

CHAPTER 3

THE AUSTRALIAN HERITAGE COMMISSION

Introduction

3.1 The bills involve a significant change in the key expert body tasked with advising the Commonwealth Minister for the Environment and Heritage and administering the legislation. The abolition of the Australian Heritage Commission and its replacement with the Australian Heritage Council (the ‘Council’) has met with criticism in relation to three key matters: the scope of the role of the Council; its powers to make determinations on heritage status; and its membership. These are discussed in turn.

The role of the Australian Heritage Council

3.2 The functions of the AHC are set out in section 7 of the existing *Australian Heritage Commission Act 1975*:

(a) on its own motion or on the request of the Minister, to give advice to the Minister, on matters relating to the national estate, including advice relating to:

(i) action to identify, conserve, improve and present the national estate; and

(ii) expenditure by the Commonwealth for the identification, conservation, improvement and presentation of the national estate; and

(iii) the grant of financial or other assistance by the Commonwealth for the identification, conservation, improvement or presentation of the national estate;

(b) to encourage public interest in, and understanding of, issues relevant to the national estate;

(c) to identify places included in the national estate and to prepare a register of those places in accordance with Part IV;

(d) to furnish advice and reports in accordance with Part V;

(da) subject to Part VA, to administer the National Estate Grants Program, being the program devised for the grant by the Commonwealth, in accordance with that Part, of financial assistance to the States and internal Territories and to approved bodies for expenditure on National Estate projects;

(e) to further training and education in fields related to the conservation, improvement and presentation of the national estate;

(f) to make arrangements for the administration and control of places included in the national estate that are given or bequeathed to the Commission; and

(g) to organise and engage in research and investigation necessary for the performance of its other functions.

3.3 This can be compared with section 5 of the Australian Heritage Council Bill 1999, which defines the new Council's functions as:

(a) to make assessments requested by the Minister under the *Environment Protection and Biodiversity Conservation Act 1999*;

(b) to advise the Minister, on request, on conserving and protecting places included, or being considered for inclusion, in the National Heritage List or Commonwealth Heritage List;

(c) to advise the Minister, on request, on matters relating to heritage including the following:

(i) promotional, research, training or educational activities;

(ii) national policies;

(iii) grants or other financial assistance;

(iv) the monitoring of the condition of places included in the National Heritage List or Commonwealth Heritage List;

(v) the Commonwealth's responsibilities for historic shipwrecks;

(d) to nominate places for inclusion in the National Heritage List or Commonwealth Heritage List;

(e) to perform any other functions conferred on the Council by the *Environment Protection and Biodiversity Conservation Act 1999*.¹

3.4 There are two striking differences between these provisions. The first is the extent to which the bills remove the capacity of the Council to act on its own accord, instead requiring the direction of the Minister. Thus, the Council will no longer receive nominations for listing, and the Council must not undertake an assessment of a place's National/Commonwealth Heritage Values unless the Minister asks it to do so. Equally, if someone nominates a place for heritage listing to the Minister, yet the Minister for whatever reason decides not to forward the nomination to the Council, the

1 Australian Heritage Council Bill 2000, p 3.

Council is not permitted to undertake any assessment of that place's Heritage Values.² The second is the narrowing of the broader functions of the proposed Council in contrast to that of the existing Commission.

3.5 This Bill therefore serves to decisively alter the independence of the key administrative heritage body. In comparing these differences, the Australian Conservation Foundation comments:

If the Commonwealth is to play a leading role in heritage issues, including best heritage practice, and have a council that has credibility and status, it is important that these duties be written into the functions of the new Council.

Furthermore, these functions and duties must be able to be undertaken by the Council of its own volition and without requiring specific direction or request from the Minister (as required under the present AHC Bill). The Council cannot be restricted to acting only at the request of the Minister.³

3.6 The Environmental Defender's Office (EDO) stated:

I think it is fair to say that these amendments give the bulk of the powers to the minister. Our concern is that may not be the most healthy recipe for heritage protection into the future. Heritage in some sense is a political issue but primarily it should be a technical issue: Does this have cultural aesthetic value to the community? Heritage can be very prone to political pressure and political mood swings, and there is a sense that it needs to be raised above that.⁴

3.7 Professor David Yencken, the foundation Chair of the Australian Heritage Commission, argues that the change is unjustified, with no evidence to suggest that the Commission has misused its powers:

