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Bill (No.2) 2000

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 105 2000-01

Environment and Heritage Legislation Amendment Bill
(No.2) 2000

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Law and Bills Digest Group
28 March 2001

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Environment and Heritage Legislation Amendment Bill (No.2) 2000

Date Introduced: 7 December 2000

House: Senate

Portfolio: Environment and Heritage

Commencement: Most of the Bill commences on Royal Assent. However, the provisions specifically dealing with indigenous heritage (schedule 2) do not commence until the Aboriginal and Torres Strait Islander Heritage Protection Bill 2000 comes into force.¹

Purpose

To amend the *Environmental Protection and Biodiversity Act Conservation 1999* to create a scheme to protect and manage places having cultural or environmental heritage significance. This will replace the existing scheme under the *Australian Heritage Commission Act 1975*.

Background

The Environment and Heritage Legislation Amendment Bill (No.2) 2000 (the Bill) is part of a package of three Bills. The other Bills are the Australian Heritage Council Bill 2000 and the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000 (which amongst other things repeals the *Australian Heritage Commission Act 1975*).

Origins of the Australian Heritage Commission and the Register of the National Estate

In 1973, the then Whitlam Government established the Hope committee of inquiry into the 'National Estate'.² At that time, the term national estate had no defined meaning, although in his 1972 election policy speech, the Hon Mr Gough Whitlam referred to the need 'to preserve and enhance the quality of the national estate, of which land is the very foundation'.³

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The terms of reference for the Hope committee included a review of 'the role which Australian Government⁴ could play in the preservation and enhancement of the national estate'. In handing down its report in 1974, the committee proposed that a National Estate Commission Act be passed which would require

all Australian Government agencies or departments to act so as to ensure the maximum possible conservation of items of the National Estate.⁵

The committee also recommended that all Government development-related legislation be amended to contain a provision to the effect that any works be done in a way that they

cause no damage to the National Estate, or if it is not practical to execute them without causing some damage, they shall be so executed that they cause the least damage to the National Estate that is reasonable in the circumstances of the case.⁶

In June 1975, the *Australian Heritage Commission Act* (the *AHCA*) was passed. The *AHCA* established the Australian Heritage Commission (the Commission)⁷ as an independent statutory authority whose main functions included:

- the identification of places to be included in the National Estate
- developing a register of those places (the Register),
- furnishing conservation advice to Commonwealth Departments and agencies proposing to take action that might affect a place on the Register, and
- advising the Environment Minister on actions for the conservation, improvement and presentation of the National Estate.

As originally set out in the *AHCA*, the National Estate was defined as consisting of

those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community.⁸

This definition was amended in 1991 by adding a list of indicative matters⁹ that Commission was permitted to consider in determining if a place had sufficient value to be included on the Register of the National Estate.

How the Commission and the Register of the National Estate work

The Commission consists of a Chair and between 4 and 6 Commissioners, all part-time positions. They are appointed by the Governor-General for a term of up to 3 years, although they may be reappointed and serve continuously for up to six years. At least half of the Commissioners, including the Chair, cannot be Commonwealth officers.

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Although not expressly provided for in the AHCA, the Commission accepts nominations for the inclusion of places on the Register from any organisation or individual. Nominations are assessed by Commission staff with the assistance of expert bodies and individuals against a set of criteria derived from the list of matters contained in section 4(1A) of the AHCA.¹⁰

The decision on whether a place is of sufficient heritage significance to be placed on the Register is made by the Commission. Subsection 23(1) of the AHCA provides that

Subject to this section, where the Commission considers that a place that is not part of the Register should be recorded as part of the National Estate it shall enter the place in the Register.

In *Australian Heritage Commission v Mt Isa Mines*, the Full Courts of the Federal and then the High Court considered the question of whether a place is part of the National Estate was either a 'jurisdictional fact' or a question for the Commission to determine within the definitional criteria imposed by section 4 of the AHCA. Federal Court Chief Justice Black, supported on appeal by the High Court, found that it was in fact a question for the Commission to determine, using some degree of 'value judgment' as part of its decision-making process.¹¹

Importantly, Black CJ also ruled that the Commission had the discretion to decline to record a place on the Register even when it had determined that the place was part of the National Estate.¹² This issue was not examined in any real detail in the High Court judgement.¹³ Nonetheless, the Full Court did not adversely comment on the Chief Justices view. Thus while the matter is not absolutely beyond doubt, it appears that the Commission has a discretion not record a place on the Register notwithstanding it meets the section 4 criteria. The AHCA also does not require the Commission to give reasons for declining to record a place on the Register, including in the case where its has exercised its discretion referred to above.

The Commission is required to consider any objections to the proposed listing before making a final decision. Subparagraph 23(3)(a)(iv) of the AHCA indicates that, in considering an objection to listing, the Commission gives 'upmost consideration to significance of the place as part of the National Estate' rather than any social, economic or political implications flowing from Register listing. Where a written objection to a proposed listing is received, the Minister may appoint an independent person or persons to 'assist and advise' the Commission in considering the objection: subsections 23B(2)-(3).

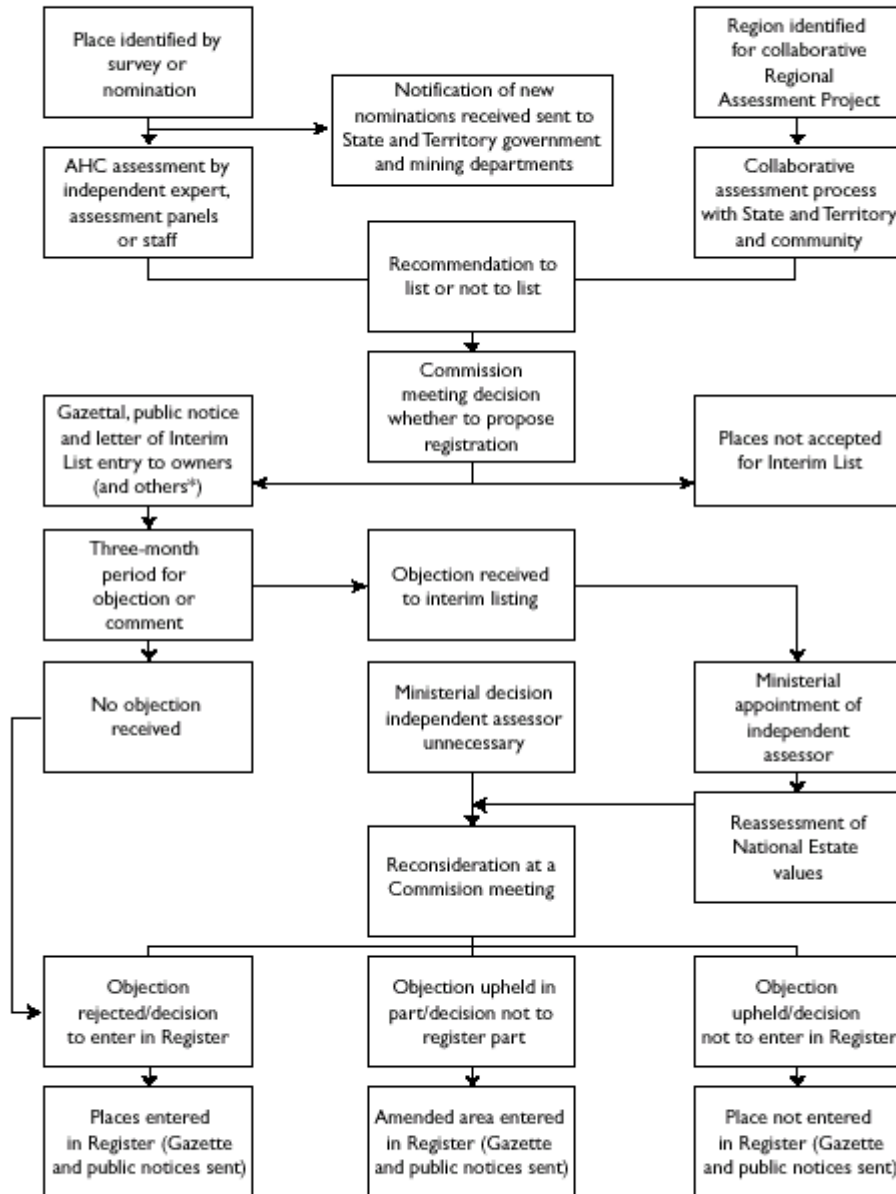
The only power of direction the Minister has is that he or she may direct the Commission to 'inquire' whether a place should be removed from the Register: paragraph 24(1)(b). However any action as a result of the inquiry is up to the Commission. The full nomination, assessment and registration process is illustrated in figure 1.

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Register listing process



* Notification letters are sent to: Commonwealth, State and Territory Admin and Mines Depts, local government, nominators, Commonwealth MPs

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The only substantive legal protection afforded by AHCA to a place listed on the Register¹⁴ is through section 30. This essentially imposes two duties on the Commonwealth:

- that any action¹⁵ proposed by the Commonwealth which 'adversely affects' a place in the Register should only be taken where the Minister or authority proposing the action is satisfied there is 'no feasible and prudent alternative'¹⁶; and
- if the Minister or authority is satisfied no such alternatives exist, that they must also be satisfied that all measures that can reasonably be taken to minimise the adverse effect will be taken.

The Commission must be notified of any proposed action by the Commonwealth that might 'affect to a significant extent' a place on the Register and be given a 'reasonable opportunity' to comment on the proposal. There is no explicit requirement for the Commission's comments to be taken into account when considering whether to go ahead with the proposed action, but a failure to do so would likely breach at least the second duty referred to above. There are no civil or criminal penalties for breaches of the AHCA.

Listing a place in the Register imposes no direct legal constraints on owners of private property, or on State or Local governments. The Commission has no power to direct private owners or State or Local governments on their actions which might affect a place in the Register.

