CHAPTER 5

ADMINISTRATION OF THE NATIONAL AND COMMONWEALTH HERITAGE LISTS

An extensive component of Australia's national heritage is in public ownership, under the stewardship of the Commonwealth Government ... . The Australian people are the owners of these heritage properties and the Commonwealth has a responsibility to conserve and sustain these assets.[1]

Introduction

5.1 As has been discussed in earlier chapters, the single most significant change proposed by the bills is the replacement of the existing Register of the National Estate with two smaller, but more strongly protected lists: the National Heritage List and the Commonwealth Heritage List. While the Committee broadly supports the development of the National and Commonwealth Heritage Lists, there are a number of issues identified in submissions which need further consideration. These issues are:

- the scope of the lists;
- the assessment criteria and management principles;
- opportunities for external comment;
- ministerial accountability;
- removal of places from the list;
- heritage surveys and registers;
- the application of state laws to Commonwealth land;
- review and reporting requirements;
- compensation;
- program funding; and
- thematic listing.

5.2 Enforcement and protective provisions are discussed in the following chapter.

Scope of the lists

5.3 The Committee has heard two main views expressed in relation to the scope of the two proposed heritage lists: the National Heritage List and the Commonwealth Heritage List. The first is that the new system proposes to implement a graded system

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1 ACNT, Submission 4, p 2.

of lists, and in doing so will need to determine the nature of the heritage significance of places nominated for listing. Thus, decisions will need to be made not only as to whether a place has heritage significance, but also whether the significance is local, regional, or national. This consideration will then determine whether the place will be listed and if so, whether it should appear on a local, state or territory, or federal list.

5.4 The Australian Conservation Federation argues against this system, claiming that the National Trusts unsuccessfully explored the use of graded or selective lists decades ago.[2] According to the Australian Council of National Trusts, there are:

> … serious concerns about the concept of a restricted National Heritage List. Australia's natural and cultural heritage is constantly evolving through environmental and historical change. Hence, judgements of heritage significance are also evolving. The concept that there could be fixed 'levels' of importance, enabling a finite national heritage list, is inherently flawed. There will be a few places with generally agreed iconic national status. There will also be many places of only local significance. Between these extremes there will be a very large array of places with no 'fixed' status.[3]

5.5 The second issue raised is that as the guiding principle of the new arrangements should be to strengthen overall protection for heritage properties, all properties listed on the RNE should be transferred to the one of the two new lists. As one submission noted, this would accord with the growing protection afforded to heritage in other western countries:

> In all western countries over the last 30 or so years there has been a progressive strengthening of heritage protection, reflecting increasing public awareness of the significance of heritage protection. Lists and registers have grown very much larger. In the UK there are now over 440,000 places on national heritage building lists. In the US, with a federal system of government, there are now over 60,000 places on the National Register of Historic Sites. These are historic sites only.[4]

5.6 Mr Simon Molesworth QC, representing the Australian Council of National Trusts, argues that a direct incorporation of the RNE into the new lists is the most efficient use of the register:

> Why on earth does the new bill have a provision in it that says the minister *may* approve the incorporation of places listed in the registered national estate in the Commonwealth list? Why do we have to reinvent the wheel? Surely the excellence of the work of the Australian Heritage Commission over the last 26 years is such that you do not have to go back and again look

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2 ACF, Submission 16, p 8.

3 ACNT, Submission 4, p 1.

4 Professor Yencken, Submission 10, p 4. This point is also made by ATSIC, Submission 25, p 13; and Professor Adam, Submission 20, p 2.

> at the Melbourne Town Hall or look at rock art sites and Kakadu and say, 'Do you thing we ought to put this on or not?', call for inquiries, go through the process.[5] [italic added]

5.7 The Committee notes that decisions on what places will go onto either of the two lists will depend on the criteria for Commonwealth or National heritage values. These criteria are still to be finalised, although the criteria for the National List are available in draft form.[6]

5.8 The Committee also notes that the probable size of either list remains unclear. As Mr King, Chair of the AHC commented during hearings, the National List is likely to contain certain obvious sites such as the Sydney Harbour foreshores, the Gippsland forest, Uluru, and Riversleigh[7] but there are no indicative lists.

5.9 The Committee considers the suggestion of placing all RNE sites that are on Commonwealth land onto the Commonwealth Heritage Register is an attractive proposition since it should result in greater protection of Commonwealth heritage places. The key criteria for the Commonwealth list revolves around Commonwealth ownership of the land and is not tied to any particular level of heritage significance. As was discussed in Chapter 2, Commonwealth land is not subject to state or territory law, and following the impasse in negotiations, it does not seem likely that the Commonwealth will bind itself to state laws in the foreseeable future, although the Committee considers that it should do this. Consequently, since heritage sites on Commonwealth land cannot be protected by any other law, they must remain under the protection of the Commonwealth.

5.10 There are two ways in which this could occur. First, as discussed in Chapter 4, entries on the RNE would, according to the Department, receive protection via sections 26 and 28 of the EPBC Act. Second, they could be transferred directly to the Commonwealth Heritage List.

5.11 The Committee considers that the second of these offers clearer protection but that this should be augmented by recognising Commonwealth heritage places as matters of national environmental significance.