I think it is the view of all of the people who are making this joint submission that, given that the commission and its act have been reviewed some seven times over this period – three times in my incumbency – and the invariable conclusion has been, in basic principle, that the commission and its processes are worthy to be retained, the fact that we now have 25 years of experience should not be lightly cast aside.⁵

3.8 The Australian Council of National Trusts believe that the model proposed in the bills is also a fundamentally dangerous one:

If one strikes a time when a minister is less keen to receive independent objective advice, then a body such as the Heritage Council will not be asked

2 EDO, Submission 21, p 6.

3 ACF, Submission 16, p 12.

4 Mr Marc Allas, *Proof Committee Hansard*, Canberra, 28 February 2001, p 4.

5 Professor Yencken, *Proof Committee Hansard*, Canberra, 28 February 2001, p 18.

to give advice. Hence one of the principal concerns of the National Trust is that the structure that is set out in these bills will result in a council which potentially will be inactive. Whether it is going to be so or not in the future, none of us can tell because the intention of one minister compared to another over time will vary.⁶

3.9 The example was given during hearings of the Victorian Mineral Resources and Development Act, which has:

... a whole series of sections, about the Environment Advisory Committee, which has a whole range of statutory functions but it can only become active if the minister asks it to give advice – and it has not met for four years, under both governments. It has not met for four years, so none of the statutory functions of the Environment Advisory Committee under that act have been performed, because the ministers, in their wisdom, have decided they could do without it.⁷

3.10 The EDO commented particularly on two aspects of the Council's restricted role. First is that under sections 324D and 341D, the public may nominate a place for inclusion in the National/Commonwealth Heritage List. The nomination, however, may be rejected by the Minister without any consideration by the Australian Heritage Council:

At the very least, the Council should be able to make a preliminary assessment of the merits of a nomination, prior to any determination by the Minister.

Nominations should be forwarded as a matter of course to the Australian Heritage Council as an independent body with expertise in heritage for their consideration of the nomination's merits. ... This approach is consistent with that taken in relation to the nomination process for threatened species under the EPBC Act.⁸

3.11 Secondly, the EDO criticise sections 324G(4) and 341G(4) which allows the Minister to ask any person (with appropriate qualifications or expertise) to assess the merits of any comments received by the Minister on a proposed place for the National Heritage List:

This provision is unnecessary and highly discretionary.

There is no sound policy reason that the Network is aware of that would explain why the Australian Heritage Council, as '*an independent statutory body to advise on the Commonwealth's heritage responsibilities*' should not

6 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 74.

7 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 82.

8 EDO, Submission 21, p 11.

be primarily responsible for this function. By creating an ability to bypass the Council, this provision has the ability to undermine the Council's role.

It would also potentially allow the Minister to ask, for example, the proponent or their consultants to assess the merits of the comments received, if the Minister deemed that they had 'appropriate qualifications or expertise'. This is clearly unacceptable.⁹

3.12 Many submissions therefore argue for the need to preserve a broad and independent role for the Council, including wide proactive and discretionary powers to promote national leadership and coordination. Thus, according to the Australian Council of National Trusts:

In the crucial policy, standards setting, research, promotion and public education areas the new Council should act as an independent, proactive body similar to the present Australian Heritage Commission.¹⁰

3.13 Mr Peter King, Chair of the AHC, rejects criticisms that new Australian Heritage Council will not be an independent body:

... the council has several obligations, which are discrete and confer very significant powers upon the body, which are much greater than the current commission has. For example, once a nomination has been put forward, there must be a referral by the minister to the council within 20 business days. That is section 341D. The council itself may make nominations. It is an absurd proposition to suggest that the council is not independent if it has the right – under this legislation, as proposed – to make a nomination itself. That means it has independent status to act of its own accord. That is subsection 324D(5).¹¹

3.14 Mr Bruce Leaver, Executive Director of the AHC, also rejected the criticism of the Environmental Defender's Office in relation to the capacity of the Minister to seek additional comments:¹²

That provision is put in the act as a natural justice and procedural fairness issue where the council itself has nominated a place for listing. It would be unfair in a judicial sense for the council then to be judge and jury – and I think the mining industry body referred to this – and assess comments made on their own nomination. It was considered essential that under circumstances where there was a conflict of interest and natural justice and

9 EDO, Submission 21, p 12.

10 ACNT, Submission 4, p 5. See also Penrith City Council, Submission 23, p 3; Victorian government, Submission 31, p 3, and Submission 30, Australian Council of Professional Historians Association, p 3.

