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No. 13 2002–03

Environment and Heritage Legislation Amendment Bill (No.1) 2002

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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

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No. 13 2002–03

Environment and Heritage Legislation Amendment Bill
(No.1) 2002

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23 September 2002

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Environment and Heritage Legislation Amendment Bill (No.1) 2002

Date Introduced: 27 June 2002

House: House of Representatives

Portfolio: Environment and Heritage

Commencement: Various times, but the main part of the Bill (schedule 1) will commence on a date to be fixed by proclamation, or failing that, within six months of the last of the three Heritage Bills (see below) receiving Royal Assent.

Purpose

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

Background

History of the Heritage Bills

The Environment and Heritage Legislation Amendment Bill (No.1) 2002 (the Bill) is part of a package of three Bills (the Heritage Bills) designed to replace the *Australian Heritage Commission Act 1975* (AHCA). The Bill contains the main protection and procedural changes. Of the two other Bills, the Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002 repeals the *Australian Heritage Commission Act 1975* (AHCA) - thus abolishing the existing Australian Heritage Commission (the Commission) - and the Australian Heritage Council Bill 2002 creates its proposed successor, the Australian Heritage Council (the Council).

The Heritage Bills were first introduced in Senate in December 2000. A comprehensive background regarding the Government's rationale in proposing to change the Australian Heritage regime is contained in the relevant March 2001 Digest at <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD105.PDF>.

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The 2000 Bills were periodically debated in the Senate during 2001 - they did not reach the House of Representatives - and they were last debated in August that year. Key issues in the Senate debate were:

- The independence of the Council from the Environment Minister
- Whether the decision-maker as listing places on the National Heritage and / or Commonwealth Heritage Lists should be the Environment Minister or the Council
- The future of the Register of the National Estate
- How places that do not make it on either the National Heritage and Commonwealth Heritage list should continue to benefit from some form of protection, and
- The relationship between the Bills and the protection of indigenous heritage.

The 2002 version of the Heritage Bills contains some substantial changes as compared to those introduced in 2000. These include:

- the Register of the National Estate retains its statutory identity
- the Council may undertake assessments of places for potential listing of its own initiative as opposed to needing a Ministerial direction to do any assessment
- the Council has an enhanced role in advising the Minister
- National and Commonwealth Heritage places outside of Australia are protected, and
- Commonwealth agencies have greater responsibilities in relation to Commonwealth Heritage places they control or are intending to sell or lease.

However, like the 2000 Bills, the 2002 counterparts retain the Environment Minister as the decision-maker as to whether a place is included on the National and Commonwealth Heritage Lists.¹

A brief outline of how the Bills would change the Australian heritage regime

The Register of the National Estate, which currently has about 13,000 places on it, was established through the *Australian Heritage Commission Act 1975* (AHCA). Unless also protected under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA) the only substantive legal protection afforded to a place listed on the Register is through section 30 of the AHCA. Section 30 imposes two duties on the Commonwealth:

- that any action 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', and

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- 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.² There is no explicit requirement for the Commission's comments to be taken into account by the action Minister or authority 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. Such a failure would potentially be subject to judicial review (ie a court might rule that due process had not be followed and invalidate any decision to proceed with the action). However, 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 that might affect a place in the Register.*

Places on the Register may also be 'indirectly' protected under the environmental assessment provisions of the EPBCA, if the place is also a matter of national environmental significance (MNES)³, is on Commonwealth land, or the proposed action that threatens the heritage value is to be undertaken by a Commonwealth agency. In such circumstances, subject to some exceptions, if *any* person (including any level of government) wishes to take an action that will have a significant impact on the place on the Register, they must first get approval from the Commonwealth Environment Minister, who will generally require an environmental assessment of some sort before considering whether to approve the action. Under Part 3 of the EPBCA, failure to get Ministerial approval before taking an action with a significant impact renders a person liable to up to seven years gaol or fines of over \$550 000.⁴

The AHCA has no application outside of Australia.

