

CHAPTER 6

ENFORCEMENT OF HERITAGE PROTECTION

Introduction

6.1 A key driver of reform in heritage legislation is the need to provide more effective protection of heritage places. As was discussed in earlier chapters, the listing of a property on private or commercially owned land under the Register of the National Estate confers largely symbolic protection. Under the proposed regime, this will be replaced with the stronger enforcement provisions contained in the *Environment Protection and Biodiversity Conservation Act 1999*.

6.2 Although submissions to the inquiry largely support this stronger enforcement regime, a number of weaknesses were identified. These relate principally to the definitions of particular words and phrases, and the need to extend protection to encompass certain additional categories of offence. These issues are explored in this chapter.

Definition of ‘action’

6.3 The definition of ‘action’ is very significant to the operation of the enforcement provisions of the proposed heritage protection regime. The sections of the Bill creating offences relating to national heritage places¹ and those of the EPBC Act requiring approval of proposals² are triggered by ‘actions’. These are defined in the EPBC Act to include projects, developments, undertakings or alterations, but exclude various types of decisions and provisions of grant funding.³

6.4 This definition is considerably narrower than the AHC Act definition it is designed to replace. Section 30(4) of the AHC Act expressly includes government decisions; approval of programs; the issuing of licences or permits; grants of financial assistance or the adoption of recommendations.⁴

6.5 Submissions argue for the definition of ‘action’ to be broadened to include disposal actions and grants.

Disposal actions

6.6 In relation to the former, the Australian Council of National Trusts argues:

1 Section 15C

2 EPBC sections 26 & 28

3 EPBC sections 523, 524 and 524A

4 WWF, Submission 12, p 9. See also ACF, Submission 16, p 11.

Currently, the Commission is alerted if disposal is planned but under the new Act this appears unlikely. This will mean that Commonwealth agencies will not have to consult concerning the disposal of property – which is happening apace across Australia – and so heritage properties may pass out of Commonwealth control with no effective heritage protection unless already state heritage-listed.⁵

6.7 The bills currently provide specific provisions for the protection of any heritage listed properties subject to sale or disposal.⁶ The effectiveness of these sections is discussed below.

6.8 These sections do not cover the disposal of properties that are not listed, and cases where the heritage values of a place have not been identified. While priority should be given to the identification of these values as a precursor to proper management, the Committee realises that this will not always happen, and hence a ‘safety net’ mechanism is needed to ensure the long term protection of the heritage values of these properties.

Grants

6.9 In relation to the second matter, other groups point to the importance of the definition continuing to include grants, in order to achieve better heritage outcomes in two major types of grant programs:

Firstly, grants programs designed for heritage outcomes, such as the Federation Fund, will be checked by a technically equipped organisation, the Council and its staff, to ensure that all aspects of the grant are positive and that the maximum benefits accrue to the heritage place, the community and the grant recipient.

Secondly, grants programs that are not of a heritage nature will be assessed by a heritage aware Council for any impacts that could affect the heritage place. In so doing, the Commonwealth will be aware of any unintended affects on heritage places that a grant program could have caused.⁷

6.10 This point was expanded upon by Dr Warren Nicholls, Australian Conservation Foundation:

Experience with the Heritage Commission – where section 30(4) of that Act does pick up grants as a Commonwealth action – shows that, with many Commonwealth grants programs, there are often well intended proposals put by applicants who seek to do the right thing but which, if funded, would result in a negative effect on heritage. By the Heritage Commission, as an expert body, having this opportunity of being able to review these programs

5 ACNT, Submission 4, p 4.

6 Bill sections 324X and 341Z

7 ACF, Submission 16, p 11.

and suggest small changes to what is proposed, projects that could have had an adverse effect on a heritage place have been changed around to have a very positive effect. The outcome is very positive for the government. Its funding is going to result in a positive effect for heritage, and there are no problems with subsequently finding out that what was intended as a good grant ended up having an adverse effect. The applicants are happy because they have had their projects amended in a positive way and, of course, the important thing is that the heritage benefits.⁸

6.11 The Committee agrees that Commonwealth grants should be subject to assessment to ensure that they further heritage protection and do not have counterproductive outcomes. However, the Committee is also mindful that ‘action’ is defined in section 528 of the EPBC Act, and that an amended definition would affect the operation of the whole of the Act, and not only matters relating to heritage. Consideration of such a wider impact is beyond the scope of the Committee’s current inquiry.