Recommendation 5.1

The Committee recommends that the Government incorporate all heritage properties on Commonwealth land that appear on the Register of the National Estate into the Commonwealth Heritage List.

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5 Mr Molesworth, *Proof Committee Hansard*, Canberra, 7 March 2001, pp 81-82.

6 See Appendix 4

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

Recommendation 5.2

The Committee recommends that Commonwealth heritage places should be recognised as matters of national environmental significance.

The assessment criteria and management principles

5.12 Two of the key documents that will affect the administration of the proposed heritage protection regime are the criteria for Heritage Values[8] and National Heritage Management Principles.[9] The criteria are used to determine whether a nominated place has heritage values, and the Minister is required to set these out in regulations. The management principles provide the basis for the management arrangements of all listed places.[10]

5.13 Two principal concerns have been raised with the Committee in relation to these documents. The first is that while both types of document are fundamentally important to the operation and effectiveness of the bills, neither have been publicly released for comment (noting however that the draft criteria for assessment of places on the National List were released last year). According to one submission:

> … without finalised criteria, it is extremely difficult to reach any conclusions about the implications of the proposed regime. The criteria are particularly important as they will correspond to the national heritage values – a vital consideration in the referrals and assessment process under the EPBC Act.[11]

5.14 And elsewhere:

> [T]hese principles are vital to a number of processes under the proposed legislation. For example, the national heritage management principles will be essential considerations before entering into bilateral agreements or making Ministerial declarations in relation to national heritage places. They are also fundamental to the preparation and review of management plans for all heritage places.
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> Once again, this is an example of key information which is not set out in the proposed legislation. The detail to be contained in these principles is left

8 Section 324C for National Heritage Values and section 341C Commonwealth Heritage Values

9 Section 324W for National Heritage Management Principles and section 341W for Commonwealth Heritage Management Principles.

10 See Chapter 1 for a more detailed description of the operation of these provisions.

11 WWF, Submission 12, p 3. See also AMEC, Submission 9, p 15.

> completely up to Ministerial discretion, and will not be subject to any formal public scrutiny.[12]

5.15 These concerns suggest that without an examination of these documents, no effective review of the proposed regime is possible.

5.16 Mr Leaver, of Environment Australia, responded in hearings that:

> Whilst a considerable amount of work has been done on management principles, national heritage management principles and Commonwealth heritage management principles, a considerable amount more work needs to be done, particularly on the very difficult melding together of the various heritage environments, including indigenous heritage. It is the department's view that these are best detailed in regulations to the act, rather than the act itself, to provide flexible tools that can be changed relatively easily over time as the understanding and concepts relating to these difficult heritage issues are discussed and ways forward are worked through with the community.[13]

5.17 The Committee appreciates the difficulties faced by the department in formulating these documents. Nevertheless, they are critical to an understanding of how the proposed regime will operate in practice. Although when the final versions of these documents are released in the future, they will no doubt be discussed in detail, the fact remains that both the public and Parliamentary debate about the proposals is occurring now, and the absence of key documents limits the capacity to make a fully informed judgement on the merits of the bills.

5.18 The Committee also considers that in relation to the assessment criteria for the Commonwealth list, this should remain the same as the current criteria for the RNE.

Recommendation 5.3

The Committee recommends that the Minister should release the Commonwealth Heritage Values criteria, and the Management Principles in draft or final form, before any final debate of the bills takes place.

5.19 In relation to the second issue, submissions have argued for the need to release the management principles as regulations subject to disallowance, in order to ensure the accountability of the documents to the Parliament. According to WWF, the proposed approach is:

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12 WWF, Submission 12, p 13. See also ACNT, Submission 4, p 9.

13 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 121.

> inconsistent with the Ramsar wetland Management Principles (s 335) and the World Heritage Management Principles (s 323), which are contained in (disallowable) the EPBC Regulations.[14]

5.20 The Environmental Defender's Office mirror these comments and state:

> In this regard, we note the Commonwealth Government's assurance to the World Heritage Committee in November 2000 that Australia was introducing National Heritage amendments to give nationally significant sites an equivalent level of protection enjoyed by World Heritage sites.[15]

5.21 This view is shared by several of the state governments, stressing the need for both consultation with the states, and the inclusion of all key documents in the legislation itself; as a schedule to the Act, or as regulations.[16] The South Australian government points out that this has been the practice in their equivalent state legislation in the *Heritage Act 1993* and the *Development Act 1993*.[17]

5.22 The Committee recognises that locating the Management Principles as gazetted documents rather than as regulations, offers advantages of administrative flexibility and the capacity to evolve their contents. However, the Committee considers that in the interests of transparency and accountability, it is more important that the Management Principles be released as part of the regulations.

Opportunities for external comment

5.23 A number of submissions received by this inquiry have argued that the regime proposed by the bills offers inadequate opportunity for public involvement.

5.24 The Committee notes that the bills offer a number of opportunities for public participation, including: the requirement to invite public comments prior to listing a place;[18] the requirement that the heritage lists be publicly available;[19] as well as the reporting requirements discussed below.[20] In making assessments of heritage values, the Australian Heritage Council is obliged to give a place's owner/occupier and any indigenous persons with rights or interests a reasonable opportunity to comment.[21]

5.25 The Department also noted that the inclusion of the heritage protection regime into the EPBC Act gives interested persons the opportunity to ensure compliance

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14 WWF, Submission 12, p 13.