In terms of the *proposed* regime under the heritage bills, the Register will remain, but as the AHCA will be repealed, the section 30 protection outlined above will cease. Places with potential historical, cultural, indigenous or natural values (that meet specified criteria) may be included on either a National Heritage List or a Commonwealth Heritage List. The National List would probably be a relatively limited number of sites national significance, with Commonwealth List consisting of other places presumably of slightly lesser value that are owned or leased by the Commonwealth. Of course, this means that the vast majority of places currently on the Register of the National Estate will not be transferred to either List.

Places on the National Heritage List would become a new category of MNES and thus be subject to the EPBCA Environmental Minister's approval process as mentioned above. Places on the Commonwealth List would receive similar protection as currently since any action having a significant environment impact on Commonwealth land would also require Ministerial approval. As mentioned above, failure to get Ministerial approval before taking an action with a significant impact carries heavy penalties.

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The main Bill incorporates significant management responsibilities for Commonwealth agencies that own or control places on National or a Commonwealth Heritage Lists. These are detailed in the main provisions section of this Digest.

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 the Act's 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)**.

With the introduction of National and Commonwealth Heritage provisions into the EPBCA, it has become necessary to modify existing heritage-related definitions so as to restrict them to provisions dealing with World Heritage. **Item 3** amends existing subsection 12(4) so as to restrict the application of ‘cultural heritage’ and ‘natural heritage’ definitions to section 12⁵ only rather than the whole of the EPBCA.

Item 4 inserts **new sections 15B** and **15C**. These new sections are very similar to existing sections 12 and 15A which create civil⁶ 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 power⁷) 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 or outside Australian jurisdiction
- actions having a significant effect on indigenous heritage values (see **item 48** 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 conservation. 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

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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 penalties are \$550 000 for individuals and \$5.5 million for corporations. 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 \$231 000.⁸

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.⁹

Item 7 inserts **new sections 27B** and **27C** which are designed to protect Commonwealth Heritage places outside Australian jurisdiction. Essentially these require that an action taken outside Australian jurisdiction¹⁰ that may have a significant impact on the environment of a Commonwealth Heritage places outside Australian jurisdiction must, subject to certain exceptions, have the Commonwealth Minister's approval.¹¹ These provisions are very similar to **new sections 15B** and **15C** (although they do not have similar constitutional restrictions) and other existing provisions protecting matters of national environmental significance. The penalties are however smaller – for example the maximum civil penalty under section 15B is \$550 000 (for an individual) whereas under **new section 27B** it is \$110 000. Note that **new sections 27B** and **27C** were not contained in the 2000 version of the Bill.

Items 11 and 12 insert references to 'National Heritage values' and 'the environment of a Commonwealth Heritage place outside Australian jurisdiction' 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.

Items 13 and 14 insert **new sections 34BA and 34F** which provide for the circumstances in which the Environment Minister may make a section 33 declaration that an action does not need approval under Part 9 of the EPBCA even though it may have a significant impact on the values of a National Heritage or Commonwealth Heritage. Section 33 declarations can be made on the basis that an action has already been approved by the Commonwealth under a previously accredited management plan.¹²

Items 13 and 14 essentially mirror existing sections 34B-E relating to World Heritage properties, Ramsar wetlands¹³ 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 or Commonwealth 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 or Commonwealth heritage management principles.

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Item 15 inserts **new section 51A**, which covers the circumstances in which the Minister may enter into a bilateral agreement¹⁴ that includes a provision relating to a national heritage place. **Item 15** essentially mirrors existing sections 51-56 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.

Item 16 inserts a **new subsection 74(1A)**, a provision that was not included in the 2000 Bill. Existing section 74 requires that, when a proposal has been referred to the Environment Minister for a decision as to whether it is a controlled action¹⁵ the Environment Minister must inform and invite comment from Commonwealth and state Ministers and the public¹⁶ within 10 business days as to whether it is a controlled action. **New subsection 74(1A)** will require the Environment Minister to inform and invite comment from the Aboriginal and Torres Strait Islander Commission if the Minister thinks the proposed action may have a significant impact on the indigenous heritage values of a National or Commonwealth Heritage place.