Recommendation 6.1

The Committee recommends that the Government consider means to ensure that the range of actions triggering assessment under the *Australian Heritage Commission Act 1975* are also assessed under the proposed regime, especially with regard to the sale of Commonwealth properties and to the assessment of grants.

Protection upon sale or lease

6.12 When heritage listed property is sold or leased by the Commonwealth, there is a danger that its heritage values will no longer be properly protected. This issue is of particular relevance in the context of the wide ranging policy of disposals of Commonwealth properties around Australia, teamed with a policy of sale and lease-back of significant amounts of office accommodation. Accordingly, the bills provide⁹ that the Commonwealth must include a covenant to protect heritage values whenever it executes a contract for the sale or lease of Commonwealth land involving heritage, and must take reasonable steps to ensure that this covenant binds the successors in title.

6.13 The Committee has heard evidence that covenants are not the most effective means of providing protection to heritage properties. The Australian Council of National Trusts state:

8 Dr Nicholls, *Proof Committee Hansard*, Canberra, 28 February 2001, p 54.

9 Sections 324X and 341Z. See also ACNT, Submission 4, p 4, and WWF, Submission 12, p 11.

Disposal is a key issue of concern as the only protection proposed in the Bill is covenants. This does not represent best-practice. In the experience of National Trusts and state heritage agencies, covenants do not provide long term protection of heritage values and rarely remain effective past the first change in ownership. Far more effective protection is provided by heritage listing (state or local listing) before the property is disposed of.¹⁰

6.14 The Department acknowledged that there may be weaknesses with the proposed system but considers that it remains the best alternative:

If somebody can develop a better more workable system in relation to protection of heritage through the sale of property, then we would certainly be interested in it, but through the protracted consultation process that appeared to be the simplest and most workable of the options that were open.¹¹

6.15 Submissions have offered several solutions to these limitations. In the view of the Schofield Report, it is preferable to avoid sale of Commonwealth properties with heritage values and use instead a long term lease; or alternatively, in order of preference:

- freehold sale to a State Body for conservation purposes;
- freehold sale to a Local Authority, private body with adequate protection under State Heritage Laws;
- a covenant in perpetuity on freehold sale.¹²

6.16 Others recommend amendments to require a conservation agreement under Part 14 of the EPBC Act to be entered into with the new land-holder prior to the execution of the contract for the sale or lease of that land;¹³ or the use of permits and other mechanisms, such as heritage agreements for monitoring and continuing to preserve heritage values after disposal.¹⁴

6.17 The Environmental Defender's Office recommend that:

[Sections] 324X and 341Z should be amended to require that any National or Commonwealth heritage place that is the subject of a sale or lease by the Commonwealth be subject to adequate heritage listing under State heritage

10 ACNT, Submission 4, p 4. See also ACF, Submission 16, p 14.

11 Mr Bruce Leaver, *Proof Committee Hansard*, Canberra, 7 March 2001, p 124.

12 Quoted in EDO, Submission 21, p 16.

13 WWF, Submission 12, p 11.

14 ACNT, Submission 4, p 3.

legislation. Alternatively, the Commonwealth must take all reasonable steps to ensure that the place is protected by a State heritage listing.¹⁵

6.18 The Committee notes that the identification of the need for provision of better protection of Commonwealth heritage properties after sale or disposal was one of the outcomes of the Schofield Report.¹⁶ The Committee also recognises that over time, problems may emerge with the effectiveness of the covenant system provided for in the bill. For these reasons, there are obvious benefits in considering some of the other options suggested by submissions such as leasing (thereby retaining a property under Commonwealth laws); sale to a state or territory; or listing under state or territory registers. However, the Committee also recognises that these options may be inappropriate in some circumstances, and may impose unwarranted restrictions on the operational flexibility of an agency.