15 EDO, Submission 21, p 16.

16 Tasmanian government, Submission 28, p 4. See also Penrith City Council, Submission 23, p 4; and New South Wales government, Submission 29, p 2.

17 South Australian government, *Proof Committee Hansard*, Canberra, 7 March 2001, p 6.

18 Sections 324G and 341G

19 Sections 324M and 341M

20 see paragraphs 5.67 – 5.72

21 Sections 324F and 341F

through the injunction provisions of section 475 and the natural justice and procedural fairness provisions of section 487.[22]

5.26 Several groups believe that these provisions do not go far enough in providing avenues for public involvement in decision making and consultation, which should extend to the preparation of key documents such as the Heritage Values; the Management Principles; and management plans.[23] The Environmental Defender's Office also recommend that all nominations received by the Minister should be automatically advertised for public comment.[24]

5.27 The state governments also argued strongly that the bills should give much greater opportunity for state and territory involvement in the listing process. The Tasmanian government argues:

> The legislation should provide for automatic referral of nominations to the relevant state or territory for comment and this comment should be considered in the decision making process.[25]

5.28 The NSW government makes a similar point:

> [T]here is no provision in the proposed legislation for the Commonwealth to consult with relevant state and territory governments before adding places to the National Heritage List.
>
> There was strong agreement at previous meetings of State and Commonwealth officials that consistent with the COAG Heads of Agreements, the preparation and management of the NHL should be undertaken in a cooperative manner between the Commonwealth and the States. The listing of places on the NHL should only be undertaken after consultation and agreement with the relevant state or territory.[26]

5.29 According to the Victorian government:

> Victoria believes that the state or territory interests or involvement in properties nominated for the National List is no less than for World Heritage properties. Therefore the state or territory participation in the process for listing properties to the National List should not be less than that provided for listing World Heritage properties.[27]

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

23 EDO, Submission 21, p 11, 14 and 16; WWF, Submission 12, p 14-15; and ACNT, Submission 4, p 9.

24 EDO, Submission 21, p 11.

25 Tasmanian government, Submission 28, p 3 and 6.

26 New South Wales government, Submission 29, p 1. See also South Australian government, Submission 27, p 4.

27 Victorian government, Submission 31, p 3. See EPBC Act Part 15

5.30 A key aspect of any legislative reform is the role for public participation in decision making processes. The Committee considers that maximising such opportunities is part of best practice public administration, and reflects a strong community expectation that government and their agencies will operate in an open and transparent way. This is particularly so in relation to decisions on the management and protection of heritage properties.

5.31 If it is to be effective, consultation must cover both specifically affected individuals and groups as well as the wider community, and offer sufficient time for the consideration of a proper response. In this respect it is worth noting that object 3(1)(d) of the EPBC Act, refers to the need to 'promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples'.

5.32 For these reasons, the Committee considers that as a general proposition every opportunity for public involvement should be maximised. In most respects though, the Committee considers that this principle is complied with. The Committee does, however, feel that there should be an opportunity for public comment on the draft regulations which should include the Heritage Values and Management Principles. The Committee also would expect that, in line with past practice, the Department will provide opportunities for consultation on all key documents, including the Management Plans.

5.33 The Committee does not, however, agree with the states' proposition that they should have an effective veto over listings. As noted in Chapter 2, this issue has been one of several causes of the breakdown in negotiations between the states and the Commonwealth. The Committee agrees with the Commonwealth government that listing and protection of places of identified national significance should not require the prior agreement of the relevant state or territory government.

Ministerial accountability

5.34 Submissions reflect a concern that the bills do not provide adequate accountability mechanisms for ministerial decision-making. Under the proposed legislation, the Minister is obliged to advise the nominator of reasons for choosing not to accept a nomination;[28] or not to list;[29] the Minister must publish a Statement of Significance prior to listing a property on either of the Lists;[30] and the both lists must specify the heritage values for which they were listed.[31] The Minister must also table

28 Section 324D(2)(b)

29 Section 324H(1)(b)

30 Section 324G(2)

31 Sections 324B(3) and 341B(3)

reasons in each House of Parliament explaining the decision to remove a place from a List.[32]

5.35 Submissions have argued that these provisions do not go far enough. According to the Australian Minerals Exploration Council:

> The bill's processes are essentially a 'closed shop' closed to all but the Minister, his advisers, his Department and the Australian Heritage Council, a Council which reports exclusively to him and whose members he appoints.[33]

5.36 Accordingly, some submissions have argued that in the interests of transparency and accountability the Minister should be required to publish reasons for decisions not to accept a nomination or not to list, rather than merely advise the nominator.[34] The Minister should also make public all heritage assessments of the AHC,[35] in place of the proposed prohibition on the AHC from disclosing their assessments.[36]

5.37 In considering these issues, Environment Australia notes there are several reasons why the reasons for Minister's decisions not to accept nominations are only provided to the nominator:

> Publicising the results of a nomination can often have a significant adverse impact on the nominee, particularly in rural or regional communities. The experience is that often heritage listing of a place can be bitterly resented by some and the nominee can be socially ostracised or face worse impacts. The heritage nominations on Norfolk Island mentioned in Mosley's evidence has precipitated this type of reaction.[37]

5.38 Environment Australia also note that Principle 11 of the *Privacy Act 1988* places limits on disclosure of personal information. Also, the reasons for a Ministerial decision have to be given to any interested person through the operation of section 13 of the *Administrative Decisions (Judicial Review) Act 1977*.[38]

5.39 Many of the considerations discussed in the preceding section apply equally to this issue. For a heritage protection regime to have credibility, especially given the often controversial nature of the debate, it is essential that the Minister be fully

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32 Section 324J(6)

33 AMEC, Submission 9, p 14.

34 EDO, Submission 21, p 13.

35 EDO, Submission 21, p 14.

36 Sections 324P & 341P

37 Letter from Mr Bruce Leaver to the Secretary dated 9 March 2001.

38 This Act is linked to the matters covered by the bills by s 487 of the EPBC Act. Letter from Mr Bruce Leaver to the Secretary dated 9 March 2001.

accountable for all important decisions. On this point the Committee notes the views of Mr Molesworth:

> There is a long-standing practice of good government to always write laws for the worst governments because, as time goes by, you can have very good ministers, you can have less good ministers and you can have bad ministers.[39]

5.40 The Committee views the assessments of the AHC as being centrally important to the process of public accountability especially given that in Chapter 3, the Committee argued that the Australian Heritage Council should have the final decision on listing. Listing decisions are limited to heritage considerations, while the Minister is expected to take into account the wider range of economic and social considerations in coming to decisions on management arrangements. For this process to be transparent, the AHC assessment of listing should be a public document.

5.41 The Committee recognises the privacy issues raised by the Department but does not consider them to pose insurmountable obstacles to disclosure. The privacy of nominations could and should be protected, but this does not mean that the assessments should not be published.

5.42 It is arguable that the bills already provide for the release of much of the assessments. As mentioned, sections 324H and 341H of the Heritage Bill require the publication of a statement of heritage values for every place listed. However, this may or may not amount to information as detailed and specific as that provided in the AHC assessment. However, this section does not provide for the publication of assessments when places are not listed.

5.43 Also sections 324P and 341P of the Heritage Bill impose certain duties on members of the AHC not to disclose assessments or advice. The implications of this section are not clear, and while appearing not to prohibit disclosure under certain circumstances, they do not impose any positive obligation to publish AHC assessments. The Committee believes they should.

5.44 However in relation to public disclosure, the Committee recognises the need to properly protect certain types of information, such as the location and significance of certain kinds of aboriginal sites. Accordingly, the Committee endorses the confidentiality provision proposed in sections 324N and 341N of the Environment and Heritage bill.

Recommendation 5.4

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require the release, on request, of AHC assessments of heritage values and listing.

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

Removal of places from the list

5.45 The bills provide several mechanisms for removal of places from the two lists by the Minister.[40] The first is where the places do not have any national/Commonwealth heritage values. The second is when 'it is necessary in the interests of Australia's defence or security to do so'. To effect a removal, the Minister must gazette the removal, together with a statement of reasons laid before both Houses of Parliament. A key difference however, is that whereas the instrument is subject to disallowance on the first ground, it is not disallowable in relation to removal on defence or security grounds.

5.46 This has been the subject of some criticism on the grounds that the terms 'defence or national security' are not defined and therefore liable to abuse. ATSIC note the recommendations of the Justice Woodward Royal Commission into Aboriginal Land Rights in the 1970's in relation to the national security over-ride:

> The over-ride was for eventualities such as national emergencies and it was not to be used for more trivial matters such as the economic status of any corporation or employment. However to safeguard the process for such an over-ride, Woodward recommended that the instrument to over-ride the veto ought to be a disallowable instrument … .[41]

5.47 The Australian Council of Professional Historians' Association add their concern that the use of the general terms 'defence and security reasons' may enable an opportunistic interpretation that could include any matter relating to the operations of defence or security agencies.[42]

5.48 Conversely, the South Australian government and the Australian New Zealand Minerals and Energy Council (ANZMEC) argue that the bills should be amended to enable both state governments and the owner or occupier to require the Minister to consider whether to remove a place from a list.[43]

5.49 The Committee shares the concerns relating to the scope of the 'defence or security' provisions for removal from a list, particularly as it is not subject to review or disallowance, in the way ordinarily foreseen by the bills for removal of places. The generality of the terms opens the possibility for abuse, and the Committee concludes that the provision should be tightened.

5.50 The Committee does not agree that states, territories or land owners/occupiers should be given the right to compel the Minister to consider removing a place. Where a place is listed and managed appropriately, it would not be expected that there would be many instances of the heritage values of that place being lost. Similarly, where the

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40 Sections 324J and 341J

41 ATSIC, Submission 25, p 16.

42 ACPHA, Submission 30, p 6.

43 South Australian government, Submission 27, p 5 and ANZMEC, Submission 24, p 8.

place is listed following a proper assessment and public comment, the listing should not need re-evaluation and constant retesting. The Committee considers that the inclusion of the provisions suggested is therefore unnecessary.