Item 18 inserts **new section 137A** which prevents the Minister, in considering whether to approve a proposed action that is likely to have a significant impact on the values of a National Heritage place, from acting 'inconsistently' with the National Heritage management principles and any other Commonwealth agreement that exists in relation to a place. This mirrors other limitations on the Minister's decisions on World Heritage places, Ramsar places etc in existing sections 137-140. **Item 18** was not included in the 2000 version of the Bill.

Item 19 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 21-29 all insert heritage (both National and Commonwealth Heritage) references into Part 14 of the EPBCA. Part 14 deals with conservation agreements. The purpose of the amendments is to allow conservation agreements to include the protection and conservation of the heritage values of any World Heritage property or National or Commonwealth Heritage places as part of their objectives. **Items 21-29** contain some differences as compared to their equivalent provisions in the 2000 Bill. The more significant differences include:

- World Heritage properties were not mentioned in the 2000 Bill, and
- The 2000 Bill required conservation agreements to be 'not inconsistent with the national heritage...[or]...Commonwealth management principles' whereas the 2002 version (at **new subparagraph 305(2)(b)(ii)**) only requires an agreement to be 'not inconsistent with *at least one* of the World Heritage,...National Heritage...[and]...Commonwealth Heritage management principles'. This means that

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the 2002 Bill has a less 'rigorous' - or more flexible, depending on one's point of view - standard in terms of conservation agreement adherence to management principles.¹⁷

Item 31 inserts **new Division 1A - *Managing National Heritage places***. Division 1A contains **new sections 324A-324ZC**.

New section 324B applies new Division 1A to 'places, acts and omissions outside the Australian jurisdiction' unless the relevant provision has shows a contrary intent. As noted previously in this Digest, coverage of places 'outside the Australian jurisdiction' was not included in the 2000 version of the Bill, nor is it a part of the AHCA.

New section 324C 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.*¹⁸ **New section 324C** varies slightly from its 2000 version in that the National Heritage List must be kept as a 'written record' by the Minister versus the Minister had establish the List by publishing it in the Gazette.

New section 324D defines 'national heritage values' as values that meet one or more criteria to be set out in regulations. The effect of **new section 324D** is that the Minister must consider the criteria in making a decision whether a place has national heritage values. [Draft criteria](#) have been circulated for comment to stakeholders. Should a place be included on National Heritage List by the Minister, its national heritage values are deemed to be those specified in the relevant entry on the List: **new subsection 324D(2)**.

New section 324E covers how nominations can be made and how these are initially dealt with. The Minister has the power to reject a nomination without referring to the Council. As was the case in the 2000 Bill, the Minister may reject a nomination if the person nominating the place fails to provide requested additional information within a reasonable period. However, the 2002 Bill differs in that the only other ground for rejection¹⁹ without referring to the Council, is if the Minister is 'satisfied that [the nomination] is vexatious, frivolous or not made in good faith' - previously the Minister could apparently reject it simply through his or her discretion. If the nomination is not rejected by the Minister, it must be referred to the Council within 10 business days of receipt.²⁰ If the nomination is rejected, reasons must be given to the nominator for the Minister's decision.

Under **new section 324F**, if the Minister considers that a place has one or more national heritage values and one or more of these values are under threat, he or she may put the place in the National Heritage List before going through the normal assessment process. Within a 'reasonable time' of such an 'emergency listing', the Minister must publish a notice advising of this action. The Minister must also refer the place to the Council for an assessment of its heritage values within 10 days of emergency listing unless the Council has previously assessed the place.

There are some differences between the 2002 and 2000 versions of **new section 324F**:

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- The 2000 version required the place to be under 'imminent threat';²¹ and
- The 2002 version requires the Minister to take 'all practicable steps' to identify each person who is the owner or occupier and advise them of the listing

New sections 324G and **324H** deal with procedural aspects of the Council's assessment of whether a nominated place conforms to heritage criteria.