At the end of the June 2000, there were 12,618 items in the Register of the National Estate,¹⁷ with some 483 places on the interim list. 2700 places were waiting assessment by the Commission.

The Commission's 1999-2000 annual report noted that ten places on the Register had been destroyed or damaged to the extent that they would likely be removed from the Register.¹⁸

Protection of heritage under the *Environmental Protection and Biodiversity Conservation Act 1999*

The word 'heritage' does not appear in the definition of environment in section 528 of *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA). However, the 'social, economic and cultural aspects of...people and communities' are included within the definition. Thus historic and cultural heritage values are implicitly part of the environment for the purposes of the EPBCA.

This means that, by virtue of sections 26-28 of the EPBCA, actions¹⁹ taken either on Commonwealth land or by Commonwealth agencies that have a significant effect on heritage values are thus prima facie 'controlled actions' under section 67.

Thus any person proposing to take action on Commonwealth land that would result in significant damage to a place listed on the Register would likely be subject to Part 3 of the

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EPBCA. Equally, any action taken by a Commonwealth agency would also be covered. Either of these two cases would require the approval of the Environment Minister for any action to proceed unless there was a relevant declaration, bilateral agreement, Regional Forestry Agreement etc in place. In the case of a Commonwealth agency, they would have to satisfy both the AHCA and the EPBCA.

Note that other aspects of natural and cultural heritage, eg World Heritage, are also protected by the EPBCA. However, as this Digest is concerned about protection of 'Australian' heritage, these aspects are not covered here.

Protection of Indigenous Heritage under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHPA) allows the Commonwealth Minister for Aboriginal Affairs to make a declaration protecting significant Aboriginal areas or objects where they are under a 'serious and immediate threat of injury or desecration'. The ATSIHPA is a scheme of protection of last resort: before the Minister can make a declaration in relation to non-Commonwealth land, he or she must consult with the relevant State or Territory to determine whether 'effective protection' is available under the relevant State or Territory law. In this sense the focus of the ATSIHPA is fundamentally different to the Bill in that the Bill provides for the development of pro-active management regimes for listed places rather than the reactive protective measures.

In 1995 the Hon Elizabeth Evatt AC was commissioned by the then Minister for Aboriginal and Torres Strait Islander Affairs to review the ATSIHPA. Her report, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* ('the Evatt Review') was presented to the subsequent Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, in August of 1996.

The Aboriginal and Torres Strait Islander Heritage Protection Bill was subsequently introduced into Parliament in April 1998 and in a slightly amended form in December that year. The relevant Bills Digest Comments²⁰

While there is broad-based support for the principle that the current need of reform there has been no consensus on the substance of this reform. The current Bill implements neither a significant number of the Evatt Review's recommendations, nor the recommendations of the [Parliamentary Joint Committee].

Under the 1998 Bill, if an application for a protective declaration relates to an object or place located in a State or Territory that has heritage regime accredited by the Commonwealth, the Commonwealth can only intervene if the Minister considers that intervention would be in the 'national interest'. The Bill does not define national interests.

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The Bill's use of the concept of the national interest attracted emphatic opposition from Aboriginal and Torres Strait Islander Commission (ATSIC). According to the Bills Digest, in a press release released the day the Bill was introduced, ATSIC commented that²¹

the Bill effectively allows the Commonwealth Minister...to hand over heritage protection to the states and territories, despite the clear constitutional responsibility that the Australian people gave to the Commonwealth Government in 1967.

The Bill has stalled in Parliament because of disagreement between the House of Representatives and the Senate with regard to proposed amendments to the Bill. It has not been debated since late 1999.

Public reviews of the Commission and the Register of the National Estate: 1979-1996

The operation of the AHCA was reviewed by a Parliamentary Committee in 1979 and by an Environment Departmental Committee in 1986.

The recommendations of the 1979 report, *Environmental protection: Adequacy of legislative and administrative arrangements*, mainly focussed on some of the problems arising from the assessment process, particularly delays in making determination on nominations of those places in the interim register. A search of Parliamentary records indicates there was no explicit Government response to this report, although many of its recommendations were addressed in the amendments made to the AHCA in 1991 (see below).

The 1986 report, *Review of the Commonwealth Government's Role in the Conservation of the National Estate*, considered a somewhat broader range of issues. Key findings of the report included:²²

- the Commonwealth should continue to bear responsibility for the conservation of the National Estate
- that grading places into categories of relative significance within the Register is not desirable *but* that a graduated system of national, state and local registers could be pursued as an objective with potential for creating greater public awareness and participation than existing arrangements, and
- that proposals for greater Ministerial control, state and local government veto powers and the inclusion of other than National Estate criteria in the registration process should not be accepted.

The report also recommended some changes to the AHCA - for example the inclusion of 'indicative matters' for making a decision regarding inclusion on the Register²³ and the addition of some provisions dealing with National Estate Grants. These recommendations were ultimately included in the *Australian Heritage Commission Amendment Act 1991*.

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A public review of the management of Commonwealth-owned heritage properties was conducted during the mid 1990s. The report of the 'Schofield Committee', *Present for the Past*, was submitted to the Government in January 1997. The report found serious problems and, amongst other things, recommended:

- the development of a program to identify and list on the Register all Commonwealth owned properties of heritage significance
- that Commonwealth agencies develop and implement a heritage strategy, including the use of a heritage asset manual, and report on performance through Parliament, and
- the development of bilateral agreements between the Australian Heritage Commission and State and Territory Heritage Agencies for the delegation of the Commission's functions on actions affecting individual properties.

The Australian Heritage Commission's 1999-2000 annual report noted in relation to the Schofield report²⁴

The Commission has advised the Government on the need for Government agencies to identify their heritage assets and adopt a best practice approach to management through the development of asset registers and conservation management plans...During the year, a draft Commonwealth-State-Territory protocol on Commonwealth heritage properties was also developed...the protocol aims to provide a framework for a cooperative and coordinated interagency approach in relation to the provision of advice on Commonwealth historic heritage properties, where disposal or major changes are proposed that are likely to affect heritage values.

Development of a National Strategy for Australia's Heritage Places

When the AHCA came into being in 1975, virtually the only 'heritage' legislation existing in the States was 'National trust' type legislation dating mainly from the 1950's and 1960's and some legislation relating to historic buildings. Legislation that linked heritage protection with planning started to develop in the late 1970s with the *Heritage Act 1977* (NSW) and the *Heritage Act 1978* (SA). By the mid 1990s, all States had heritage legislation in place, although heritage protection was often scattered between several Acts according to the 'type' of heritage in question - natural, historic indigenous, or (non-indigenous) cultural. Many of these States have also developed heritage registers. However, it is understood that most of the legislation dealing with natural and indigenous heritage does not provide for a register-based system of protection.

In 1996, the Commission commenced its Future Directions process, producing several discussion papers: *Australia's National Heritage: Options for Identifying Places of National Significance*, *National Heritage Standards* and *A National Future for Australia's Heritage*. *A National Future for Australia's Heritage* concluded that lack of a national heritage regime had led to 'significant gaps and duplications' in heritage protection. For

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example, the lack of a consistent approach between jurisdictions as to heritage registers had resulted in 'omissions and overlaps of assessment, listing and management processes'.

The following year, Commonwealth, State, Territory and Local governments signed a COAG 'Heads of Agreement' on their respective 'Roles and Responsibilities for the Environment'. Amongst other things, governments agreed to

the rationalisation of the existing Commonwealth / State arrangements for the identification, protection and management of places of heritage²⁵ significance through the development, within twelve months, of a co-operative national heritage places strategy which will: (i) set out the roles and responsibilities of the Commonwealth and the States (ii) identify criteria, standards and guidelines, as appropriate, for the protection of heritage by each level of government, (iii) provide for the establishment of a list of places of national heritage significance; and (iv) maximise Commonwealth compliance with State heritage and planning laws.

This was followed in 1998 by the release of the Government's consultation paper *Reform of Commonwealth Environment Legislation*.²⁶ Amongst other things, this paper outlined the Commonwealth's intended approach on heritage legislation, including the linkage of heritage assessment and approval processes to what was to become the EPBCA.

In August 1998, the Commission convened, as part of its Future Directions process, the National Heritage Convention to discuss issues concerning standards and principles for heritage identification and management in Australia. The convention communique states, amongst other things, that²⁷

Australian governments should develop and implement a National Heritage Places Strategy, where all levels of government and community take responsibility for heritage protection. Such a Strategy should:

- be based on clear statements of principles and standards that fully take into account the Heritage Principles and Standards agreed at this Convention and attached to this communique
- recognise that while there may be a need for administrative divisions at different government levels for the management of heritage in Australia, the Commonwealth Government must take responsibility for leadership and standards setting for the conservation of all heritage places at whatever level they are managed
- and recognise that, while heritage places may be identified and managed by local, State and Territory governments and the community, there should nevertheless be a national, comprehensive inventory of heritage places, subject to confidentiality and other standards.

Following the convention, the Commonwealth released *A National Strategy for Australia's Heritage Places*. The paper outlined the Governments preferred position²⁸ for the purposes of consultation with stakeholders on developing the final form of a National Strategy.²⁹

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However, the Commonwealth was ultimately unsuccessful in gaining the support of the States and Territories for the Strategy. Senator Hill, the Commonwealth Environment Minister, later commented:³⁰

For some years we sought to develop a cooperative [heritage] model with the states that would achieve the goals that are set out in the COAG agreement. Basically, by the end of last year [1999] I formed the view that that was not going to work—that was after it had been rescued on a number of occasions in the hope that we could finally reach a resolution. Why wasn't it going to work? Largely because, when it came to the crunch, the states simply were not prepared to agree to consistent standards, were not even prepared to agree as to what areas of the environment should be covered by it and were not prepared to agree to a transfer of powers to the Commonwealth that would enable the Commonwealth to fully meet its part of the commitment....Having reached the conclusion that it simply was not going to work, we are now looking at what we can achieve consistent with the strategy through Commonwealth actions and that is the process we are embarked on at the moment.