Recommendation 5.5

The Committee recommends the Government consider amendments to sections 324J and 341J of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 that would serve to either clarify the exact meaning of the phrase 'in the interests of Australia's defence or security', and require that decisions to remove a place from a Commonwealth or National Heritage List be executed by disallowable instrument.

Heritage surveys and registers

5.51 A recurring problem on Commonwealth property appears to be mismanagement of heritage properties caused by a failure of individual agencies to properly identify their significance. According to Ms Sullivan:

> Commonwealth buildings, and areas of great natural heritage under the control of the Commonwealth have been neglected, misused, sold off to the highest bidder, or returned to the states in an extremely dilapidated condition.[44]

5.52 Similar comments were made by the Australian Council of National Trusts:

> Under the present regime, few Commonwealth agencies have identified all of their heritage properties and those that have identified some and developed management plans often act in disregard of those plans. Most Commonwealth-owned property is being disposed of without any assessment or public consultation.[45]

5.53 Mr Peter King, Chair of the Australian Heritage Commission, expressed this view:

> The Commonwealth, frankly, has not had a good record of looking after its own heritage, which is a matter of which the Commonwealth cannot be proud, and successive governments have failed to properly identify and conserve their own heritage – such as the wonderful post offices, defence facilities and many other places of natural and cultural significance right around this country.[46]

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44 Ms Sullivan, Submission 14, p 8.

45 ACNT, Submission 4, p 2.

46 Mr Peter King*, Proof Committee Hansard*, Canberra, 7 March 2001, p 107.

5.54 This problem may have worsened since the 1989 devolution of the property management function to individual agencies and away from the centralised control of the Department of Administrative Services. The Schofield Report notes that it has not been the role of the AHC to undertake identification of heritage property. Neither is there recognition of responsibility for the identification and conservation of heritage property in the legislation or Corporate Plans of most Commonwealth entities:

> As a result there has been no comprehensive program for the identification of all Commonwealth owned heritage properties and most identification has been done by non-Commonwealth bodies (such as the National Trust).[47]

5.55 The bills appear to maintain this position, in that section 341X of the Heritage Bill requires Commonwealth agencies that own or control places that have or might have heritage values:

> must take all reasonable steps to assist the Minister and the Australian Heritage Council in the identification and assessment of the place's Commonwealth heritage values.

5.56 It was put to the Committee that this provision does not go far enough in correcting the problem of the lack of identification of heritage places, identified in the Schofield Report.[48] According to the Australian Conservation Foundation:

> Among other recommendations in the Schofield Report that have not been adopted by the Commonwealth or incorporated in these Bills is the recommendation that the Commonwealth implement a three-year program to identify and list in the RNE all Commonwealth places of heritage significance. This would seem to be a highly important duty for the Commonwealth to accept in its approach to looking after its own heritage, especially as it is well recognised that a full inventory of Commonwealth heritage has never been carried out.[49]

5.57 Professor Lennon makes a similar point, and suggests amending section 341X to require Commonwealth agencies to:

- seek to conserve heritage places under their control;
- identify heritage places and keep an inventory;
- undertake a survey of places under their control to identify those with heritage value. The initial survey to be completed by 2003;

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47 1996 Commonwealth Report by the Committee of Review – Commonwealth owned Heritage Properties – A Presence for the Past, Chapter 3, page 1.

48 A Presence for the Past, Chapter 3

49 ACF, Submission 16, p 14. See also EDO, Submission 21, p 20; ACNT, Submission 4, p 3; WWF, Submission 12, pp 5 & 10; Ms Sullivan, Submission 14, p 8.

- survey within 6 months any new places brought under their control, to identify heritage values;
- surveys shall conform to guidelines and standards provided by the Australian Heritage Council; and
- Commonwealth agencies will review their inventories at least every 5 years.[50]

5.58 An alternative suggestion is that the bills be amended to require an inventory of heritage sites on Commonwealth land and Commonwealth properties similar to the current requirement for threatened species contained in section 172 of the EPBC Act.[51]

5.59 The Committee agrees with these views, and considers that it is fundamental to the proper and methodical management of Commonwealth property, that a proper effort is made to thoroughly assess the heritage values of places in the Commonwealth property portfolio. This has become particularly important in the current devolved environment. The Committee also considers that the heritage values of places should be known before decisions are made to sell or dispose of property.

Recommendation 5.6

The Committee recommends that the Government amend the bills to require Commonwealth agencies to implement a heritage inventory of their property portfolios that will properly identify and assess heritage values. Commonwealth agencies should be further required to review their inventories at least every five years.

Recommendation 5.7

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to prepare and maintain a heritage strategy for the management of their heritage places as was recommended by the Schofield Report.

Recommendation 5.8

The Committee recommends that the Government amend the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 to require Commonwealth agencies to undertake a survey of the heritage values of all newly acquired properties in accordance with standards and guidelines provided by the Australian Heritage Council.

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50 Professor Lennon, Submission 11, p 5.