New subsection 324G(4) requires the Council to, in undertaking the assessment, 'take all practicable steps to identify...and advise of the assessment' the place's owner and occupier, as well as each indigenous person with 'rights or interests in all or part of 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. **New section 324G(5)** specifies that Council cannot consider any matter that does not relate to whether the place meets national heritage criteria when undertaking an assessment.

A significant feature of the 2002 version of the Bill is that the Council is now permitted to undertake an assessment on its own initiative: the 2000 Bill prohibited a formal assessment unless requested by 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 324H(1)-(2)**. However, this not required if the Council's assessment is that that place has does not meet national heritage criteria: **new subsection 324H(5)**. Should it be required, the notice must set out the place's heritage criteria 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 324F**. Presumably 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 324H(4)**).

New section 324J 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](#) for the 2000 version of the Bill.

The Minister must make the decision whether or not to list within 60 business days²² after close of the standard 40 day public comment period. The decision to list is at the Minister's discretion, although if the Minister's decides not to list he or she must give reasons to the person who nominated the place or any other person who asks for them: **new subsection 324J(4)**.

Unlike the 2000 version, the 2002 Bill sets out specifically what the Minister must consider in making a decision whether or not to include a place on the National List or to remove it after emergency listing. Under **new subsection 324J(8)**, these matters are:

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- the Australian Council's assessment of whether the place meets any of the National Heritage criteria
- any comments that were received during the period of assessment in 324G
- any public comments that were received in accordance with the notice requirement in 324H, and
- any assessment of these public comments

New section 324L deals with removal of places or values from the National Heritage List. Under **new subsection 324L(1)**, a place can only be removed by the Minister if he or she is satisfied that

- the place (or the relevant part of it) no longer has any National Heritage values,²³ or
- it is necessary in the interests of Australia's defence or security to do so.

Under **new subsection 324L(2)**, one or more National Heritage values can only be removed by the Minister if he or she is satisfied that

- the place (or the relevant part of it) no longer has the National Heritage values, or
- it is necessary in the interests of Australia's defence or security to do so.

The Minister's ability to remove a National Heritage value on the defence or security ground was not contained in the 2000 Bill. It is worth remembering that the Bill operates so that it directly protects National Heritage *values* rather than *places* per se. Where the Minister decides that Australia's defence or security considerations overrides the desirability of protecting say the *natural* heritage value of a place, the Minister will still be able to continue protection of other heritage values not affected by the relevant defence or security activity.

The Minister must request advice from the Council before removing a place (or part of it) or one or more values from the National Heritage List: **new subsection 324M(1)** - thus the 'request advice' requirement does not apply if the prospective removal is on the defence or security ground. 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. In providing this advice, 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, except on defence or security grounds, is disallowable by either house of Parliament under section 46A of the *Acts Interpretation Act 1901*: **new subsection 324L(5)**. This is consistent with the 2000 version of the Bill.

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Additional national heritage values may be added to a place already on the National Heritage List. **New section 324N** essentially obliges the Minister to go through the full consultation and advisory procedure outlined in **new sections 324E-J** before adding any additional values.

New section 324Q allows the Minister to give only a general description of a place, including its location and national heritage values if he 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 and was also contained in the 2000 Bill.

New section 324R imposes a duty on Council members not to disclose any information about a **new section 324G** assessment or **new section 324M** advice unless it is to the Minister, fellow Council member or an employee of the relevant Department 'whose duties relate to the Council'. This prohibition lapses either after the Minister's decision has been made public via Gazettal under **new sections 324J** and/or **324L** or if the Minister fails to meet the timelines to make and release decisions set out under **new subsections 324J(1)** and **(5)** or **324M(5)**.²⁴ Once the prohibition has lapsed, Council members must provide **new section 324G** assessments or **new section 324M** advice to anyone who asks. However, the member must 'take reasonable steps' to ensure that he or she does not provide a 'more detailed description than is necessary for sufficient compliance' with the Act if the member 'is aware' that section 324Q applies.

New sections 324S-W deal with the Minister's obligation to develop management plans for National Heritage places in Commonwealth areas.

