload.

## 7 Emergency Listing

(i) A major heritage change in the Bill is that the Minister is no longer required to respond to a request for emergency listing within 10 days, nor is the Minister required to publish any reasons for the decision not to emergency list a nominated place.

Whilst the provisions in the current Act were open to abuse and did tie up significant DEH resources when invoked, they did provide an assurance that the government was prepared to act in an ‘emergency’ to protect our heritage. There is still this option available, though it is much less transparent and arguably too much discretion has been given to the Minister.

Recognizing the need for reform, the ACNT would suggest that the reforms

have gone too far and that there is a middle position. Provided that the nomination meets some conditions (is legitimate, is not frivolous or vexatious, the Minister believes that the place contains one or more national heritage values, the place satisfies the new section 324JL(1) criteria and therefore merits heritage assessment) it should be protected until a final assessment can be completed.

## **8 Financial undertakings for interim injunctions (Item 763, which repeals section 478 of the Act)**

(i) Under the current Act, community organizations such as the National Trust can seek and be granted injunctions against inappropriate development. The above change removes a considerable measure of protection for conservation groups. Currently they are not required to make undertakings to meet damages when seeking interim injunctions. The court will still have the discretion not to require an undertaking for damages but the protection should be guaranteed, given the public benefit motivation for the action. The amendment will be a further disincentive for community organizations to engage in activities under the Act to protect our heritage.

A strong feature of the Act to date has been that it encouraged public participation and involvement. The expanded standing provisions of Section 487 for ‘persons aggrieved’ and the absence of the requirement to make damages undertakings have certainly played a significant role in this participation. To wind this back is a very negative step.

## THE NATIONAL TRUST

The National Trust, the nation's oldest and largest community-based conservation organization, is celebrating its 60th anniversary this year.

Founded in Sydney in 1945 in response to the proposed destruction of fine colonial buildings along Macquarie Street, and the cutting down of trees in the fast developing suburban North Shore, the National Trust has been focused on the conservation of heritage in all its dimensions for the past sixty years.

The Trust logo—the gum leaf seen through an open window—represents graphically the dual interest the Trusts have always shared in the conservation of the nation's cultural and natural heritage.

The Australian National Trust has strong links with the international Trust movement. Trusts worldwide follow similar objectives and support reciprocal rights for members. In particular, the Australian Trusts provide strong support for the developing community-based heritage Trusts in Asia.

The formation of the state/territory Trusts preceded Commonwealth and state heritage legislation, and indeed the development of most environmental protection legislation. Therefore, the overwhelming priority of the National Trust movement for its first several decades was to ensure the passage of statutory protection in all jurisdictions, and to advocate concertedly for the protection of major heritage places then under threat of wholesale destruction in cities and towns nationwide.

Each of the state and territory Trusts was formed in response to its own community needs, often in response to major threats to iconic heritage places. Each Trust is a fully independent entity and each has developed its own distinctive character, but all share a common set of principles concerning the value to the community of its heritage—broadly defined—and a commitment to advocating for the retention and accessibility of that heritage.

By 1965, all the mainland states had Trusts, and with the Commonwealth finally beginning to focus on its own national heritage responsibilities, the Australian Council of National Trusts (ACNT) was formed to represent the interests of the National Trust movement to the Commonwealth.

The National Trust movement has a proud record of advocacy for heritage protection and vast experience in the conservation and stewardship of heritage places. The 72 200 National Trust members and 7400 Trust volunteers nationwide are responsible for 260 heritage places and ensure 170 of these are opened regularly to the public.

As it celebrates the 60th anniversary of the founding of the National Trust in Australia, the National Trust movement is focused on ensuring it will be able to continue to work purposefully into the future, informing and engaging Australians in the care and protection of their heritage.

**National Cultural Heritage Forum**  
**The future role for the Register of the National Estate**

The National Cultural Heritage Forum is a grouping of organizations concerned about national policies and issues related to national cultural heritage. Its membership includes

- Australasian Institute for Maritime Archaeology
- Australasian Society for Historical Archaeology
- Australia ICOMOS
- Australian Academy of the Humanities
- Australian Council of National Trusts
- Australian Heritage Council
- Australian Local Government Association
- Federation of Australian Historical Societies
- Heritage Chairs & Officials of Australia and New Zealand
- Indigenous Cultures Program representative
- Engineering Heritage Australia
- Museums Australia
- National Environment Consultative Forum (NECF)
- National Indigenous Cultural Heritage Officers Network
- Property Council of Australia
- Royal Australian Institute of Architects

*The RNE and the new heritage regime*

Throughout the debate leading to the passage of the heritage bills there was strong community and NCHF member support for the retention of the RNE, and that support was finally translated into a political commitment to retain the RNE.

Consequently, the RNE is now part of the new regime.

*But what part should the RNE continue to play in national heritage identification and protection?*

While the incorporation of the RNE into the new heritage regime poses certain dilemmas, the Forum believes that the strong support for its retention indicates a perception of major deficiencies in the statutory protection provided for heritage places across the nation.