11 Mr Peter King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 110.

12 See para 3.11 above.

procedural fairness issues were involved the minister should have the capacity to seek independent advice.¹³

3.15 In considering these issues, the Committee concludes that the bills fundamentally alter the role of the Commonwealth's main heritage agency, in ways that are not justifiable in the absence of any evidence that the Commission's existing powers have been misused. Furthermore, the Committee accepts the view that the functions of the existing Australian Heritage Commission are appropriate and will be as relevant in the future as they have been in the past and that they will enable the Council to continue carrying out its important role in providing national leadership on heritage issues.

3.16 For these reasons, the Committee concludes that the roles and functions of the Council should be broadened to enable the AHC to act independently of Ministerial direction. The role of the Committee in the preparation of management plans should also be expanded.

Recommendation 3.1

The Committee recommends that section 5 of the Australian Heritage Council Bill 1999 be amended to broaden the roles of the Council to reflect those of the existing Commission set out in section 7 of the *Australian Heritage Commission Act 1975*, and in particular to enable the Council to act both on its own motion and on the request of the Minister.

Recommendation 3.2

The Committee recommends that the Australian Heritage Council Bill 2000 be amended to include the reporting powers of the Commission provided for under section 7(d) of the *Australian Heritage Commission Act 1975*.

Determinations on heritage status

3.17 An issue that provoked considerable debate is the determination of heritage status. This involves two central and closely related questions: first, whether the Council or the Minister should make decisions on whether a nominated place should be listed on either the National or Commonwealth Heritage Lists; and second, what matters should be considered relevant to the decision.

3.18 Currently, the AHC makes decisions to list a place on the Register of the National Estate. Under the proposed system however, the new Council will be limited

13 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 122.

to providing the Minister with a written assessment of a place's heritage values. The decision to list or not is the Minister's.

Arguments supporting the AHC as decision maker

3.19 Critics of the bills, drawing on issues relating to the independence of the AHC, argue that the decision on listing should be removed from political considerations and made by heritage experts solely on the basis of a nominated property's heritage values. According to Professor Lennon:

There is a long history in Australia of such decisions being made by expert heritage councils rather than Ministers except where the Minister has the right to 'call in' contentious cases. The range of decisions will be similar to those to be imposed by National Heritage Listing. With such a strong and successful history it seems entirely unnecessary for the Commonwealth Minister to make all such decisions, and much more appropriate for the expert Council to make the decisions.¹⁴

3.20 The key consideration for many submissions is that listing is a technical issue that should be determined by technical experts in the Council rather than by the Minister. Conversely, there is concern that decisions by the Minister are likely to be overly influenced by a range of political considerations unrelated to the central heritage issues. The Australian Conservation Foundation (ACF) argue that:

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.¹⁵

3.21 In supporting this view, the ACF point to the 1997 Australian Heritage Commission discussion paper *Australia's National Heritage - options for identifying heritage places of national significance* which considers the merits of different approaches and states:

The dependence on Ministerial decisions for listing could prove to be difficult for the Minister in terms of the time required to determine every listing proposal. This option also means that there is potential for other considerations to take precedence over heritage significance, resulting in a non-representative and/or non-comprehensive heritage register.¹⁶

3.22 ACF also note that the 1996 Report by Hon Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, made the same point:

14 Professor Lennon, Submission 11, p 2.

15 ACF, Submission 16, p 7. See also Dr Mosley, Submission 5, p 2.

16 ACF, Submission 16, p 7.

Minimum standards for state and territory laws should provide for assessments relating to the significance of sites and areas to be separated from decisions concerning land use. The former should be the responsibility of aboriginal heritage bodies; the latter the responsibility of the executive.¹⁷

3.23 According to the Environmental Defender's Office, this conclusion was generally agreed upon during the public consultation process at HERCON:

In the long term, best practice heritage protection will not be achieved by political processes. Exposure to the politics of the day will ultimately make fragile heritage places vulnerable to development pressures and undermine heritage conservation goals. The credibility and integrity of the new national scheme will also be placed at risk. This is one of the most important failings of the proposed new scheme.¹⁸

3.24 Those supporting this view accept that there are a wide range of other issues that need to be considered but that these relate to the management of heritage properties and should not affect the central issue of determining the existence of heritage values. This separation of identification and management is one of the fundamental principles of the Burra Charter, an internationally recognised set of heritage management principles created by Australia International Council on Monuments and Sites (ICOMOS).¹⁹

3.25 Ms Sullivan explains this division of responsibilities:

There are basically two separate processes involved here. The first is the assessment and identification of heritage places on the basis solely of their heritage value. The second is the subsequent decisions about their conservation or otherwise which take into account a whole range of factors other than these heritage values.²⁰ ...