Subject to **new section 324T**, **new paragraphs 324S(1)(a)-(b)** require the Minister to develop management plans for places entirely within Commonwealth areas or places outside of Australian jurisdiction entirely controlled or owned by a Commonwealth agency. The Bill requires these to be done 'as soon as practicable' of first coming within the ambit of **new paragraphs 324S(1)(a)-(b)**: under the 2000 Bill this timeframe was to be prescribed in regulations. Any **new section 324S** management plan must both address any matters prescribed in regulations and 'not be inconsistent' with National Heritage management principles referred to in **new section 324Y**. If these principles change, the Minister must 'as soon as practicable' amend the plan if necessary to avoid any inconsistency. Note that the 2000 Bill had no public consultation process for management plans other than giving notice of the making, amending, revoking or replacing a plan. The 2002 Bill specifies that the Minister must seek and consider, in accordance with regulations, any comments made in relation to the making, amending, etc of management plans.

A **new section 324S** management plan can be a plan developed under another Commonwealth law: **new section 324V**. In any case, a **new section 324S** plan must be reviewed every five years - this compares to seven years under the 2000 Bill and brings

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the review period into line with 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 subsection 324W(2)**. The Commonwealth and Commonwealth agencies must not contravene a **new section 324S** plan: **new section 324U**. There are no penalties for any contravention that may occur, although the existing provisions in the EPBCA regarding civil injunctions for breaches of the Act will apply.²⁵

New section 324T provides that the Minister must not make a **new section 324S** plan for 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 'not be inconsistent' with National Heritage management principles. However, **new paragraph 367(1)(j)** (see **item 33**) 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 324X deals with the management of national heritage places that lie wholly or partially within an area under State or (self-governing) Territory jurisdiction.

New subsection 324X(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 place that is covered by **new section 324X**. 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 324X(3)**. These obligations under **new section 324X** mirror those under existing sections 320-322 of the EPBCA relating to World Heritage Properties in areas under State or Territory jurisdiction.

New section 324Y provides that regulations must prescribe principles for managing National Heritage places. This compares to the 2000 Bill which required the Minister to make and gazette National Heritage management principles. Regulations are disallowable, whereas the Minister's principle-making power under the 2000 Bill was not subject to this. [Draft principles](#) have been circulated to stakeholders. **New section 324Y** 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, although such regulations appear to be restricted to situations where specified constitutional powers operate, eg interstate trade and commerce. These restrictions were not in the 2000 Bill.

Commonwealth agencies that own or control a National Heritage place are required under **new section 324Z** to 'take all reasonable steps to assist' both the Minister and (Australian

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Heritage) Council to identify and assess the National Heritage values of that place. Agencies also have a similar duty to assist in the making of **new section 324S** management plans.

New section 324ZA sets out how National Heritage places and their values may be protected if a Commonwealth agency sells or leases Commonwealth land. The 2002 version of the Bill introduces a little more flexibility to agency obligations, although it also incorporates an explicit role for the Minister in overseeing its exercise.

Under new subsection 324ZA(2), the basic responsibility of the relevant agency is that the sale or lease contract *must* include a covenant 'the effect of which is to protect' the National Heritage values of the place *unless* it is satisfied that:

- having regard to other means of protecting those values, including such a covenant in the contract is unnecessary to protect them or is unreasonable, or
- including such a covenant in the contract is impracticable.

Under the 2000 version of the Bill, there were no exceptions to the covenant requirement.

If the agency does not include a covenant in the contract, or if any included covenant will not bind successors in title or otherwise could be insufficient to ensure the ongoing protection of the National Heritage values of the place, the Minister must be informed before the contract is entered into. In such cases, the Minister must either 'take all reasonable measures' to enter into a conservation agreement with the prospective buyer or lessee 'for the protection and conservation' of the place's National Heritage values or 'advise the agency about measures to ensure the ongoing protection' of those values. The one exception to this Ministerial obligation occurs if no covenant is included in the contract because the agency considers this 'unnecessary' to protect the National Heritage values, the Minister *may* (rather than *must*) 'advise the agency about measures to ensure the ongoing protection' of those values. In all cases, the relevant agency must take 'all reasonable steps' to ensure that the measures contained in the Ministers advice are in fact undertaken.