Recommendation 6.2

The Committee recommends that the Government consider additional administrative means to protect Commonwealth Heritage List places upon sale or disposal, incorporating a range of methods, including listing, to ensure the preservation of these properties.

Definition of ‘significant impact’

6.19 The meaning of ‘significant impact’ is also critical to the enforcement and triggering provisions discussed above. As one submission explains:

The Minister’s decision as to whether a proposed action will have a ‘significant impact’ on a matter of NES, and therefore whether the action requires approval under the EPBC Act, is one of the most important decision-making points in the processes under the Act.¹⁷

6.20 Submissions have raised three central objections to this arrangement: the source of the definition in Administrative Guidelines; and the failure of the definition to encompass damage to heritage properties caused by either cumulative impacts or neglect.

15 EDO, Submission 21, p 16. See also Dr Nicholls, *Proof Committee Hansard*, Canberra, 28 February 2001, p 57.

16 1996 Commonwealth Report by the Committee of Review – Commonwealth owned Heritage Properties – A Presence for the Past, p 62.

17 WWF, Submission 12, p 7.

Administrative Guidelines

6.21 The first relates to the source of the definition. What constitutes ‘significant’ for the purposes of the Act is to be prescribed by the regulations,¹⁸ however, two submissions have pointed out that the definition is derived not from regulations but rather Administrative Guidelines,¹⁹ which they argue have no statutory force; are easily changed; are not enforceable and thus provide no certainty for stakeholders.²⁰ There is the concern that:

As a result, the Minister has a very broad discretion as to whether to subject a project to environmental assessment and approval under the EPBC Act. Given the importance of this decision, we consider that the definition of significant should be in Regulations, as provided for under section 524B of the EPBC Act.²¹

6.22 The Committee has not received sufficient evidence on the legal status and enforceability of administrative guidelines to draw any clear conclusions. However, in general terms, it would appear that the guidelines are not binding on the Minister, and accordingly provide the Minister with considerable discretion to interpret and amend the concept of ‘significant impact’. While there are some advantages in this approach, the Committee considers that the concept of ‘significant impact’ is sufficiently central to the enforcement provisions of the regime to render it desirable that the issue is clearly defined in regulations, as envisaged by the EPBC Act. Again, this view is tempered by the observation that such a change may have wider impacts on the operation of the EPBC Act that the Committee has not considered in the context of this inquiry.

Recommendation 6.3

The Committee recommends that the Government table the proposed definition of ‘significant impact’ in relation to natural heritage places, before any further debate on the bills takes place.

Recommendation 6.4

The Committee recommends that the Government place the definition of ‘significant impact’ in regulations created pursuant to the EPBC Act.

18 EPBC section 524B

19 ‘Administrative Guidelines for determining whether an action has, will have, or is likely to have a significant impact on a matter of national environmental significance under the *Environment Protection and Biodiversity Act 1999*.’ See Environment Australia website: http://www.erin.gov.au/epbc/proponents/significance_guidelines_text.htm

20 EDO, Submission 21, p 9.

21 WWF, Submission 12, p 7.

Cumulative impacts

6.23 The second issue relates to the threshold requirement of ‘significant impact’, which may not properly take account of multiple, small but cumulative or incremental actions that overall may have a major impact on a heritage listed place:

Such impacts can be critical, especially when repeated on many occasions, in many places in close proximity to each other. Examples would include repeated actions to one or a series of adjacent buildings or a series of developments along a stretch of coastline.²²

6.24 The Australian Council of National Trusts explains that heritage places unlike natural places, are non-renewable, and the destruction of historical fabric, no matter how minor, involves permanent loss:

a series of minor physical changes will collectively and cumulatively lead eventually to the total loss of heritage value, particularly in precincts comprising several places.²³

6.25 An alternative is to retain in the new regime, the terms used in the existing Act: ‘adversely affects’ and actions ‘that might affect to a significant extent’, which it is argued are suited to heritage protection and carry the added advantage of already possessing well established common law interpretations.²⁴ Accordingly, submissions advocate several other solutions, including the use of section 341R management plans as a tool to control limited actions,²⁵ or the creation of:

a range of lesser offences not requiring ‘significant impact’ to encompass more ‘minor’ actions – for example, altering or damaging a Commonwealth heritage place.²⁶