With the failure to reach agreement on consistent standards to underpin heritage management across Australia, the Commonwealth then addressed itself to the aspect of the COAG agreement that it could implement unilaterally - the establishment of a National Heritage List.

The National Heritage List and the concept of 'national significance'

The issue of whether the Register should only contain places of 'national significance' was extensively discussed in the 1986 Environment Departmental review³¹. The report suggested that, as a long term objective, a graduated system of heritage registers might be developed, with the Register being 'a selective list of those places with significance for the nation as a whole'.³² Places with State or local significance would then be included in state and local registers. It appears that the report contemplated these places would still be afforded some type of (unspecified) protection under the AHCA.³³

The possibility of replacing the numerically large National Estate Register with a slimmed-down version was flagged by the Commission in its *A National Future for Australia's Heritage* paper referred to earlier. In the paper, the Commission stated that it intended³⁴

to explore the implementation of a...tiered system of heritage evaluation, in which, in partnership with the States

- the Commonwealth assumes a major responsibility for identifying and conserving *places of outstanding National value* (italics added by author)
- subject to bilateral agreements on appropriate standards and Strategies, State and Territory Governments assume more responsibility for identifying and conserving places of state and local significance

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A subsequent Commission paper, *Australia's National Heritage - Options for Identifying Heritage Places of National Significance*, noted that³⁵

consultation to date by the Commission has shown very mixed reactions to the notion of 'national significance' and hence to a list of such places...the Commission has not finalised its view on the creation of a national list...[it] believes that such changes should only be made if they result in a net gain for the protection of Australia's heritage places generally.

Such 'mixed reactions' seemed to have been carried through to the 1998 Heritage Convention referred to earlier. The report of the Ombudsman to the Convention commented³⁶

the largest group of representations were those which opposed a hierarchical or ranked national listing of heritage places. There was strong demand for retention of the Register of the National Estate as a comprehensive (all heritage types) unranked national identification register with an ongoing national heritage identification process. The proposed restricted 'national list' of outstanding national places was not supported if it meant the loss of the Register of the National Estate, and there were many comments about the desirability of having a national register which separates the process of heritage place identification from the protection and management decisions made by States, Territories and local government.

The 1999 *A National Strategy for Australia's Heritage Places* paper confirmed the Commonwealth's intention to proceed with developing the 'national list'. The paper also proposed 'criteria', at least one of which would need to be met in order for a place to be considered of 'national heritage significance'. These criteria were:³⁷

1. outstanding importance to the course, or pattern of our national natural or cultural history
2. possession of uncommon, rare or endangered aspects of our national natural or cultural history of outstanding national value
3. potential to yield information that will make an outstanding contribution to an understanding of our national natural or cultural history
4. outstanding importance in demonstrating the principal characteristics of a class of natural or cultural places or environments valued by the nation
5. outstanding importance in exhibiting particular aesthetic characteristics valued by the nation
6. outstanding national importance in demonstrating a high degree of creative or technical achievement at a particular period
7. outstanding importance for social, cultural or spiritual reasons in the context of national natural or cultural history

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8. having a special association with the life or works of a person, or group of persons, of outstanding importance in our national natural or cultural history, and
9. places that are listed on the World Heritage List will be automatically regarded as being of national heritage significance

No form of these 'criteria' are contained in the Bill itself, although proposed subsection 324C(1) provides that criteria are to set out in regulations. However, Environment Australia have said that draft criteria have been distributed and discussed in a series of stakeholder consultations and other briefings held over 2000.³⁸ These are at Appendix 2. It is understood that draft criteria have been considered by the Commission as of March 2001 and a version is now with Senator Hill.³⁹ It is not known whether these have been modified from those set out in Appendix 2.

Commonwealth Heritage Places

In addition to the National Heritage List, the Bill creates a Commonwealth Heritage list. A commitment to develop a list of Commonwealth Heritage places was contained in the Coalition's environment policy for the 1998 election.

Commonwealth Heritage places will have a separate set of criteria to the National Heritage List. Only places in Commonwealth areas may be placed in the List by the Minister. A listed place enjoys protection by virtue of sections 26 and 27A of the EPBCA. The Bill also introduces additional requirements for the Commonwealth and Commonwealth agencies regarding compliance with management plans for listed places: see proposed section 341T.

Main Provisions

Schedule 1 - Amendments to the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA) relating to the National Heritage List and Commonwealth Heritage List

Item 1 adds a new object into the EPBCA by **new paragraph 3(1)(ca)**: 'to provide for the protection and conservation of heritage'.

Existing subsection 3(2) describes the features of the EPBCA through which its objectives are meant to be achieved. **Item 2** adds the references to the National and Commonwealth Heritage Lists to these features at **new paragraph 3(2)(f)**.

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With the introduction of National and Commonwealth Heritage provisions into the EPBCA, it is sometimes necessary to limit existing heritage definitions so as to restrict them to provisions dealing with World Heritage. **Item 3** amends **subsection 12(4)** so as to restrict the application of ‘cultural heritage’ and ‘natural heritage’ definitions currently appearing in **subsection 12(4)** to section 12 only rather than the whole of the EPBCA.⁴⁰

Item 4 inserts **new sections 15B** and **15C** into the Act. These new sections are very similar to existing sections 12 and 15A which create civil and criminal offences for unlawful actions having significant impacts on the values of World Heritage properties - **15B** and **15C** create equivalent offences for **National heritage places**. The main difference is that existing sections 12 and 15A apply to all persons (because of the reach of the external affairs constitutional power) whereas **new sections 15B** and **15C** only apply to:

- actions by the Commonwealth, Commonwealth agencies and constitutional corporations
- actions undertaken for overseas and interstate trade and commerce
- actions taken in a Commonwealth area or a territory
- actions having a significant effect on indigenous heritage values (see **item 34** for a definition of indigenous heritage values), and
- actions having a significant effect on national heritage values relevant to Australia’s obligations under Article 8 of the Biodiversity Convention. Article 8 covers in-situ conservation⁴¹. However, **subsections 15B(6)** and **15C(12)** state that '[an offence only occurs in relation] to actions whose prohibition is appropriate and adapted to give effect to Australia's obligations under Article 8 of the Biodiversity Convention'. (see discussion under concluding comments for more on this).

As for existing sections 12 and 15A, civil penalties⁴² are \$55,000 for individuals and \$550,000 for corporations and criminal penalties are imprisonment up to 7 years or a fine of up to \$46,200, or both. By virtue of subsection 4B(3) of the *Crimes Act 1914*, a corporation convicted of criminal offence would face a maximum fine of \$231,000.⁴³

Note that **new sections 15B** and **15C** do not apply to forestry operations taken under Regional Forestry Agreements or to authorised actions in the Great Barrier Reef Marine Park.⁴⁴

Item 5 inserts references to national heritage values into a table in existing section 34. The table lists ‘matters protected’ – essentially these are the things or values which may trigger the need for Ministerial approval (and environment assessment) if a proposed action might have a significant impact upon them.

Item 6 inserts **new section 34BA** which provides for the circumstances in which the Environment Minister may make a section 33 declaration that an action does not need

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approval under Part 9 of the EPBCA even though it may have a significant impact on 'matters protected' under Part 3. Section 33 declarations can be made on the basis that an action has been already been approved by the Commonwealth under a previously accredited management plan

Item 6 essentially mirror existing sections relating to World Heritage properties, Ramsar wetlands etc in that the Minister may only make a section 33 declaration where he or she is satisfied that the declaration will promote the management of the place in accordance with the national heritage management principles *and* that it conforms to any requirements prescribed by the regulations. In addition, the Minister may only accredit a management plan if he or she is satisfied that the management plan will promote the management of the place concerned in accordance with the national heritage management principles. These principles are to be made by the Minister and Gazetted (**new section 324W**). As such these principles will **not** be disallowable as they would have been if they were made via regulations.

Item 7 inserts **new section 51A** which provides for the circumstances in which the Minister may enter into a bilateral agreement⁴⁵ that includes a provision relating to a national heritage place. **Item 7** essentially mirrors existing EPBCA sections relating to World Heritage properties, Ramsar wetlands etc in that again the Minister may only enter into a bilateral agreement where he or she is satisfied that the agreement will promote the management of the place in accordance with the national heritage management principles *and* that it conforms to any requirements prescribed by the regulations (see concluding comments on the role of the Council re agreements).

Item 8 makes a minor consequential change required by the insertion of **new section 34BA** into **item 6**.

Item 9 changes the name of Chapter 5 of the EPBCA from *Conservation of Biodiversity* to *Conservation of Biodiversity and Heritage*. Under the Bill, Chapter 5 will now also deal with the mechanics of how National and Commonwealth Heritage places will be listed, protected and managed.

Items 10-20 all insert heritage (both National and Commonwealth Heritage) references into Part 14 of the Act. Part 14 deals with conservation agreements. The purpose of the amendments is to allow conservation agreements to include the protection and conservation of National and Commonwealth Heritage places as part of their objectives.

Items 21 performs a similar function to **item 3** by restricting the definition of natural and cultural heritage to existing section 323. Section 323 requires that regulations be made setting out World Heritage management principles.

Item 22 inserts **new Division 1A** - *Managing National Heritage places*. Division 1A contains **new sections 324A-324Z**.

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New section 324B requires the Environment Minister to establish the National Heritage List. The Minister may only include a place in the National Heritage List if satisfied that the place has one or more national heritage values. It thus becomes a 'National Heritage Place'. *However, even if a place has national heritage values, the Minister does not have to put it on the National Heritage List.* See discussion of **new section 324H** for more on this.