51 Mr Pittock, *Proof Committee Hansard*, Canberra, 28 February 2001, p 31.

Application of state laws to Commonwealth land

5.60 The Committee has heard some debate on the extent, if any, to which Commonwealth agencies managing heritage places should be bound by state/territory laws. As a matter of law, Commonwealth land is not subject to state or territory law by reason of the grant to the Commonwealth of exclusive law making powers in relation to Commonwealth land in section 52(2) of the Australian Constitution. Nevertheless, the Commonwealth may exercise the option of deeming itself bound by state/territory law.

5.61 Some submissions have argued that obliging Commonwealth agencies to comply with state/territory heritage protection regimes would lead to better protection. As the Schofield Report states:

> Very few Commonwealth agencies list their properties in state/territory registers, a move criticised by states … . Conversely, in some instances, state/territory governments have been reticent to include Commonwealth properties on their registers because of the limitations on protection implied by the Commonwealth's immunity from state/territory legislation … .[52]

5.62 The report accordingly goes on to recommend that Commonwealth agencies 'have full regard to state and territory heritage and planning regulations where practicable'.[53] This view is supported by the Australian Council of National Trusts, who note that this is consistent with the COAG agreement, in which the governments:

> Agree to increased compliance by Commonwealth and State departments, statutory authorities, agencies, business enterprises and tenants with the relevant state's environment and planning [including heritage] laws.[54]

5.63 The ACNT comment that this intention was then carried through in the AHC briefings during 2000:

> All Commonwealth Government Business Enterprises (GBEs), non-GBE companies, statutory authorities whose primary functions are commercial, and business units, would be required to comply, and non-compliant Commonwealth agencies, were to secure approvals in accordance with Commonwealth measures which are at least equivalent to the environment and planning laws of the relevant state.[55]

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52 A Presence for the past, p. 24

53 A Presence for the past, p. 25

54 Part (g). ACNT, Submission 4, p 7. See also ACF, Submission 16, p 14; EDO, Submission 21, p 7.

55 ACNT, Submission 4, p 7

5.64 Among the states, Tasmania was also expecting to see Commonwealth compliance with state and territory laws:

> The Tasmanian government was advised that the new legislation would contain provisions by which the Commonwealth would have to comply with State law. The Bill contains no such provision and there is no acknowledgement of existing State processes.[56]

5.65 According to the Tasmanian government, the absence of compliance can cause significant problems:

> The Hobart General Post Office (GPO) offers a prime example of the problem of the Commonwealth not complying with State processes. The post office building has historic heritage values and certain restrictions are placed on works to the site. In late 2000, the GPO decided to erect a neon sign adjacent to the building. The normal planning requirements set out by the State were completely ignored because the GPO was able to use Commonwealth exemptions to avoid them.[57]

5.66 As was examined in Chapter 2, the absence of provisions binding the Commonwealth to state or territory laws on Commonwealth places can be attributed in large part to the failure of negotiations on the bilateral agreements. Nevertheless, the Committee notes that the bills and the EPBC Act provide the framework for the eventual accreditation of state and territory laws, processes and decisions.

5.67 The Committee also notes that there is a general public expectation that heritage places on Commonwealth land will be managed to a uniform standard in accordance with best practice. The Committee has heard evidence demonstrating wide divergence in state and territory laws, definitions, and practices across the heritage protection field. Until uniform Australian standards are agreed upon, it would be impractical for the Commonwealth government to base heritage protection on Commonwealth land solely upon state and territory laws.

5.68 In considering these issues, the Committee concludes that the Commonwealth government should continue to actively negotiate with the state and territory governments to work towards the agreements envisaged in the Schofield Report and the terms of the COAG Agreement. In addition, Commonwealth agencies, should commit to compliance with relevant state or territory planning and heritage laws; where two protective regimes apply, the Commonwealth should bind itself to whichever law offers the maximum level of protection. Commonwealth departments and agencies should also begin listing Commonwealth properties on relevant state, territory or local government heritage registers.

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56 Tasmanian government, Submission 28, p 4.

57 Tasmanian government, Submission 28, p 4.

Review and reporting requirements

5.69 The bills propose a number of reporting obligations, including reviews of heritage listed management plans at least every seven years,[58] and a review of and report on the two heritage lists at least every ten years.[59]

5.70 Submissions have argued that in both cases, the stipulated timeframe is too long, suggesting that both management plans and heritage lists need to be reviewed every five years. Adoption of this time-scale would also relate the reviews to the existing five year State of the Environment reporting period,[60] and be consistent with the review requirements for World Heritage management plans.[61]

5.71 A second issue in relation to the heritage list review is the content of the reports themselves. Submissions recommend amendments to require consideration of broader matters than are stipulated in the bills.[62] The Environmental Defender's Office suggests the reports on the heritage lists should include:

- Details of nominations referred to the Council, including details of Council's assessments and final determinations.
- The extent and nature of the sale of Commonwealth properties, and the impact on heritage values.
- Strategic issues and indirect impacts upon National/Commonwealth Heritage Values. For instance, impacts brought on by Commonwealth, State and local environmental planning and development processes.
- Australia's compliance with the World Heritage Convention.
- The effectiveness of and compliance with heritage standards across the nation.
- The effectiveness of heritage protection under any bilateral agreement with States and Territories.[63]