[T]he proposal that the Council can only assess a place or places for National Listing or Commonwealth Listing on a reference from the Minister is unduly restrictive and confining. Such a provision would enable a Minister to prevent the assessment of controversial places at the beginning of the process, presumably on political or economic grounds. The place for a decision on these grounds is later in the process, after the significance of the place has been independently determined and made public.

... Ideally the Council should make the decisions about listing, on the grounds of heritage significance, and the Minister should make subsequent management decisions, transparently based on a range of broader considerations. If the Council is not to make decisions about listing, but

17 ACF, Submission 16, p 7.

18 EDO, Submission 21, p 5. See also p 13.

19 The Hon Dr Barry Jones, *Proof Committee Hansard*, Canberra, 7 March 2001, p 90.

20 Ms Sullivan, Submission 14, p 6. See also ACF, Submission 16, p 6.

only to recommend to the Minister then it is important that recommendations from the Council, about the significance of places and the analysis which backs this up should be publicly available.²¹

3.26 By separating the listing and management functions, heritage lists become the key source of information which is then used, together with other considerations, to inform management decisions. Thus, according to Mr Simon Molesworth, Member, Australian Council of National Trusts:

The list should not reflect the management and financial responsibility. The list should be driven by significance, because no-one in this world ought to be fearful of information. A heritage list is basically being informed of what is significant, and what is significant is quite divorced from any issue of what you are going to do with it in the future. It might be that you have to knock it over, but at least you would do that with your eyes open, and you would know. That is why we need lists untainted by processes that might follow.²²

3.27 In addition, the Hon Dr Barry Jones pointed out that where this separation is not followed and the Minister makes decisions, there is the likelihood that heritage issues will receive less attention in the wider considerations of departmental officials advising the Minister:

there is a danger, I think, that if the Minister is not looking at objective, arms-length, expert advice from the council – or the renamed commission which becomes the council – he then relies on the department. There is a danger that the department may, as it sometimes appears to do, take a whole of government approach ...²³

Arguments supporting the Minister as decision maker

3.28 Other evidence however, supports the view that the Minister is the appropriate decision maker for heritage listing decisions. A key point in this argument is that in contrast to listing on the RNE, under the proposed legislation, listing has major enforcement, social, and economic ramifications, including on the Government administration of its own properties. Such decisions also involve issues of federal-state relations, and potentially significant budget implications. It is therefore argued that for a decision to be workable, it should be made by the Minister to ensure that Government ‘owns’ the decisions. In addition, such decisions, when made by elected government, are more fully accountable to the electorate and Parliament.²⁴

3.29 Mr Bruce Leaver, Executive Director of the AHC, explains:

21 Ms Sullivan, Submission 14, p 6. See also Australia ICOMOS, Submission 17, p 4; ACPHA, Submission 30, p 4; and Mr Connor, *Proof Committee Hansard*, Canberra, 28 February 2001, p 56.

22 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, p 79.

23 The Hon Dr B Jones, *Proof Committee Hansard*, Canberra, 7 March 2001, p 96.

24 Mr Leaver, Submission 18, p 3.

Decisions on natural and indigenous cultural heritage can be deeply controversial and, as a result, decisions are most often made at the State Cabinet level or even by Parliament. The notion of an independent body deciding on these heritage listing conflict outcomes is difficult to accept and, in all probability, would be unworkable because of the major land use conflict issues involved, often dealing with complex political, social and economic issues.²⁵

3.30 Mr Leaver elaborated on these points during public hearings:

Unlike the Register of the National Estate, national listing may mean major impositions on property use through the application of significant penalties and environmental impact assessment obligations. These will be backed by the injunction and judicial review provisions of the EPBC Act. In view of the possible implications for affected citizens, it would be sound governance, in the department's opinion, for the decision maker to be accountable and responsible to parliament.

Depending on the nature of the heritage values involved, listing may impact on property rights, triggering section 51 (xxxi) of the Australian Constitution, thus requiring settlement 'on just terms' – to use the terms of that section. In fact, it is noted that in recent cases some members of the High Court have moved to a broader reading of that section of the Constitution, so if the Commonwealth intervenes to protect property and the property owner's rights to freely use a property are constrained, including a state government, this can, in some cases, give rise to a compensation obligation. It is highly questionable, in the department's opinion, whether or not unelected bodies should have the power to commit governments to potentially significant and unbudgeted compensation liabilities.