New section 324C defines *national heritage values* as values that meet one or more criteria to be set out in regulations.⁴⁶ The effect of **new section 324C** is that the Minister must consider the criteria in making a decision whether a place has national heritage values. For a National Heritage place, its *national heritage values* are deemed to be those specified in the National Heritage list: **new subsection 324C(2)**. There is no obvious reason to why these criteria are left to regulations to be spelt out apart from providing the Government with more flexibility to amend them.

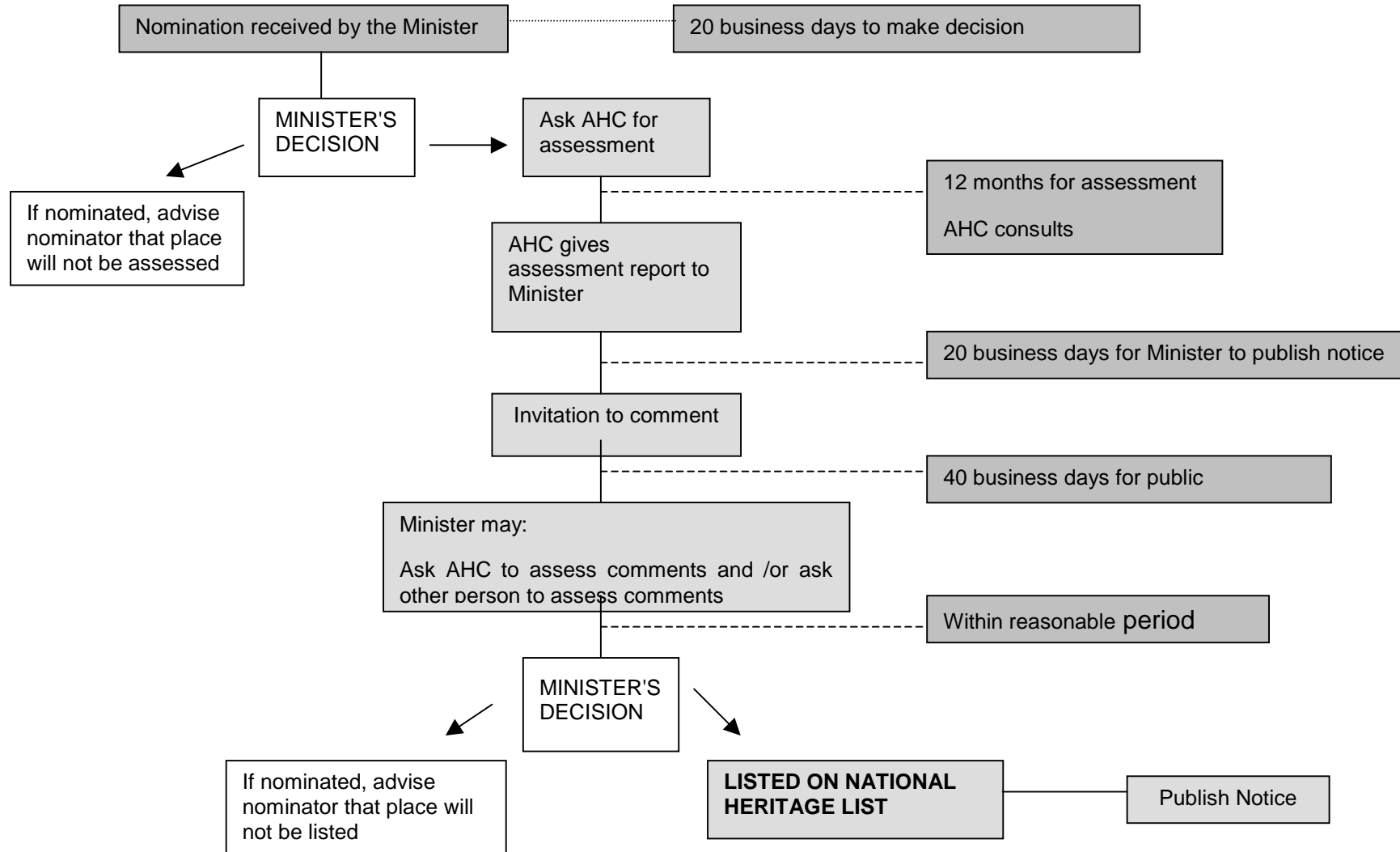
New section 324D covers how nominations be made and how there are initially dealt with. Nominations are to be made to the Minister.⁴⁷ Figure 2 is a simplified version of the proposed listing process.

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Figure 2: National Heritage List – the Listing Process



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Under **new section 324D**, any person, including the proposed Australian Heritage Council (the Council),⁴⁸ may nominate a place. A statutory time limit of 20 business days is imposed on the Minister to either

- ask the Council for an assessment of the place's national heritage values; or
- advise the person who made the nomination of the Minister's decision not to include the place in the National Heritage List. In this case, reasons must be given to the nominator for the Minister's decision.

The effect of the latter is the Minister may, in theory, reject a nomination without advice from the Council even though the place may have 'obvious' national heritage values. In the interests of transparency, particularly where the reasons for not listing may include matters not directly related to heritage values,⁴⁹ subsection 324D(2) could be amended to require the Minister to give an appropriate level of detail in these reasons. In addition, the Minister could be required to make these reasons public rather than just to the nominator.

Under **new section 324E**, if the Minister considers that a place has one or more national heritage values and one or more of these values are under 'imminent threat', he or she may put the place in the National Heritage List without going through the normal assessment process. Within 10 business days of such an 'emergency listing', the Minister must publish a notice advising of this action and must also refer the place to the Council for an assessment of its heritage values. The Council has 40 business days to complete this assessment dating from the Minister's referral unless the Minister extends this time.

The emergency list procedure is of course a necessary part of the protection regime. However, as the Minister is not obliged to publish that a place has been listed until ten business days after the fact, in theory a person could commit the criminal offence of damaging the National Heritage values of a place without knowing that it was on the National List. As a copy of the National List may be kept electronically, it might be appropriate to amend **new section 324E** to require the Minister to include the listing on the electronic list within 24 hours.

New sections 324F and **324G** deal with procedural aspects of the assessment of heritage values by the Council for nominated places.⁵⁰

New subsection 324F(2) requires the Council to, in undertaking the assessment, 'make reasonable efforts to notify' the place's owner and occupier, as well as any indigenous persons with 'rights or interests in the place' if it might have indigenous heritage value. These persons must then be given a 'reasonable opportunity' to comment on the possible inclusion of the place on the National Heritage List.

'Indigenous heritage value' is defined in **item 34** of the Bill. It is not clear what information that Council will draw on to make a judgment on whether a nominated place may have indigenous heritage value, although two members of the Council must have 'experience or expertise concerning indigenous heritage', one of whom must 'represent the

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interests of indigenous people'. While this should minimise any chance of the Council mistakenly concluding that no indigenous heritage values are likely to be present, the Bill could possibly add a requirement that the Council notify the relevant ASTIC regional council that is undertaking an assessment of a place lying within the Council's region. It would then be up to regional Council to advise the (Heritage) Council whether it was aware of any information that would assist the later in determining whether a nominated place may have indigenous heritage value.

New section 324F(3) specifies that Council cannot consider any matter that does not relate to the place's national heritage values when undertaking an assessment.

New subsection 324F(6) forbids the Council from undertaking an assessment of a place's national heritage values unless the Minister requests that it do so. This represents a significant curtailment of the Commission's existing independence, as at present it may undertake assessments on its own initiative. **New subsection 324F(6)** does however allow the Council to 'undertake research and investigations necessary for the purposes of nominating places to be included in the National Heritage List' without the express consent of the Minister.

Within 20 business days of receiving the Council's assessment, the Minister must invite public comments on the possible inclusion of the place on the National Heritage List: **new subsections 324G(1)-(2)**. This does not apply if the Council's assessment is that that place has no national heritage values. The notice must set out the place's heritage values (presumably as determined by the Minister) and invite comments within 40 business days or 20 business days if the place is already on the National List under the emergency listing provisions of **new section 324E**. Comments received would normally be assessed by the Council, however the Minister may ask another person with 'appropriate qualifications or expertise' to assess them (**new subsection 324G(5)**). However, it appears that the Minister does not have to refer them to anybody for assessment.

New section 324H deals with the decision whether to include a place in the National Heritage List. As previously mentioned, the fact that the Minister makes the decision whether or not to list is a very significant change to the current situation under the AHCA. The various arguments for and against this proposed change are covered in the concluding comments section of the Digest.

The Minister must make the decision whether or not to list within a 'reasonable period' after considering any **new section 324G** public comments. This implies that the Minister can indefinitely postpone a decision by postponing consideration of comments - a rather odd outcome given the statutory timelimits imposed on other aspects of the assessment process. The decision to list is at the Minister's discretion, although if the Minister decides not to list he or she must give reasons to the person who nominated the place: **new subsection 324H(1)**.⁵¹ The comments on providing reasons made in relation to 324D also apply to 324H. If the place has been listed under the emergency provisions, the Minister

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does not have to give reasons to remove it. A decision to list must be followed by a public notice which includes setting out the place's national heritage values.

New sections 324J and **324J** deal with removal of places from the National Heritage List. A place can only be removed by the Minister if he or she is satisfied that

- the place does not have any national heritage values; or
- it is necessary in the interests of Australia's defence or security to do so.

For comparative purposes, the grounds for removal of a place under the AHCA is that the Commission considers that it 'should not be recorded as part of the National estate'. Subparagraph 24(3)(a)(v) of the AHCA indicates that, in considering an objection to removal, the Commission gives 'upmost consideration to the significance of the place as part of the National Estate'.

On the first ground, the Minister must consult the Council on both the removal of the values applying to a place and removing the place from the National Heritage List. The length of time the Council has to provide advice to the Minister is decided by the Minister. The Minister must consider the Council's advice, but only if it is given to the Minister within the period decided by him or her. The Council must only consider matters 'relat[ing] to the national heritage values of the place concerned'. A decision to remove the value(s) or the place is disallowable by either house of Parliament under section 46A of the *Acts Interpretation Act 1901*. The Minister must give reasons for the removal in the instrument tabled before Parliament. The removal only takes effect after the expiry of the time limit for disallowance.