5.72 According to another submission the reports should include:

> details of assessments and approval (including any conditions on those approvals) under the EPBC Act in relation to places included in each list, details on the monitoring of compliance with those approval, and the general

58 Section 324U and section 341V

59 Section 324Z and section 341ZB

60 Pursuant to section 516B of the EPBC Act 1999. Professor Lennon, Submission 11, p 4.

61 EDO, Submission 21, p 15.

62 At sections 324Z(2) and 341ZB(2)

63 EDO, Submission 21, p 18.

> level of compliance with the EPBC Act requirements relating to national and Commonwealth heritage places.[64]

5.73 Sydney Water made the added point that where possible the Commonwealth and the states should set up common reporting:

> Sydney Water already reports on such matters to the NSW Heritage Council/Office. Sydney Water recommends that the Commonwealth and states liaise so that the reporting format suitable for reporting to the Parliament is such that the state information can be forwarded to the Minister for inclusion in the report to Parliament, thus avoiding further duplication of reporting by an organisation.[65]

5.74 The Committee agrees with these views and reiterates the comments made earlier in this chapter on the importance of transparency and accountability. Information is a key prerequisite for public participation. Effective monitoring of the outcomes of heritage protection, and proper comparison across lists and times, also requires comprehensive information that is as standardised as possible.

Recommendation 5.9

The Committee recommends that the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to require reviews of management plans for both the National and Commonwealth Heritage Lists every five years.

Recommendation 5.10

The Committee recommends that the Government consider broadening the reporting requirements to include the range of matters suggested by submissions.

Recommendation 5.11

The Committee recommends that Commonwealth Departments and agencies detail the implementation of their heritage strategies in their annual reports.

Compensation

5.75 The EPBC Act refers to compensation for the acquisition of property,[66] in accordance with the requirements of paragraph 51(xxxi) of the Australian Constitution. The Australian Mining and Exploration Council (AMEC) raise their

64 WWF, Submission 12, p 15.

65 Sydney Water, Submission 7, p 3.

66 Chapter 7, Section 519

concern that the provision for compensation is too narrow and does not adequately recognise other categories of loss that may occur when properties are listed on one of the heritage lists:

> In AMEC's view, this treatment of the compensation issue is totally inadequate … There are a whole range of other losses people could suffer as a result of heritage listings, ranging from decreases in property values, loss of access resources, eg water and loss of future income.
>
> The compensation payable by the Commonwealth clearly needs to be extended past the single category of property acquisition… .[67]

5.76 The Committee has not received enough evidence on this issue to form any conclusions on the extent or the exact nature of the costs that may be associated with heritage listing of a property. It does, however, consider that AMEC raise an important point, which should receive further consideration.

5.77 The Committee considers that as a matter of general policy, where the Australian people wish to protect a place for its heritage values, the owners of such places should, as much as possible, not suffer financial disadvantage. The Committee notes, however, that as with planning laws which have similar impacts, some positive, some negative, mandatory compensation is not an effective policy nor is it a policy that is generally applied in Australia or elsewhere. In addition, the Committee notes that heritage listing, in some instances, increases the value of a property.

Recommendation 5.12

The Committee recommends that the Government give further consideration to the range of measures offered to assist the owners of heritage properties including grants and tax and other concessions.

Funding issues

5.78 The bills provide for 'financial or other assistance for the identification, promotion, protection or conservation' of a Commonwealth or National heritage place.[68] This contrasts to the provision in the AHC Act for the National Estate Grants Program[69] and the mandate for the AHC to administer it.[70]

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67 AMEC, Submission 9, p 19. See also Mr Layton, *Proof Committee Hansard*, Canberra, 28 February 2001, p 41.

68 Sections 324Y and 341ZA

69 AHC Act 1975, Part VA.

70 AHC Act 1975, Section 7

5.79 The National Estate Grants Program has since been changed into the Cultural Heritage Projects Program. In 1999/2000, the AHC considered 401 applications under this program, and the Minister provided financial assistance to 44 projects valued at $3.25 million.[71] This program is designed to conserve places of cultural significance – built and indigenous heritage, but does not include natural heritage places.[72]

5.80 Submissions raised the concern that future Commonwealth funding of heritage places will be restricted to the probably smaller number of places on the two new lists, which witnesses argue amounts to a further withdrawal by the Commonwealth from its national leadership role. Mr Molesworth, Australian Council of National Trusts, notes that funding:

> … may be available to heritage properties on the Commonwealth list and there is funding that may be available to heritage properties that are on the national list. There is no provision in the proposed legislation to provide funding generally to the vast number of other significant heritage properties in this country.
>
> Under the old National Estate grants program, the eligibility was listing on a heritage register, not just on the National Estate list but also on the state lists. So the Commonwealth was able very proactively to protect, in a way, by providing the incentive of money, and it was available right across the board to all listed properties. What we have now is a possibility of that method of the Commonwealth protecting heritage being restricted just to the national list and the Commonwealth list – excellent for those properties that happen to be on those lists; sad for those that are not.[73]

5.81 The Australian Council of National Trusts further comment that:

> In the past 25 years NEGP funding has made an immense contribution to practical conservation and to pioneering work in identifying and interpreting heritage places.[74]

5.82 These changes have also attracted the criticism of state governments. By transferring management of most heritage places to the states and territories, the bills will also transfer responsibility for the funding of heritage protection of these places to the states and territories. This has major budgetary implications.