6.26 These would be regulated through a permit system modelled on Part 13 of the EPBC Act relating to actions impacting upon members of threatened species.²⁷

6.27 The Committee notes that under the existing Administrative Guidelines, it is arguable that such minor or cumulative impacts could amount to a significant impact. The Guidelines require consideration of (among other things):

- all direct and indirect impacts;
- the frequency and duration of the action;

22 ACF, Submission 16, p 13. See also ACNT, Submission 4, p 3.

23 ACNT, Submission 4, p 2.

24 ACF, Submission 16, p 13.

25 ACF, Submission 16, p 13.

26 WWF, Submission 12, p 10. Note also the comments of EDO, Submission 21, p 21.

27 ACF, Submission 16, p 13.

- the total impact which can be attributed to that action over the entire geographic area affected, and over time;
- and invokes the precautionary principle.²⁸

6.28 Although the guidelines relating specifically to heritage protection are not yet available, examination of guidelines for other matters of environmental significance, such as world heritage properties, also suggest that cumulative impacts may be covered.

6.29 Nevertheless, the Committee concludes that the concept of ‘significant impact’ caused by cumulative impacts should be explicitly covered.

6.30 The Government may also wish to consider developing a permit system for cumulative actions affecting Commonwealth heritage. This could be similar to the existing system under Part 13 of the EPBC Act for members of species in Commonwealth areas.

Recommendation 6.5

The Committee recommends that in framing the definition of ‘significant impact’ for heritage places, in the regulations, specific consideration should be given to including impacts caused by cumulative actions.

Protection against neglect

6.31 In a closely related issue, it is argued that the provisions of the Bill do not offer protection against neglect of heritage places, and therefore need to be extended to cover both positive and negative acts in the protection regime. Associate Professor Paul Adam comments:

In the built environment it has been recognised that ‘demolition by neglect’ is a major threat. There is a need to recognise that failure to manage can have the same effect in the natural environment.²⁹

6.32 It is therefore argued that the Bill should be amended to impose minimum standards for the maintenance and repair of listed places, similar to the requirements of section 118 of the *Heritage Act 1977* (NSW).³⁰

6.33 The Committee agrees with the importance of preventing destruction through neglect. However, it is noted that adding the proposed amendments to the definition of ‘significant impact’ would result in attaching criminal penalties to the failure to

28 Administrative Guidelines p 2.

29 Associate Professor Adam, Submission 20, p 3.

30 WWF, Submission 12, p 7. See also ACF, Submission 16, p 14.

properly maintain a heritage place. The Committee is mindful that proper maintenance may imply considerable expenditure for the owners of heritage places. For this reason, criminal penalties may be appropriate for Commonwealth owned heritage places, but are probably less so for private owners, and that the Commonwealth should address the issue by means of management plans and associated grants programs.

6.34 In the Committee's view, the size and scope of the list (which has not yet been announced) will have some bearing on the appropriateness of this action since criminal penalties may be appropriate for the owners - whether public or private - of Australia's icon sites, but less so for other sites. As a general principle, however, attaching criminal penalties for failing to properly maintain a heritage place would appear to be appropriate for government owned properties but arguably less so for privately owned sites, especially where considerable expenditure may be required to maintain that site and where this places financial burden on the owner. In these cases, it would be more appropriate for the Commonwealth to address the issue by means of management plans and associated grants programs.

Recommendation 6.6

The Committee recommends that for places on the Commonwealth Heritage List, the Government include in the definition of 'significant impact' the neglect of the place.

Recommendation 6.7

The Committee recommends that the Government specifically addresses the issue of the neglect of places on the Register of the National Estate and National Heritage List through the adoption of measures such as management plans and grants funding.