In relation to the latter ground, it is unclear whether, for example a place could be removed because it is situated on the site of intended military exercises. The Minister is not required to consult the Council if considering removal on this ground (**new subsection 324K(1)**), nor does the Parliament have any power to disallow the decision.

Additional national heritage values may be added to a place already on the National Heritage List. **New section 324L** appears to oblige the Minister to go through the full consultation and advisory procedure outlined in **new sections 324F-G** before adding any additional values.

New section 324N allows the Minister to give only a general description of a place, including its location and national heritage values⁵² if her or she considers it 'would be significantly damaged... by the presence or actions of persons' by a public disclosure of full information on the location, values or other aspects of the place. This reflects the current confidentially provisions in **existing section 24C** of the AHCA.

New section 324P imposes a duty on Council members not to disclose any information about a **new section 324F assessment** or **new section 324J advice** unless for 'official purposes'. This prohibition lapses 60 business days after the Minister has received the

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assessment or advice or after the Minister's decision has been made public via a notice for **new section 324F** or Gazettal for **new section 324J**. There is no such duty under the current AHCA. However a similar duty is imposed on members of the Threatened Species scientific committee under existing subsection 189(6) of the EPBCA in relation to their advice to the Minister on threatened species and communities.⁵³

New sections 324Q-U deal with the Ministers obligation to develop management plans for National Heritage places.

Subject to section **new 324R**, **new section 324Q** requires the Minister to develop management plans for places entirely within Commonwealth areas. The Bill does not place a time limit on the Minister to satisfy this requirement, although this time limit is to be prescribed in regulations: **new subsection 324Q(1)**. Any **section 324Q** management plan must 'be not inconsistent' with national heritage management principles. If these principles change, the Minister must amend the plan if necessary to avoid any inconsistency. Again there is no explicit time limit to make these amendments.

There are no public consultation requirements in developing management plans. A plan can be a plan developed under another Commonwealth law: **new section 324T**. In any case, a **section 324Q** plan must be reviewed every seven years. This compares five-year reviews for World Heritage and Ramsar properties under existing sections of the EPBCA. The review must specifically assess its consistency with the national heritage management principles in force at the time: **new section 324U**

The Commonwealth and Commonwealth agencies must not contravene a **section 324Q** plan: **new section 324S**. There are no penalties for any contravention that may occur, although the existing provisions in the EPBCA regarding injunctions for breaches of the Act will apply.

New section 324R provides that the Minister must not make a **new section 324Q** plan any part of a place if it is within either

- the Heard and McDonald Island Territory and is covered by a plan in operation under the (Territory) *Environmental Protection and Management Ordinance 1987*, or
- a Commonwealth reserve and is covered by a plan under the EPBCA.

There is no requirement that, in these cases, such pre-existing management plans be amended to 'be not inconsistent' with national heritage management principles. However, **new paragraph 367(1)(j)** (see **item 24**) requires that a plan for a Commonwealth reserve that includes a National Heritage or Commonwealth Heritage place must 'take account' of the National Heritage or Commonwealth Heritage principles.

New section 324V deals with the management of national heritage places that lie wholly or partially within an area under State or Territory jurisdiction.⁵⁴

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New subsection 324V(2) provides that the Commonwealth must use its 'best endeavours to ensure' that a management plan, not inconsistent with the national heritage management principles, is prepared for every national heritage places that is covered by section 324V. The Commonwealth and Commonwealth agencies must 'take all reasonable steps' to exercise their powers and their functions 'not inconsistently with principles and the plan', if any: **new subsection 324(3)**. These obligations under **new section 324V** mirror those under existing sections 320-322 of the EPBCA relating to World Heritage Properties in areas under State or Territory jurisdiction.

New section 324W requires the Minister to make and gazette National Heritage management principles. There are no consultation requirements in developing these principles. The EPBCA as passed in 1999 required that regulations be made to prescribe management principles for World Heritage properties, Ramsar properties and Biosphere reserves. **New section 324W** also allows for the making of regulations that impose obligations on persons so as 'to implement or give effect' to any National Heritage management principles. There is no indication what these obligations might be.

New section 324X requires that if a Commonwealth agency sells or leases Commonwealth land that includes a National Heritage place, the sale or lease contract must include a covenant 'the effect of which is to protect' the National Heritage values of the place. The agency must also 'take reasonable steps to ensure as far as practical' the covenant binds subsequent owners or lessees.

New section 324Y provides that the Commonwealth may give financial or other assistance to State or Territory governments or another person to help identify, promote, protect or conserve national heritage places. Part VA of the AHCA currently allows State and local Government and incorporated non-profit organisations to apply to the Minister for grants 'in respect of National Estate projects'. During 1999-2000, this grants program was subsumed within the Governments Cultural Heritage Projects program.

New section 324Z requires that the Minister must ensure a review of the National Heritage List is carried out at least every ten years and that a report of that review is tabled in Parliament. This implies that the review itself may not be published, although this may merely be semantics. Also, there is nothing in **new section 324Z** that would prevent the review and the report being carried out by a third party without any involvement of the Council.

Under **subsection 324Z(2)**, the report must include details of the following:

- the number of places included in the National Heritage List;
- any significant damage or threat to the national heritage values of those places;

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- how many heritage place management plans have been made, or are being prepared, and how effectively the plans that have been made are operating;
- the operation of any conservation agreements under Part 14 of the EPBCA that affect national heritage places; and
- any other matters that the Minister considers relevant.

Paragraph 43(1)(a) of the AHCA currently requires the Commission to report annually on the 'condition of the national estate' and any other matters 'relating to the national estate that it thinks fit'.

New sections 341A-341ZB deal with **Commonwealth Heritage places**.

The content and effect of **new sections 341A-341ZB** largely duplicate **new sections 324A-324Z**, except of course that they deal with Commonwealth Heritage places rather than National Heritage places. The following commentary will therefore only deal with provisions where they significantly depart from equivalent sections **new 324A-324Z** or where otherwise warranted.

New section 341B provides that a place may only be included in the Commonwealth Heritage List if the Minister is satisfied **both** that the place has one or more Commonwealth Heritage values and is entirely within a Commonwealth area.

The assessment, public consultation and Ministerial decision-making processes for Commonwealth Heritage places are the same as for National Heritage places.

New section 341Q deals with the development of management plans for Commonwealth Heritage places. Each Commonwealth agency that owns or controls a Commonwealth Heritage place must develop a management plan for the place.⁵⁵ The plan must be developed within a timeframe set out by regulation and must not be inconsistent with the Commonwealth Heritage management principles.

Before making, amending or revoking and replacing a plan for managing a Commonwealth heritage place, the relevant agency is required to seek the (Environment) Minister's advice on the matter and must take account of any advice received from him or her relating to the place. The Minister must consult with the Council in preparing any advice for the agency. The agency must give notice (but not a prior notice), in accordance with the regulations, if it makes, amends or revokes and replaces a plan for managing a Commonwealth heritage place

Section 341R deals with the accreditation of management plans for Commonwealth Heritage places. It has no direct counterpart for National Heritage places. It allows the Minister to accredit a Commonwealth agency management plan for Commonwealth heritage place. From the agency's perspective, the advantage in having a plan accredited is that it does not have to seek **new section 341Y** advice about taking actions (providing they are in accordance with that plan) that may have a significant impact on a place.

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Under **subsection 341R(2)**, the Minister may only accredit a plan that the Minister is 'satisfied provides for the conservation of the Commonwealth Heritage values of the place concerned'. He or she is also prohibited from accrediting a plan that the Minister considers is 'inconsistent' with Commonwealth heritage management principles. The Minister may revoke accreditation if he or she 'considers it appropriate to do so': **new subsection 341R(3)**.

New section 341W requires the Minister to develop and gazette Commonwealth heritage management principles in the same way as for National Heritage management principles. Again, regulations may be made to impose obligations on persons so as to implement or give effect to these principles.

New sections 341X and 341Y create obligations for Commonwealth agencies with respect to Commonwealth heritage places.

New section 341X requires that a Commonwealth agency that owns or controls a place that has, or might have, one or more Commonwealth heritage values 'must take all reasonable steps to assist the Minister and the [Council] in the identification and assessment of the place's Commonwealth Heritage values'.

New section 341Y provides 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',⁵⁶ the agency must ask the Minister for advice about taking the action. The Minister must consult with the Council in preparing the **new section 341Y** advice.

Item 24 inserts a **new paragraph 367(1)(j)**. Existing subsection 367(1) sets out what a management plan for a Commonwealth reserve must contain. If a Commonwealth reserve includes a National Heritage or Commonwealth Heritage place, **new paragraph 367(1)(j)** requires that the plan 'take account' of the National Heritage or Commonwealth Heritage management principles.

Items 25 and 26 insert references into existing subsection 391(3).

The effect of **item 25** is that, in making a management plan for a National Heritage place that is entirely within a Commonwealth area or areas, the Minister must take into account the precautionary principle as defined in subsection 391(2). **Item 26** provides that the Minister must do likewise in deciding under **new section 341R** whether to accredit a Commonwealth agency's management plan for a Commonwealth Heritage place under its control.

Item 27 extends the principle of criminal liability of corporation executive officers to situations where the (constitutional) corporation commits an offence regarding National Heritage under **new section 15C**. Liability would only occur if the officer:

- knew that, or was reckless or negligent as to whether, the contravention would occur; and

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- was in a position to influence the conduct of the body in relation to the contravention; and
- failed to take all reasonable steps to prevent the contravention.

A conviction carries a penalty of up to 2 years imprisonment.