5.83 According to the NSW government, the Commonwealth must fund 'the additional costs that [NSW] incurs as a result of exercising its responsibilities under the new legislation'.[75] And further:

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71 AHC Annual Report 1999/2000, p. 26

72 Environment Australia website, http://www.environment.gov.au/heritage/awhg/chpp/information.html#info (as at 2 March 2001)

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

74 ACNT, Submission 4, p 6. See also ACF, Submission 16, p 11.

> Commonwealth financial assistance should be available to owners of heritage properties regardless as to whether they are of National, state or local heritage significance.[76]

5.84 The South Australian government adds that:

> It is considered that the intentions of the Commonwealth in respect of the continued provision of funding assistance for the protection and management of other Australian heritage assets, in accordance with the significant role that it has played historically, should be clarified, discussed and agreed with the states. Also, the implications for states' resources of the proposed cooperative development of a management plan for the national heritage places need to be considered and understood to ensure that arrangements for financial and other assistance from the Commonwealth are appropriate.[77]

5.85 The Victorian government gives a similar view:

> a significant retreat from the historical role played by the Commonwealth. It is important that the Commonwealth continues to provide funding assistance for the protection and management of Australia's heritage assets at levels, not simply those exhibiting national heritage values.[78]

5.86 The Committee has not received evidence relating to the extent or outcomes of discussions between the Commonwealth and the states in relation to these funding issues. Nevertheless, it is clearly a matter critical to the creation of an effective heritage protection scheme. As discussed in Chapter 2, the Committee believes that the Commonwealth should commit to a role of national leadership, and this carries with it certain funding responsibilities. For this reason, the Committee concludes that it is undesirable that the legislation should limit funding to places on the Commonwealth and National Heritage Lists, particularly given the Committee's recommendation that the Register of the National Estate be retained.

5.87 The Committee notes the suggestions of several witnesses for ways in which funding can be directed to protect a large number of listed properties. Dr Susan Marsden, National Conservation Manager, Australian Council of National Trusts (in relation specifically to the RNE), states:

> There are a range of quite sophisticated ways in which you can protect those 13,000 places without necessarily reducing them to a very small list of national places. Firstly, you can do what, for example, English Heritage does. Every year it puts out a register of buildings at risk, compiled from its

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

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

77 Ms Burch, *Proof Committee Hansard*, Canberra, 7 March 2001, p 64. See also Tasmanian government, Submission 28, p 5.

78 Victorian government, Submission 31, p 6.

> much greater register of buildings in the UK, and then provides funding and advisory support to local authorities to help look after those buildings.
>
> Secondly, you could still keep the Register of the National Estate but simply highlight each year a different range of places – not necessarily a finite list each year – bring them up to scratch, develop management regimes with the appropriate governments that might protect and interpret those places, and then move on.[79]

5.88 Two other important funding issues are first, the provision of funding for education – particularly in relation to the requirements of the heritage regime – and second, for monitoring of compliance with that regime. As the Humane Society International's submission noted, 'the effective implementation of the new Commonwealth heritage regime will ultimately depend on adequate enforcement of the regime'.[80] The Government must therefore ensure that sufficient funds are directed towards these two needs.

Recommendation 5.13

The Committee recommends that sections 324Y and 341ZA of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to enable Commonwealth funding assistance to any heritage place.

Recommendation 5.14

The Committee recommends that the Commonwealth Government give priority to negotiations with the state and territory governments that will clarify the role and extent of Commonwealth Government funding in relation to overall heritage protection.

The potential for thematic listings

5.89 An aspect of the bills which has attracted some enthusiastic responses is the provision for the creation of thematic listings in the National Heritage List.[81] Dr Mosley comments that this concept has considerable history in Australia, and the provision for thematic listings offers the opportunity to utilise information collected over many years by government agencies.[82] He comments that:

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79 Dr Marsden , *Proof Committee Hansard*, Canberra, 7 March 2001, p 78.

80 WWF, Submission 12, p 16.

81 Section 324D(6)

82 Peak Environmental Enterprises, Submission 5(a)

> … there is a possibility – and a great opportunity if you like – for two kinds of cultural landscapes to be accepted as themes for the national heritage list. One would be indigenous cultural landscape as a type, and the other would be areas that are, if you like, the combined results of humans and nature. There are wonderful examples of these on the fringes of nearly every one of our big cities. For instance, in Perth we have the Darling Ranges. Here around Melbourne we have the Mornington Peninsula, the Dandenong Ranges and Mount Macedon. In Adelaide we have the Adelaide Hills. In Sydney we have the Hawkesbury River country, and other areas. I could go on.[83]

5.90 Mr Bruce Leaver, of Environment Australia, also notes:

> the potential for national place assessment under a nominated theme to be done in conjunction with state and local government, to provide a package of sites under that theme which could then be marketed and managed as a heritage product, particularly for regional development.[84]

5.91 The Committee believes that the development of thematic listings should be given further consideration.

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83 Dr Mosley, *Proof Committee Hansard*, Canberra, 28 February 2001, p 13

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