The Forum therefore endorses its continuance, and advocates that its retention be utilised:

- to encourage the EPHC and the Heritage Chairs & Officials to commit to redressing identified statutory deficiencies (such as the fact that some States and Territories have no capacity to register natural or Indigenous heritage sites), and
- to form the core of a truly complete database of all places of value to the nation, the Australian Heritage Places Inventory (AHPI).

AHPI already contains summary information about places listed in State, Territory and Commonwealth Heritage Registers, and it is intended that this be further extended with the inclusion of other registers, government and non-government.

*What is the purpose of the Register under the new regime?*

While the AHC Act 2003 is silent regarding the purposes of the Register, certain functions have been designated for the RNE under the new heritage regime. The *Explanatory Memoranda* provides the following:

The Register will be an information resource for the purposes of heritage promotion and education. Furthermore, the Minister for the Environment and Heritage will be required under a new provision (Item 37 of the Environment and Heritage Legislation Amendment Bill (No. 1) 2002) to consider, where relevant, information in the Register when making decisions on the impact of an action on the environment under the Environment Protection and Biodiversity Conservation Act 1999.

*Why was there such strong community support for the retention of the RNE?*

The RNE was the first, and remains the most complete register of heritage places nationwide. It remains the only national list, which attempts to cover places of most value and meaning to communities across all jurisdictions and thresholds of values.

As such, it provided and continues to provide recognition that local heritage places are part of the national set of places of value. While listing a place on the RNE provided little substantive protection, it did, and it still does, carry considerable moral suasion.

While it pre-dated effective State/Territory and finally Commonwealth statutory protection for heritage places, the RNE did, and does still, have the following virtues:

- It covered all 3 environments, and allowed for the registration of places with multiple and shared values across those 3 environments;
- It registered and provided recognition of the value of places not necessarily well protected by their respective State/Territory legislation, especially natural and Indigenous places;

- It provided a level of statutory protection for the registered places where Commonwealth actions were concerned, and allowed for the registration of significant Commonwealth owned and managed places. Neither function, except in the case of Australia Post, was provided by State/Territory legislation. This allowed for the Commonwealth story to be told;
- It provided the first picture of heritage places nationwide, and continues to contain the most complete set of data concerning heritage places assessed to a consistent standard and criteria across the nation. This facilitated research, informed management and decision-making, and provided data for activities such as State of the Environment reporting;
- It provided registration for nationally significant places, allowing for the national story to be told.

*What role/function is the RNE currently providing?*

The community continues to value the RNE, and will continue to value the national recognition and moral suasion brought by RNE listing, regardless of its actual statutory powers, until they are absolutely certain that their special places can be, and are actually being fully protected by State/Territory and local jurisdictions.

Therefore, there will be a continuing role for the RNE to provide a ‘safety net’, until effective statutory protection across all 3 environments, down to places of local significance, is provided in all jurisdictions.

Equally, until there is a fully effective schema for ensuring that data concerning all heritage places from statutory and non-statutory lists is fully captured and made available, ideally through a publicly accessible database or similar ‘one-stop-shop’ arrangement, the RNE will continue to be a vital research tool regarding the state and condition of heritage places nationwide, especially with regard to State of the Environment reporting.

*What then should be the long-term vision for the RNE?*

Until Australia has seamless and fully integrated effective heritage protection legislation across all environments, the RNE should continue as a statutory register, able to provide a safety net for places of State/Territory and local value which have inadequate statutory protection within their own jurisdictions.

Once that standardised and seamless heritage protection has been achieved across the nation, the RNE will still need to be retained as an essential database filling the gap between State/Territory and the new national registers, unless the RNE data has all been formally accepted into other appropriate statutory databases.

This will require:

- Reformation of State/Territory and local statutory protection (through the EPHC and Heritage Chairs and Officials) so that all natural and cultural (including Indigenous) heritage places across the nation are able to be adequately protected within their own jurisdiction;
- Standardising of thresholds across jurisdictions so that levels of significance accord nationwide, and agreement that places from all 3 environments will be protected within their jurisdictions;
- Consolidation of all statutory and non-statutory lists into one readily accessible meta database, the AHPI.

Until these measures are completed, the RNE should continue to be developed:

- as the core of the development of a national heritage places database – the platform for the *Australian Heritage Places Inventory*;
- as the place to record the National or Commonwealth Heritage values of places which the Minister declines to register on the National or Commonwealth Heritage Lists;
- as the place to record the values of NHL nominations which arise in the context of thematic studies which document the values of a range of places, few of which are likely to end up on the NH List itself;
- as the list, to be used in hopefully fewer instances as national standardisation of State/Territory registrations and more comprehensive and wider integration of protection occurs, to list places of National Estate value when a relevant jurisdiction declines or is unable to recognise the place;
- for State of the Environment reporting, as it is the only list able to provide a national and consistent overview of information about the state and condition of heritage places nationwide.