Item 33 inserts a definition of 'heritage value' into existing section 528, which is the list of general definitions under the EPBCA. The definition is

[the] heritage value of a place includes the place's natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.

This definition is quite similar to the existing definition of 'National Estate' in subsection 4(1) of the AHCA.

Item 34 inserts a definition of 'indigenous heritage value' into existing section 528. The definition is

[the] indigenous heritage value of a place means the heritage value of the place that is of particular significance to indigenous persons in accordance with their traditions.

Item 40 inserts a definition of 'place' into existing section 528. To paraphrase the definition, it includes:

- a location, area or region;
- a building or other structure, or group of buildings or other structures (including furniture or other articles); and
- in relation to the protection, maintenance, preservation or improvement of a place - its immediate surroundings.

Schedule 2 - Amendments relating to Director of Indigenous Heritage Protection

Note: clause 9 of the **Aboriginal and Torres Strait Islander Heritage Protection Bill 2000** proposes to establish the position of the Director of Aboriginal and Torres Strait Islander Heritage Protection. As at the time of writing, that Bill has not been debated since late 1999.

Item 1 relates to the obligations of the Council in assessing the National Heritage values if it considers the place might have indigenous heritage value. In such a case, the Council must request that the Director of Aboriginal and Torres Strait Islander Heritage Protection to provide it with written advice on the place's indigenous heritage value. If the Director's advice is received with the statutory timelimits,⁵⁷ the Council must consider it in its assessment.

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Item 2 replicates **item 1**, except that it relates to assessment of potential Commonwealth Heritage places.

Schedule 3 - Transitional provisions relating to the Register of the National Estate

Item 1 provides that a place that is on the Register of the National Estate may be transferred by the Minister to the Commonwealth Heritage List. This transference must take place within 6 months of the Bill's commencement. The place in question must be within a Commonwealth area and the Minister must be satisfied that the place has one or more Commonwealth Heritage values.

It appears no procedural elements apply: for example there is no public consultation process, and Minister does not have to seek the advice of the Council in reaching this conclusion on the transfer, although the Minister's decision must be gazetted. It is understood that the rationale behind this is to minimise the resources required to transfer places given that they have already been through the assessment, public consultation and objections process required under the AHCA.

Any places transferred to the Commonwealth Heritage List under Schedule 3 must have their Commonwealth Heritage values recorded on the List.

Concluding Comments

Listing a Heritage Place: the relationship between the Council and the Minister

A substantial number of the submissions to the Senate Inquiry into the Bill⁵⁸ express varying degrees of concern about the relationship between the Council and the Minister. In particular, that the decision to list a place is to be made by the Minister rather than the Commission as is presently the case under the AHCA. These views tend to emphasise a distinction between the listing process and the management process following listing. For example, the submission by the Australian Conservation Foundation (ACF) comments that⁵⁹

listing is a technical decision, not a political decision, and needs to be based on clearly defined and specified criteria. It is a decision in which the Minister should be seen to be at arms length and one for which the Australian Heritage Council should be publicly accountable through a public appeals process....it is very important that there is a clear separation of responsibilities between listing decisions as against management decisions or political decisions. It is not appropriate for the Minister to make the decision on whether or nor to list a place and then to be the person

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responsible for making the decision on whether a proposed action is significant and would adversely affect the place. It will be, and should be, the Minister who makes the decisions on actions affecting heritage places. This is the appropriate and timely circumstance for Ministerial involvement.

However, Environment Australia's submission expresses a contrary view, suggesting that such a differentiation is unrealistic under the EPBCA:⁶⁰

[the EPBCA's] protection provisions (unlike the *Australian Heritage Commission Act 1975*) has major enforcement, social and economic ramifications including matters binding on the Government...There is an argument that the Government should own such decisions and own the budget implications. An independent listing process runs the risk of the outcomes being marginalised by Government in the absence of ownership...(there are also) key issues of federal-state relations involved more akin to World Heritage Listing. The precedents for conflict include the Tasmanian dams and forests controversies and the controversy associated with the listing of the Wet Tropics Rainforests. It is difficult to contemplate that these issues could have been managed by independent heritage listing bodies.

Environment Australia also suggests that there is no valid precedent at State level for a fully independent heritage council with listing powers in relation to natural or indigenous heritage:⁶¹

Only South Australia, Tasmania and Victoria have listing powers,⁶² the balance of the State/Territory Heritage Councils have advisory roles to the Minister...[however]... Heritage at the State/Territory level invariably means *historic heritage*. When the operation of independent state Heritage Councils is advanced in support of a similar Commonwealth arrangement the argument is like comparing chalk and cheese. The state arrangements work comparatively smoothly because by and large they only deal with historic heritage.

A number of submissions suggest compromises between the current AHCA 'Council as lister' model and the proposed 'Minister as lister model'. These include:

- having the Council as 'default lister', but giving the Minister a call-in power so as to become the decision-maker on certain nominations, or
- having the Minister as the decision-maker, but requiring him or her to make public all the reasons for not listing, including those unrelated to the question of its heritage significance.

It is important to note that adding a place on to the proposed National or Commonwealth Heritage Lists does not provide an absolute prohibition against its damage or destruction. The Environment Minister can approve, through the procedures set out in the EPBCA,⁶³ an action that would damage or destroy a listed place. On the other hand, given that Government has clearly flagged that they intend to reduce the number of places protected (particularly under the National List) it is likely that that they will put a high priority on

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fully protecting these places. If this is so, listing a place may well have the sort of ramifications mentioned in Environment Australia's evidence above. It is notable that in giving evidence to the Senate Inquiry, officials from the South Australian Government argued that a place should only be listed with the agreement of the relevant State or Territory.⁶⁴

With this in mind, there is a stronger argument for increased Minister involvement in the National Heritage listing process than is the current situation under the AHCA. The argument in relation to the Commonwealth List is however somewhat weaker, given that the place will be on Commonwealth land and thus at least there is likely to be less direct impact on private owners or State and Territory Governments.

Transparency and Accountability in the listing process

An issue related to the Council-Ministerial relationship above, is that of transparency and accountability in the assessment and listing process.

Under the Bill, the Minister is required to invite public comments on the proposed inclusion of a place unless he or she refuses the nomination under new sections 324D or 341D. The Bill does not specify what issues the Council or Minister will consider as relevant to their consideration of any comments received.⁶⁵ In giving its assessment of the places heritage values under new sections 324F and 341F, the Council cannot consider any matter unrelated to these values but no such prohibition applies if the Minister asks for the Council's advice on the 'merits' of any public comments under new sections 324G and 341G. The Bill requires the Minister to consider any public comments, but does not expressly require the Minister to consider or take into account the Council's advice in relation to these comments.

While these may be relatively minor issues, the transparency of the decision-making process would be improved if these issues were clarified. Certainly sections of the mining industry have expressed concern about the process:⁶⁶

If, for instance, there is a nomination made of a particular area, we want all of the issues pertaining to that particular proposal, including the heritage values, to be considered in an open forum where you are not closed off from making representations—a formal process so that all these matters can be heard. If in the end the decision is against you, at least you will have been able to make all the representations possible and, if you failed to convince the group, then so be it. That is the way business operates.

In terms of accountability, there have been also suggestions from the mining lobby that a decision by the Minister to list a place⁶⁷ should be subject to greater scrutiny - for example that listing should be disallowable by Parliament. In practice, this would mean the opposition combining with independents or minor parties to disallow this in the Senate. Judicial review and injunctions preventing contraventions of the EPBCA are available in

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relation to the heritage assessment and listing process. However, these will only have much relevance to procedural matters, not the merits of how the Minister exercises his or her discretion in the assessment and decision-making process.

Transitional Protection Issues

The Australian Heritage Council Bill 2000 comes into force at the same time as the Environment and Heritage Legislation Amendment Bill (No.2) receives Royal Assent. The AHCA section 30 protection given to places on the Register of the National Estate ceases at this point. However such places should continue to be covered under sections 26-28 of the EPBCA as discussed earlier in this digest.

In terms of the new heritage scheme under the Bill, obviously it will take some time for the assessment and listing process to be completed for those places likely to be included on the National and Commonwealth Heritage List. Places on the Register also on Commonwealth land cannot be transferred to the Commonwealth Heritage List under Schedule 3 until the criteria for Commonwealth Heritage values are developed by the Government. Similarly, places cannot be given emergency listing on the National Heritage List under new section 324E until National Heritage values criteria are developed. It would seem therefore seem important that Royal Assent to the Bill does not take place until these criteria are developed, thus allowing the Minister to take action on transferences and emergency listing.

What will happen to those National Estate places that don't make the National or Commonwealth Heritage Lists?

For those places on the Register of the National Estate that are transferred across to either the National and Commonwealth List, the Bill certainly potentially offers more comprehensive protection against destruction or significant damage than under the AHCA.

Of course, it is not possible to predict how many places will receive listing under either category. However, it is understood around 800 places on the Register are on Commonwealth land and as such potentially eligible for transference to the Commonwealth Heritage List under Schedule 3. It is unknown how many National Estate places not on Commonwealth land are also currently included on State Registers and thus potentially having some protection under State law.

Oral evidence presented to the Senate Inquiry suggests there is substantial variation between States and Territories 'in their attitude to heritage...not all their legislation is equal, and I would be gravely concerned about Aboriginal places in some states.'⁶⁸ And, as previously noted, not all jurisdictions have much in the way of natural heritage protection. Of course, the Commonwealth had originally intended to deal with this variation through an accreditation process developed through the National Strategy.⁶⁹

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If they are items that were assessed to be primarily of state heritage significance, and the concept is that if the states have a heritage protection regime that meets certain accredited standards, then responsibility for the protection would be transferred to the states.

However, with the collapse of this element of the National Strategy, significant numbers of places on the register will only have protection under existing section 28 of the EPBCA. Section 28 only binds Commonwealth agencies, not State or local governments or private parties.