New section 324ZB 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. This is unchanged from the 2000 Bill. Out of interest, 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 Government's Cultural Heritage Projects program.

New section 324ZC requires that the Minister must ensure a review of the National Heritage List is carried out at least every five years and that a report of that review is tabled in Parliament. The 2000 Bill had the review occurring every ten years, but otherwise the provision is unchanged, with the report having to include details of

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

By comparison, existing 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'.

Item 32 inserts **New Division 3A** (incorporating **new sections 341A-341ZH**) which deal with **Commonwealth Heritage places**.

The content and effect of **new sections 341A-341ZH** largely duplicate **new sections 324A-324ZC**, 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, such as a notable variation from the 2000 version of the Bill.

New section 341B extends the provisions of **new Division 3A** to places, acts and omissions outside the Australian jurisdiction, unless the contrary intention appears. This is new to the 2002 Bill, and reflect the overseas protective measures introduced in **item 7**.

New section 341C 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 either is entirely within a Commonwealth area or outside the Australian jurisdiction and owned or leased by the Commonwealth or Commonwealth agency.

As for **new subsection 324E(3)**, **new subsection 341E(3)** contains no timeframe for referral to the Council for assessment if the place nominated for listing is wholly or party outside the Australia jurisdiction.²⁶

Under **new subsection 341L(1)**, the Minister must remove all or part of a place from the Commonwealth Heritage List as soon as practicable after the Minister either becomes aware that the place or part of it is no longer in a Commonwealth area or if the place is outside the Australian jurisdiction and is no longer owned or leased by the Commonwealth or a Commonwealth agency. Under the 2000 Bill, the Minister *could* remove a place if it was not entirely within a Commonwealth area, but he or she did not *have* to do so.

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New section 341S 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.²⁷ The timeframe in which the plan must be developed is set out **new subsection 341ZA(1)**.

New section 341S management plan must address any matters prescribed by regulations 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 public notice in accordance with the regulations, if it makes, amends or revokes and replaces a plan for managing a Commonwealth Heritage place.

New section 341T deals with the 'endorsing' of management plans for Commonwealth Heritage places. It has no direct counterpart for National Heritage places. **New section 341T** varies from its counterpart in the 2000 Bill in that the earlier version used the term 'accredit' rather than 'endorse'. As the term accredit is used elsewhere in the EPBCA in the context of management plans²⁸ presumably it was felt that there may be some confusion using it in the context of management plans for Commonwealth Heritage places.

New section 341T allows the Minister to endorse a Commonwealth agency management plan for Commonwealth Heritage place. From the agency's perspective, the advantage in having a plan endorsed is that it does not have to seek **new section 341ZD** advice about taking actions (providing they are in accordance with that plan) that may have a significant impact on a place, although the protection of existing section 28 still applies - see comments below.

Under **new subsection 341T(2)**, the Minister may only endorse 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 endorsing a plan that the Minister considers is 'inconsistent' with Commonwealth Heritage management principles. The Minister may revoke endorsement if he or she 'considers it appropriate to do so': **new subsection 341T(3)**.

New section 341Y requires that regulations must prescribe for Commonwealth Heritage management principles in the same way as for National Heritage management principles, and likewise allows for these regulations to impose obligations on persons so as 'to implement or give effect' to any Commonwealth Heritage management principles.

New sections 341Z-ZE create obligations for Commonwealth agencies with respect to Commonwealth Heritage places. Notably, **new sections 341ZA-ZC** were not contained in the 2000 version of the Bill.

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New section 341ZA requires a Commonwealth agency that owns or controls a Commonwealth Heritage place to develop a heritage strategy. Such strategies are distinct from **new section 341S** management plans - presumably the strategies are 'big picture' in scope. The strategy - which will cover all the Commonwealth Heritage places that the agency owns or controls - must, in addition to any matters prescribed by regulations, set out a timeframe in which the agency will:

- conduct a program to identify Commonwealth Heritage values for each place
- produce a register of Commonwealth Heritage values for each place, and
- develop a management plan for each Commonwealth Heritage place.