Definition of damage to heritage

6.35 There is also concern that the sections 15B and 15C of the Bill, which create the central penalty provisions, refer to actions that have a significant impact on the 'heritage values' of a national heritage place. Submissions have argued that this definition should be altered to cover impacts on the place itself, rather than being limited to impact on national heritage values:

protecting only the values of a national heritage place requires a careful articulation of those values during the listing process. Any oversight could

subsequently result in damage to ‘unlisted’, but nevertheless important, values.³¹

6.36 It is further argued that:

Whilst identification of the values of a heritage place can assist in the management of that place, it is far too nebulous a concept to provide adequate protection. One of the concerns is that all values are not always known at the time of listing. Indeed, on this issue, the Senate has already passed amendments to the EPBC Act that would focus on protection of world heritage ‘properties, including associated values’. A similar approach is needed for heritage protection.³²

6.37 The Australian Conservation Foundation submission further notes that this distinction is reflected in the later section 341Y which requires a Commonwealth agency to ask the Minister for advice before taking any action that could have a significant impact on a Commonwealth heritage *place*.³³

6.38 The Committee agrees with this suggestion and considers that references to heritage values is unnecessarily restrictive.

Recommendation 6.8

The Committee recommends that sections 15B and 15C of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000 be amended to prohibit any significant impacts on ‘a heritage place or its heritage values’.

Retention of the prudent and feasible alternative test

6.39 An important provision for the protection of Commonwealth Heritage List places is the requirement that before a Commonwealth agency takes an action that could have a significant impact, it must ask the Minister for advice.³⁴ In contrast, the earlier section 30(1) of the AHC Act:

requires each Minister responsible for a Commonwealth department or authority to give directions to ensure that no action of the department adversely affects the National Estate, unless satisfied that there is no

31 WWF, Submission 12, p 8. See also EDO, Submission 21, p 8.

32 ACF, Submission 16, p 12.

33 ACF, Submission 16, p 12.

34 Section 341Y

reasonable and prudent alternative to the taking of that action and that all measures that can reasonably be taken to minimise the adverse affect will be taken.³⁵

6.40 According to several submissions, the proposed new section 341Y is a poor substitute for the ‘prudent and reasonable alternative’. The North Queensland Conservation Council (NQCC) state:

It is now recognised in law in the United States that the assessment of prudent and feasible alternatives in the impact assessment process is the ‘heart’ of impact assessment. It is consider[ed] critical to proper and impartial decision-making and to protection of those areas that are held most valuable.³⁶

6.41 NQCC explains that there are several key requirements for a proper evaluation of alternatives. First, objectives must be defined in a manner that does not constrain the consideration of alternatives to a particular site or a particular manner of development. For instance, ‘a safe harbour and canal estate in Nelly Bay’ effectively prevents a proper analysis of prudent and feasible alternatives. Second, is a needs analysis, which is not the same as ‘want’ but a reflection of demand, social requirements, and the degree to which the proposal reflects a public good.³⁷

6.42 A proper evaluation of alternatives assists in a broader and more innovative assessment of possible ways to achieve a given objective, and by inference must be conducted as early as possible in the process. NQCC notes that under the US *National Environmental Policy Act*,³⁸ and its regulations, an Environmental Impact Statement must:

[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.³⁹

6.43 The Environmental Defender’s Office take a similar view and suggest the following amendment to section 341Y(2):

- A Commonwealth Agency should not take an action that is likely to have a significant impact on a Commonwealth heritage place unless there is no reasonable alternative;
- If there is no reasonable alternative the Commonwealth agency must take all reasonable steps to minimise the adverse impact;

35 EDO, Submission 21, p 21.

36 NQCC, Submission 1, p 2.

37 NQCC, Submission 1, p 2.

38 42 U.S.C. 4332(2)(C)(iii)

39 40 C.F.R. 1502.14(a). NQCC, Submission 1, p 2.

- The Commonwealth agency should provide details to the Australian Heritage Council for its comment on the proposed action affecting a Commonwealth heritage place.
- The Australian Heritage Council can request the Minister to hold an inquiry into a matter relating to the Commonwealth estate.⁴⁰

6.44 The Committee considers that there is considerable benefit in formally incorporating the substance of the ‘reasonable and prudent alternative’ test into the consideration of actions by Commonwealth agencies in relation to Commonwealth Heritage List places. Under the proposed system, the agency is under no obligation to formally consider alternatives, which the Committee believes to be a key part of any proper analysis.