Management, lease and disposal of Commonwealth Heritage Properties

A number of organisations providing evidence to the Senate Inquiry argued that the provisions relating to the management, lease and disposal of National and Commonwealth Heritage places should be strengthened. For example, Emeritus Professor David Yencken suggested that there was a lack of specific recognition of recommendations of the Schofield report in the Bill.⁷⁰

I think they are all really important recommendations. The first one that perhaps needs to be noted is that Commonwealth agencies should be asked to identify all heritage places under their control and to develop and maintain heritage inventories of those places. Secondly, there needs to be greater protection, as recommended in the Schofield report, for heritage places proposed to be sold or let by the Commonwealth. Thirdly, the Schofield report recommended that Commonwealth agencies should prepare and maintain a heritage strategy for the management of their heritage places. That is not just a plan of management for any place listed on the Commonwealth list, as proposed here, but an overall strategy for all the places under their responsibility. Finally, the Schofield report recommended that state environment, heritage and planning laws should apply to the Commonwealth. Those are four things that are not dealt with in this bill.

In its written submission, the Environmental Defenders Office Network contended that⁷¹

whilst [sections 324X and 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 [these sections] represent the least effective means of heritage protection over Commonwealth lands.... Accordingly, sections 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.

At the Senate Inquiry hearings, Environment Australia acknowledged criticism of the proposed protective measures relating to the sale of Commonwealth properties but said that⁷²

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We proposed that right through the national briefings, hoping somebody would leap to their feet and provide a better solution....If somebody can develop a better, more workable system in relation to protection of heritage through the sale of property, then we would be certainly interested in it; but, through the protracted consultation process, that appeared to be the simplest and most workable of the options that were open.

It is also important to note that items 10-20 of the Bill allow for Part 14 EPBCA conservation agreements to be entered into for the purpose of protecting and managing National or Commonwealth heritage places. Section 307 of the EPBCA provides that such conservation agreements are legally binding on the successor to the place covered by the agreement.

Does the concept of 'significant impact' make sense in the heritage context?

The concept of 'significant impact' is central to the operation of the proposed heritage scheme in that the prohibitions against taking an action only come into effect if that action has, or is likely to have, a significant impact of the relevant heritage values (or environment). This compares to the lower threshold of 'adversely affect' under the AHCA.

A number of submissions to the Senate Inquiry questioned whether the concept of 'significant impact' was appropriate in the heritage context. For example, the Australian Council of National Trusts commented:⁷³

The legislation implies that 'significant impact' will be defined in terms of current environmental impact on the natural environment and therefore large-scale physical impacts will act as national triggers. This is not appropriate for cultural heritage places which are, unlike natural places, non-renewable, and where any destruction of historical fabric, no matter how minor, involves permanent loss. Also, a series of minor physical changes will collectively and cumulatively lead eventually to the total loss of heritage value, particularly in precincts comprising several places.

'Significant impact' should be redefined to take into account the difference between natural and cultural heritage places. There should be a different system set in place that reflects current best practice planning permission for changes to heritage properties.

Similar comments were made in oral evidence by representatives of Australia Council of National Trusts.⁷⁴

Administrative guidelines have already been developed to provide guidance on what constitutes a 'significant impact' for the purposes of matters of national environmental significance in Division 1 of Part 3 of the EPBCA.⁷⁵ In light of the concerns expressed to the Senate inquiry above, it will be important that guidelines are developed for heritage as soon as possible and they give particular attention to the special aspects of cultural and indigenous heritage.

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Indigenous Heritage

Many of the issues raised in its submission and oral evidence given by the Aboriginal and Torres Strait Islander Commission (ATSIC), such as the Minister being the decision-maker regarding listing, are covered elsewhere in the concluding comments section of the Digest.

An important issue is how many places of significance to indigenous people are likely to come within the yet to be developed criteria for National heritage value and Commonwealth heritage values. It is not clear from the draft National heritage value criteria in Appendix 2 how, with exception of icon sites such as Uluru or significant/unique sites evidencing historical occupation,⁷⁶ places of significance to indigenous people will be dealt with. Certainly ATSIC have argued that the Bill should be amended so that 'all indigenous sites are considered as important in the national interest'.⁷⁷

There was also some question whether all indigenous sites currently on the Register of the National Estate should be placed on the Commonwealth list. In giving oral evidence to Senate Inquiry, Emeritus Professor David Yencken suggested that during consultation with some Aboriginal communities the Commonwealth had said that 'all indigenous sites would be placed on the Commonwealth list'.⁷⁸ Environmental Australia commented that:⁷⁹

there was a suggestion during the consultation program that indigenous places be in fact included on the Commonwealth heritage list, and that was canvassed through the briefings. This did not make it through the legislative drafting phase as it was considered to go beyond what the Commonwealth list was designed to achieve.

As the Bill now stands, only places wholly within Commonwealth areas will be potentially be eligible to be put on the Commonwealth heritage list.

Compensation

Section of 51(xxxi) of the Constitution allows the Commonwealth to acquire property 'on just terms...for any purpose in respect of which the Parliament has power to make laws'. Section 519 of the EPBCA provides that in the case of such acquisition the Commonwealth 'must pay the person a reasonable amount of compensation'.

In what circumstances might the Bill's heritage provisions give rise to the possibility of acquisition? The High Court has found that while it is not necessary for the Commonwealth to compulsorily resume or occupy land for an acquisition to occur, it must gain some benefit or advantage from its action. In the Tasmanian Dams case⁸⁰, a majority of the Justices that considered the issue found that the prohibition against damaging the heritage property under the *World Heritage Properties Conservation Act 1983* did not constitute an acquisition because of the lack of a identifiable benefit or advantage to the Commonwealth.

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The Dams case still represents good law in this respect. However, there are some indications that some High Court justices are prepared to take a more flexible view of what 'benefit' the Commonwealth must receive in order for acquisition to occur.⁸¹ As such, although the provisions of the Bill extending the Commonwealth's control over places of heritage significance would not as a general principle give rise to a section 51(xxxi) acquisition, it is conceivable that there may be instances that the Commonwealth gains some sort of benefit by declining to approve an action affecting heritage values.

In any case, some evidence to the Senate Inquiry questioned the adequacy of providing compensation only where constitutionally required under section 51(xxxi):⁸²

...the draft legislation is most inadequate in its treatment of the issue of just compensation for persons who are demonstrably disadvantaged by the heritage listing of a particular place. There is a reference to compensation for property acquisition but that is where the draft legislation stops. There is a whole range of losses that could be suffered and are not recognised, ranging from decreases in property values to loss of access to consequent increases in cost due to processes that have to be met. There is no adequate or reasonable mechanism provided in the proposed legislation to determine issues of compensation apart from pursuing the matter in the Federal Court, presumably at one's own cost. It is AMEC's recommendation that an independent tribunal needs to be established to deal with issues of compensation as a matter of natural justice and general fairness. As it is, the draft legislation by virtue of its deficiencies with respect to compensation will serve to incite community antagonism towards the worthy objectives of heritage preservation.

Subsections 15B(5)-(6) and 15C(11)-(12) Offences

The offences created by new subsections 15B(5)-(6) and 15C(11)-(12) are based on the external affairs constitutional power. The phrase 'is appropriate and adapted to give effect to Australia's obligations' appears to two places in the EPBCA; existing paragraph 25(5)(e) and subparagraph 301A(d)(ii). Subsection 25(5) serves only to list the constitutional heads of power that an additional 'matter of national environment significance' must be based on. It does not create an offence per se. Similarly, section 301A lists what type of regulations may be made to control non-native species - so again it does not of itself create an offence.

The possible difficulty with new subsections 15B(6) and 15C(12) is that it is unclear what the scope of the limitations that they impose on the offence of having a significant effect on biodiversity heritage values will be. This might potentially be overcome by making a specific acknowledgment in the places subsection 324H(1) / 341H(1) statement of heritage values that it has been listed to promote Australia's obligations under Article 8.

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Appendix 1 - Section 4(1A) of the Australian Heritage Commission Act 1975

S.4(1A) Without limiting the generality of subsection (1), a place that is a component of the natural or cultural environment of Australia is to be taken to be a place included in the national estate if it has significance or other special value for future generations as well as for the present community because of any of the following:

- (a) its importance in the course, or pattern, of Australia's natural or cultural history;
- (b) its possession of uncommon, rare or endangered aspects of Australia's natural or cultural history;
- (c) its potential to yield information that will contribute to an understanding of Australia's natural or cultural history;
- (d) its importance in demonstrating the principal characteristics of:
 - (i) a class of Australia's natural or cultural places; or
 - (ii) a class of Australia's natural or cultural environments;
- (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;
- (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;
- (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;
- (h) its special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history.

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Appendix 2 - Draft Criteria for assessment of places on the National Heritage List⁸³

Step 1 Selection within National Themes

1.1 The place must clearly represent or demonstrate a National Theme(s) according to an agreed framework that covers the natural, indigenous and historic environments. Explanatory text will establish key aspects or elements of these themes that should be represented in the National List (as opposed to State or Local Government lists).

Step 2 Assessment against criteria

2.1 The place must be of symbolic, exemplary and/or unique significance to Australia.

2.2 Without limiting the generality of 2.1, the place in its attributes and values will satisfy at least one of the following to the highest degree:

2.2.1 the place is of national importance in the past course or present pattern of nature and cultures in Australia;

2.2.2 the place has the potential to make a contribution of national importance to the understanding of Australia's history or environment;

2.2.3 the place is recognised as being of national importance for its landmark or aesthetic quality, social, or other cultural associations;

2.2.4 the place is a representative example with the principal characteristics of a class of places or environments of national importance to Australia;

2.2.5 the place is of national importance as an uncommon aspect of the history, cultures and/or environments of Australia;

2.2.6 the place has special associations with the life or works of a person or group important to Australia;

2.2.7 the place demonstrates creative or technical excellence of national importance.