An agency's strategy must be reviewed every three years and the results report to the (Environment) Minister.

New section 341ZC provides that, before a Commonwealth agency takes an action relating to a National Heritage or Commonwealth Heritage place, the agency must 'take into account' the place's Heritage values and 'minimise any impact' on those values. **New section 341ZD** provides that a Commonwealth agency must seek the Minister's advice before taking an action that may have a significant impact on a Commonwealth Heritage place except if the action is provided for, and will be taken in accordance with, a duly endorsed and in force **new section 341T** management plan: **new subsection 341ZD(2)**. As noted in the Explanatory Memorandum to the Bill, nothing in **new section 341ZD** removes the potential obligation under existing section 28 regarding Ministerial approval for Commonwealth agency actions having a significant impact on the environment.

New section 341ZE contains the same 'protective' provisions regarding the sale or lease of Commonwealth Heritage places as its National Heritage equivalent in **new section 324ZA**.

New section 341ZF did not appear in the 2000 Bill. It applies to actions that require any type of authorisation by the governing authorities of either Christmas and Cocos (Keeling) Islands Territories before going ahead. Specifically, **new subsections 341ZF(1)-(2)** require that where any such action may have a significant impact on a Commonwealth Heritage place, the governing authority must ask the Environment Minister for advice before it decides whether to authorise the action. The Minister must consult with the Australian Heritage Council in preparing the requested advice. There is no explicit obligation for the Territory authority to take into account the Minister's advice in making its decision regarding authorisation.

Item 33 inserts **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

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management principles and 'address the matters' required in **new sections 324S** or **341S** management plans.

Items 34-55 incorporate a range of amendments into existing Chapters 6 and 7 of the EPBCA, which deal with administrative and miscellaneous issues, including decision making, enforcement and definitions.

Items 35 and **36** insert references into existing subsection 391(3). The effect of **item 35** is that, in making a management plan for a National Heritage place, the Minister must take into account the precautionary principle as defined in subsection 391(2).²⁹ **Item 36** provides that the Minister must do likewise in deciding under **new section 341T** whether to endorse a Commonwealth agency's management plan for a Commonwealth Heritage place under its control.

Item 37 is a provision with no equivalent in the 2000 Bill. It inserts **new section 391A** that provides that the Minister must consider the information in the Register of the National Estate in making any decision under the EPBCA 'to which the information is relevant'.

Item 38 extends the principle of criminal liability of executive officers of a corporation 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
- 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 46 is a provision with no equivalent in the 2000 Bill. It clarifies that the heritage values (see item 47) of places come within the definition of environment in existing section 528 and thus such values are protected under existing EPBCA provisions.

Item 47 inserts a definition of 'heritage value' into existing section 528. 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 48 inserts a definition of 'indigenous heritage value' into existing section 528. The definition is

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[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 55 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 1998** proposed to establish the position of the Director of Indigenous Heritage Protection. The Bill lapsed in 2001 (it had not been debated since late 1999) and has not yet been reintroduced. Schedule 2 will not commence before an Act establishing Director of Indigenous Heritage Protection commences.

Item 1 relates to the obligations of the Australian Heritage 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 Indigenous Heritage Protection to provide it with written advice on the place's indigenous heritage value. If the Director's advice is received within the statutory timeframes³⁰, the Council must consider it in its assessment.

Item 2 provides that any advice given to the Council by the Director of Indigenous Heritage Protection under **item 1** above must be considered by the Minister when he or she makes a decision about whether to include a place in the National Heritage List under **new section 324J**. **Item 2** was not contained in the 2000 version of the Bill.

Items 3 and 4 replicate **items 1 and 2 respectively**, except they relate to assessments 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.

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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.

Schedule 4 - Other amendment

Item 1 amends existing section 515 so as to enable the Minister and Secretary to delegate their powers and functions to Director of National Parks, who may in turn delegate these powers and functions to another person. As it presently stands, section 515 only allows the Minister and the Secretary to delegate to an officer or employee of the (Environment) Department, and the Director of National Parks is not necessarily such an officer or employee.