There is another reason that the decision should be responsible to Parliament. I have mentioned the affinities between world heritage and national heritage places. Unlike Register of the National Estate entry, world heritage nominations are preceded by extensive intergovernmental discussions on a range of issues and management arrangements. As these often involve exceptionally sensitive social and economic issues, the discussions are properly conducted between governments. A non-government heritage authority would be in no position to make judgments or commitments on these matters.²⁶

3.31 There are significant natural justice issues involved:

An assessment process must allow those adversely impacted the opportunity to put their case. A body of heritage experts would be very poorly placed indeed to reasonably deal with the economic and social arguments that may be advanced by affected parties. The current bills provide for the

25 Mr Leaver, Submission 18, p 3.

26 Mr Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 118.

opportunity to put a case (324F(2), 324G). The case is put to the Minister who would presumably weigh up the heritage and other arguments before making a decision to list or not to list.²⁷

3.32 Mr Leaver also points out that it is incorrect to point to the listing powers of various state and territory bodies in support of listing powers for the Council:

There is often a fundamental misunderstanding of the heritage scope of the state/territory bodies. ‘Heritage’ at the Commonwealth level covers historic, natural and cultural heritage. 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.²⁸

3.33 According to the Department, only Queensland and Tasmania have heritage regimes in which the Council makes listing decisions, and in both cases, these decisions relate exclusively to historic heritage. A table summarising state and territory decision making processes is at Appendix 5.

3.34 It should also be kept in mind that giving autonomous listing powers to the Heritage Council would grant it powers only exercised by the Minister in the rest of the EPBC Act, in relation to threatened species, biodiversity conservation etc.²⁹ The model proposed is therefore consistent with the general framework of the EPBC Act.

Conclusions and recommendations

3.35 The Committee has carefully considered the arguments raised in what is one of the central issues of this inquiry. The Committee agrees with the concept that there must be a separation between the assessment of heritage values and the management of heritage places, that is, there must be a separation between the responsibility for listing and for decisions relating to a listed place.

3.36 Accordingly, the Committee considers that the Council should make the final decision on listing since it is the most qualified to make such technical decisions. The Committee furthermore feels that this approach best serves the primary objective of reforms, which is to strengthen heritage protection in this country. The Minister then has the responsibility for decisions related to a listed place – decisions that the Committee feels are appropriate for an elected representative of the people to make.

3.37 However the Committee recommends that section 324Q of the Australian Heritage Council Bill 2000 be amended to require the Minister to consult with the

27 Mr Leaver, Submission 18, p 4.

28 Mr Leaver, Submission 18, p 3.

29 Professor Lennon, Submission 11, p 3.

Council before creating, amending or revoking management plans for a national heritage place. If the Minister does not follow the Council's recommendations, the Minister should publish his or her reasons in the Government Gazette.

Recommendation 3.3

The Committee recommends that section 324Q of the Australian Heritage Council Bill 2000 be amended to require the Minister to consult with the Council before creating, amending or revoking management plans for a national heritage place. If the Minister does not follow the Council's recommendations, the Minister should publish his or her reasons in the Government Gazette.

Membership of the Australian Heritage Council

3.38 The final issue in relation to the Council is its membership and how members are appointed. Under Part 3 of the Bill, the Minister appoints the Chair and six members, who must have experience or expertise concerning heritage.

3.39 Submissions have raised three principal issues in relation to the membership of the Council: that appointments to the Council should not be made by the Minister; that the qualifications for membership should be amended; and that the number of members should be increased.

3.40 In relation to appointment to the Council, it is argued that to ensure both the perception and reality of independence, it is inappropriate for the Minister to appoint the members on the grounds that it may grant the Minister undue influence over the Council and impair its impartiality. Thus, members may be less inclined to give advice 'without fear or favour'.³⁰ There is also the potential for the Minister to avoid appointing anyone to the Council who does not share the Minister's general views and values. For this reason, Professor Lennon suggests that appointments should be by the Governor-General³¹ in accordance with the existing AHC Act.³²

Ministerial appointment of the chair and members of the proposed Heritage Council may lead to its politicisation and as a result lower its credibility as an independent arbitrator on heritage issues within the Australian community.³³

3.41 The Australian Council of National Trusts recommends that membership include nominees of peak conservation bodies, both community-based organisations

30 for example, ATSIIC, Submission 25, p 19.