Other Factors

The Council may also advise the Minister on any matter relating to the significance of the place.

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DEFINITIONS:

Attributes are the characteristics and or qualities of values that contribute to the national significance of a place.

Exemplary to Australia means the place is a typical or illustrative example of a type, pattern or process distinctive of Australia.

A National Theme is a subject that forms the matter for discourse about the heritage of a place or places.

Symbolic to Australia means the place represents or recalls an object, event, idea or process that is recognised as important by the Australian people.

Unique to Australia means the place is the only one of, or the best or last remaining example of a particular type in Australia.

Values are a measure of the worth, merit and significance of a place, for present and future generation.

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Endnotes

- 1 See comments under Schedule 3 in the main provisions section of this Digest.
- 2 *Report of the Committee of Inquiry into the National Estate* 1974.
- 3 *Labour Party Policy Speech* 13 November 1972.
- 4 This appears to mean the Commonwealth Government.
- 5 *Report of the Committee of Inquiry into the National Estate*, op cit , p 239.
- 6 *ibid.*
- 7 A non-statutory interim Commission was in fact established in 1974 immediately after the tabling of the Hope report.
- 8 Subsection 4(1).
- 9 These are listed under subsection 4(1A) of the AHCA.
- 10 The criteria are at <http://www.environment.gov.au/heritage/register/furtherinfo/criteria.html>
- 11 *Australian Heritage Commission v Mt Isa Mines* (1995) 560 FCR 456 at 468.
- 12 *ibid* at 465.
- 13 *Australian Heritage Commission v Mt Isa Mines* (1997) 142 ALR 622.
- 14 Including through the emergency listing procedures.
- 15 Note that the definition of 'action' incorporates governmental decisions, including licensing and permit approvals, grants etc.
- 16 This expression apparently derives from paragraph 4(f) of the US *Department of Transportation Act 1966*, which prevents the Secretary of Transportation from taking for transportation projects certain categories of land including public park and recreation lands, unless there is no 'feasible and prudent alternative' to such action: James 1995. The interpretation of 'feasible and prudent alternative' was recently considered at length by the Administrative Appeals Tribunal in *North Queensland Conservation Council vs Great Barrier Reef Marine Park Authority, 2000, unreported*. While it appears its exact meaning will turn heavily on what a court considers is the underlying purpose of the action, it is clear that all relevant economic, social and environmental factors need to be taken into account.
- 17 Over three-quarters of these were places listed due to their natural heritage values. Around two thousand for natural values, with the remainder for indigenous values.
- 18 Australian Heritage Commission, *1999-2000 Annual Report*, pp13-14.
- 19 The definition of action is narrower than that in the AHCA. It does not include decision-making.
- 20 Bills Digest No. 47 1997-98. <http://www.aph.gov.au/library/pubs/bd/1998-99/99bd047.htm>
- 21 *ibid.*

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- 22 *Review of the Commonwealth Government's Role in the Conservation of the National Estate*, Department of Arts, Environment and Heritage August 1986.
- 23 This has been referred to earlier in this Digest.
- 24 Australian Heritage Commission, *1999-2000 Annual Report*, p 41.
- 25 The Heads of Agreement noted that 'indigenous heritage issues are being addressed in a separate process and are not covered by this Agreement'.
- 26 *Reform of Commonwealth Environment Legislation*, Consultation paper issued by the Senator Hon Robert Hill, 1998.
- 27 See http://www.environment.gov.au/heritage/policies/nhc/4_convention.html
- 28 The paper represented a 'draft strategy': *A National Strategy for Australia's Heritage Places*, p 3.
- 29 Note that the paper did not include details of the legislative mechanisms for listing and protecting heritage. At the time of the papers release (April 1999), the EPBCA was still being debated in Parliament.
- 30 Senate Environment Committee, Consideration of Budget Estimates, 22 May 2000, p 69.
- 31 *Review of the Commonwealth Government's Role in the Conservation of the National Estate*, op cit, paragraph 3.46.
- 32 *ibid.*
- 33 Paragraph 3.45 of the Report says in part: 'appropriate amendments would need to be made to the [AHCA] to alter the definition of the national estate and to specify the protection afforded by the Act to those places in State and local registers'.
- 34 Page 11.
- 35 Preface, p v.
- 36 National Heritage Convention - *Report of the National Heritage Convention Ombudsman*. See http://www.environment.gov.au/heritage/policies/nhc/7_ombudsman.html
- 37 *National Strategy for Australia's Heritage Places*, op cit, p 22.
- 38 Oral evidence by Mr Bruce Leaver, Environment Australia, to the Senate Committee 7 March 2001 ECITA 123.
- 39 op cit, ECITA 121
- 40 Section 12 of the EPBCA sets out the circumstances under which a person can take an action that will have a significant impact on the world heritage values of a World Heritage property.
- 41 Article 8 of the Convention emphasises the need to establish protected areas and conserve threatened ecosystems and species in their natural habitat. See <http://www.biodiv.org/chm/conv/art8.htm>
- 42 Civil offences do not require the fault element (intention, recklessness etc) that criminal offences do.

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- 43 See item 27 in relation to the responsibility of corporate officers for offences.
- 44 This is because of existing sections 38 and 43 of the EPBCA.
- 45 This would encompass both a section 47 'assessment bilateral' and a section 46 'approval bilateral'. A further discussion of bilateral agreements can be found at <http://www.aph.gov.au/library/pubs/rn/1999-2000/2000rn16.htm>
- 46 The Commission has adopted criteria to assess places for possible inclusion on the register of the National Estate. They are expansion on the list of 'indicative matters' added to the definition of the National Estate under the 1991 amendments to the *Australian Heritage Commission Act*. This criteria (which are not legally binding) can be viewed at: <http://www.environment.gov.au/heritage/register/furtherinfo/criteria.html>
- 47 The AHCA is silent on this issue but in practice nominations are generally made through the Commission.
- 48 To be created under the Australian Heritage Council Bill 2000.
- 49 For example, probable claims for compensation from existing landowners resulting from the potential lowering of property values arising from listing.
- 50 See also new section 324L.
- 51 See also comments on the requirements to provide reasons under new subsection 324D(2).
- 52 This information would appear in the List or any other notice or document created for the purpose of the Act.
- 53 The non-disclosure period is 90 days under subsection 189(6).
- 54 Such areas include coastal waters to which States and Territories have title under the legislation implementing the 1979 Offshore constitutional settlement (OCS).
- 55 However, no plan must be developed if any part of a place is within either the Heard and McDonald Island Territory and is covered by a plan in operation under the (Territory) *Environmental Protection and Management Ordinance 1987*, or a Commonwealth reserve and is covered by a plan under the EPBCA.
- 56 Note that the impacts relate to the 'place' rather than 'values'. The EPBCA generally uses the term 'place' or 'environment' in relation to Commonwealth land or waters as opposed to 'value' in relation to the World Heritage and Ramsar Wetlands matters of national environmental significance covered by Division 1 of Part 3 of the Act.
- 57 In general, this is 40 business days, although a timelimit of 20 business days applies for places listed under emergency provisions.
- 58 Inquiry by the Senate Environment, Communications, Information Technology and the Arts Committee into the Environment and Legislation Bill (No.2) and related Bills (Senate Inquiry).
- 59 Submission 16 p6 http://www.aph.gov.au/senate/committee/ecita_ctte/hert2000/Sub16HB.pdf

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- 60 Submission 18 p 3. Note that this submission was signed off by Mr Bruce Leaver who is both Executive Director of the Commission and Head of the Heritage Group of Environment Australia. See http://www.aph.gov.au/senate/committee/ecita_ctte/hert2000/Sub18HB.pdf
- 61 *ibid.*
- 62 In oral evidence to the Senate Inquiry, the ACF asserted there were four States in this category: Senate Inquiry transcripts, 28 February 2001 ECITA 58.
- 63 The Minister does have to take into account the precautionary principle in making a decision, but that principle relates to incorporating scientific uncertainty into the decision-making process, and only relevant where there are doubts about the effects of proposed actions on heritage values.
- 64 Senate Inquiry transcripts, 7 March 2001 ECITA 63.
- 65 Note that the Minister does not have to ask for the Council's advice on the comments.
- 66 Senate Inquiry transcripts, 28 February 2001 ECITA 41. (Oral evidence by the Association of Mining and Exploration Companies).
- 67 The removal of a place may be disallowable by Parliament in certain circumstances: see section 324J.
- 68 Senate Inquiry transcripts, 28 February 2001 ECITA 27.
- 69 Senator the Hon Robert Hill, Senate Estimates transcripts 7 June 1999 p 52.
- 70 Senate Inquiry transcripts, 28 February 2001 ECITA 26.
- 71 Submission 21 16-19.
http://www.aph.gov.au/senate/committee/ecita_ctte/hert2000/Sub21HB.pdf
- 72 Senate Inquiry transcripts, 7 March 2001 ECITA 122.
- 73 Submission 4 p 2 http://www.aph.gov.au/senate/committee/ecita_ctte/hert2000/Sub04HB.pdf
- 74 Senate Inquiry transcripts, 7 March 2001 ECITA 75.
- 75 See <http://www.ea.gov.au/epbc/assessapprov/referrals/significanceguide.html>
- 76 For example, significant rock paintings.
- 77 Senate Inquiry transcripts, 7 March 2001 ECITA 103.
- 78 Senate Inquiry transcripts, 28 February 2001 ECITA 20.
- 79 Senate Inquiry transcripts, 7 March 2001 ECITA 119.
- 80 *Commonwealth v Tasmania* (1983) 158 CLR 1
- 81 See particularly Callinan J in *Commonwealth v Western Australia* (1999) 196 CLR 392 at 488.
- 82 Senate Inquiry transcripts, 28 February 2001 ECITA 41.
- 83 As provided to stakeholders during nation-wide consultations conducted by the Australian Heritage Commission, 2000.

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