Concluding Comments

From a heritage perspective, the 2002 Bills contain a number of improvements over those introduced in 2000. As noted in the main provisions sections of this Digest, the main Bill contains a range of changes that generally increase the accountability of the Environment Minister and Commonwealth agencies in both the assessment of potential National and Commonwealth Heritage places and their management should they be listed. The Register of the National Estate will retain its statutory identity and, because of the procedural requirement noted in **item 37** of the main provisions section, information on the Register will become integrated into EPBCA decision-making by the Minister. Such information should be particularly relevant as an indicator of heritage values for the purposes of Ministerial consideration regarding actions involving Commonwealth land (existing section 26) and Commonwealth agencies (section 28).

Of course, the various philosophical arguments about who should be the decision-making regarding listing, the appropriateness of concentrating on a smaller number of places in the absence of a Commonwealth-State heritage agreement, etc that were canvassed at length in the [Digest](#) on the 2000 Bills still remain.

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Endnotes

- 1 The Council remains the decision-maker in relation to the Register of the National Estate.
- 2 AHCA subsection 30(3)
- 3 Current NMES include things such as world heritage sites, internationally important (Ramsar) wetlands, endangered species etc.
- 4 Maximum fines are \$5.5 million in the case of an offence by a company.
- 5 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.
- 6 Civil offences do not require the fault element (intention, recklessness etc) that criminal offences do.
- 7 The World Heritage provisions of the EPBCA implement Australia's international obligations under the World Heritage convention.
- 8 See **item 38** in relation to the criminal responsibility of corporate officers for offences.
- 9 This is because of existing sections 38 and 43 of the EPBCA.
- 10 Australia jurisdiction includes external territories, such as Antarctica, and marine areas in the exclusive economic zone and continental shelf area.
- 11 Commonwealth Heritage places within Australian jurisdiction would be covered by existing section 27A.
- 12 It should also be acknowledged that existing subsection 33(3) provides that the actions approved or taken in accordance with the accredited management plan are not to have 'unacceptable or unsustainable impacts'.
- 13 Wetlands listed under the Convention on Wetlands of International Importance, signed at Ramsar, Iran. See <http://www.ea.gov.au/water/wetlands/ramsar/index.html>
- 14 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>
- 15 Controlled actions require the Environment Minister's approval under Part 9 of the EPBCA to proceed.
- 16 The public are informed by placing a notice on the internet.
- 17 Thus theoretically if there were five management principles relevant to the conservation agreement in question, the agreement would be valid if it were inconsistent with four but 'not inconsistent' with one.
- 18 Arguably, this is consistent with the situation under the AHCA where, even if the Commission finds a places is of sufficient heritage value to be placed on the Register of the National estate, it is probably not *legally obliged* to so: see discussion of *AHC v Mt Isa Mines* on page 3 of the Digest of the 2000 Bill.
- 19 Subject to the comments about **new subsection 324E(9)** below.

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- 20 Unless the place is wholly or partly outside the Australia jurisdiction, in which case there is no timeframe for referral. No explanation is given for this lack of timeframe.
- 21 It is understood this change was made to be consistent with emergency listing provisions for World Heritage properties.
- 22 15 days in the case of a **new section 324F** emergency listing.
- 23 Paragraph 324J(1)(a) includes the phrase 'ignoring part 324D(2)...'. This simply clarifies that that the Heritage values of the place that are physically written on the Heritage List are to be ignored for in determining whether the place has any values.
- 24 A fairly 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.
- 25 Division 14 of Part 17.
- 26 The listing of such places would presumably require consultation with the relevant country in which the place is located.
- 27 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.
- 28 Particularly in relation to environment assessment bilaterals and ministerial declarations in Chapter 3, where these may obviate the need to gain Ministerial approval for actions.
- 29 Under the 2000 Bill, this obligation only applied for places entirely within Commonwealth areas.
- 30 40 days for standard listing processes, or 20 days in relation to emergency listing.

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