31 Professor Lennon, Submission 11, p 2. See also Penrith City Council, Submission 23, p 1.

32 *Australian Heritage Council Act 1975*, section 12(2)

33 Penrith City Council, Submission 23, p 1.

and statutory committees at state level, and that the Chairman be elected by the members of the Council.³⁴

3.42 The Committee accepts the view that the existing appointment procedures under the AHC Act are an appropriate means of ensuring the independence and integrity of the Council and for this reason believes they should be retained. Secondly, there is a view that the Bill should require higher standards of expertise and experience.

[F]or the credibility of the Council its membership should be of the highest technical excellence. ... To ensure this I consider that the provisions relating to the expertise of members of the Council should be strengthened to include the stipulation that at least some of members of the Council should possess the appropriate technical qualifications.³⁵

3.43 This would mirror similar provisions in the EPBC Act for the appointment of the Biological Diversity Advisory Committee.³⁶ Others suggest the inclusion of a requirement that nominees to the Council possess a demonstrated commitment to heritage protection,³⁷ while in relation to indigenous representation, the NSW government suggests a focus on the appointment on indigenous cultural values in preference to non-indigenous professional expertise in indigenous culture.³⁸

3.44 The Australian Mining and Exploration Council (AMEC) advance an alternate view that the Council's membership include persons with commercial experience or expertise to provide a broader range of advice or else create a separate Ministerial liaison committee with representatives of community and industry.³⁹

3.45 Mr Peter King, Chair of the AHC, recommends the retention of the existing AHC Act definition of qualifications for membership of the Council:

section 7 of the proposed Australian Heritage Council Bill identifies persons entitled to be appointed as having 'experience or expertise concerning heritage.' But I think section 12, subsection 4 of the current act is a better approach. It provides for the appointment of persons having 'qualifications relevant to, or special experience or interest in, a field relating to the functions of the commission' – in this case the Council.

My own view is that it is better to have councillors who represent the community and who assess the advice from the Public Service and the

34 ACNT, Submission 4, p 4.

35 Ms Sullivan, Submission 14, p 9. See also ACF, Submission 16, p 11; WWF, Submission 12, p 12.

36 EPBC Part 19, Section 504(5)

37 ATSIIC, Submission 25, p 20.

38 New South Wales government, Submission 29, p 3.

39 AMEC, Submission 9, p 18 and 20. This issue is explored above in context of the decision making role of the Council and the scope of its considerations.

assistance that council obtains by referring matters to experts in the Public Service. I think the idea of experts assessing experts is not a good one in the administration of any statute where you have an independent advisory body.⁴⁰

3.46 The Committee accepts the view that members of the Council need to be of the highest possible standard – meaning that they have considerable technical expertise – and that either the approach adopted in the AHC Act or that used to select members of the Biological Diversity Advisory Committee under the EPBC Act would be suitable.

3.47 The Committee does not agree with the suggestions of AMEC in relation to membership. Given the decision making arrangements in the bills, it would be inappropriate to have ‘a balancing’ industry representation on the Council since the purpose of the Council is quite specifically to make recommendations based on heritage considerations only.

3.48 The third matter relates to the suggestion that the proposed seven members of the Council will be inadequate to provide the breadth of experience required and the resources to manage the considerable workload.⁴¹ Professor John Mulvaney, a former AHC Commissioner, argues that this applies particularly to indigenous membership:

No single Aboriginal following the minister’s direction under the act could be expected to evaluate and take responsibility for the whole continent, distinguishing so-called national from B-grade places. The responsibility for drawing up a national list would seem to me to be a terrible burden to place on a few Aboriginal people.⁴²

3.49 The Committee feels that it has not received enough advice to determine whether or not the proposed membership of the Australian Heritage Council is large enough to cope with its proposed workload. The Committee does, however, recommend that the Government review this point, particularly since it has been made by a former Commissioner.

40 Mr King, *Proof Committee Hansard*, Canberra, 7 March 2001, p 113.

41 Tasmanian government, Submission 28, p 6; ACPHA, Submission 30, p 3 and EDO, Submission 21, p 24.

42 Professor Mulvaney, *Proof Committee Hansard*, Canberra, 28 February 2001, p 20.

Recommendation 3.4

The Committee recommends that the Government amend section 7 of the Australian Heritage Council Bill 1999 to retain the qualifications required for the present Australian Heritage Commission in section 12(4) of the *Australian Heritage Commission Act 1975*, or that it adopt the approach used to select members of the Biological Diversity Advisory Committee under the EPBC Act.

Recommendation 3.5

The Committee recommends that the Government give further consideration to the size of the Heritage Council and whether its membership of seven is adequate to deal with its roles and responsibilities.