Recommendation 6.9

The Committee recommends that the Government consider incorporating a formal analysis of options and alternatives into section 341Y of the Environment and Heritage Legislation Amendment Bill (No. 2) 2000.

Enforcement of the EPBC Act

6.45 Concerns have also been raised over the general effectiveness of the protection afforded by the EPBC Act. Evidence to the inquiry⁴¹ drew attention the low number of referrals to the Minister. For example, eleven per cent of the total number of referrals to the Minister were from the ACT, whilst only six per cent came from Western Australia, notwithstanding the enormous differences in the size of the two areas. While recognising that the EPBC Act has only recently come into force, such anomalies may suggest problems which the Department should consider.

6.46 The Committee notes with interest the inconsistencies in the number of referrals made to the Minister under the EPBC Act. However, a detailed examination of this issue is beyond the scope of the inquiry which must remain focused on the provisions of the bills before it.

Authority of the Commonwealth Minister

6.47 Although the previous chapter discussed concerns over the breadth of the Commonwealth Environment and Heritage Minister’s powers, several submissions also suggested that in two key respects, the Minister’s powers should be expanded further.

40 EDO, Submission 21, p 21.

41 WWF, Submission 12, p 16.

6.48 The first of these relates to the status of ‘advice’ given by the Minister. Before taking actions that have or are likely to have significant impacts,⁴² or making, amending, revoking or replacing a management plan,⁴³ a Commonwealth agency must ask the Minister for advice. However, the weight that must be given to this advice is unclear. In the case of the former, the agency must ‘take account of’ the advice while in the latter, no indication of the authority of the advice is given. This raises the obvious possibility that Commonwealth agencies may largely ignore the advice given by the Minister, rendering the protection afforded by the legislation potentially useless. This has already been identified as a major weakness of the AHC Act.⁴⁴ Ms Sullivan argues that:

Firm measures are required if other Commonwealth departments and ministers are to pay more than lip service to heritage conservation. The Heritage Minister should have a final say in these matters, rather than simply having his advice taken into account.⁴⁵

6.49 The second matter relates to the issue of referral of ‘actions’ to the Minister. Under the EPBC Act, proponents are required to refer proposals to the Minister,⁴⁶ while states or territories may choose to refer.⁴⁷ The Minister may also ‘request’ but cannot compel a referral in the event that proponents fail to do so.⁴⁸ It has been suggested that this limited ‘call in’ power needs to be strengthened:

While the penalties for contravention of the EPBC Act do provide some incentive to refer relevant actions, if a proponent chooses to ignore the Minister’s request, there are very few options available to the Minister (or the community) other than to commence expensive and time consuming legal proceedings.⁴⁹

6.50 The Environmental Defender’s Office argue that the need to grant coercive powers to the Environment and Heritage Minister is stronger in the now devolved property management environment:

Since 1989, the Commonwealth Government has devolved responsibility for its property use from one central agency to several agencies. These individual agencies have their own goals and targets, prescribed policies and financial concerns, and it has been demonstrated that heritage preservation has not been a consistent priority.

42 Section 341Y(1)

43 Section 341Q(4)

44 Chapter 2, paragraph 2.8

45 Ms Sullivan, Submission 14, p 8.

46 EPBC Act section 68

47 EPBC Act section 69

48 EPBC Act section 70

49 WWF, Submission 12, p 17.

Regardless of the existence of an accredited management plan, allowing Commonwealth Agencies to determine, unchecked, their own actions over Commonwealth heritage properties will not lead to the effective or optimal levels of heritage protection. Instead, the Minister should retain responsibility for ensuring that any actions taken are consistent with the goals of heritage protection.⁵⁰

6.51 The Committee is sympathetic to both these views, and considers that there is a case to strengthen the powers of the Commonwealth Minister by allowing for the provision of compulsory advice and stronger call-in powers. However, as has been the case in several matters in this chapter, the amendments suggested involve changes that would effect the operation of the EPBC Act in a range of matters that have been beyond the scope of this inquiry. There is still, however, a need to consider how these changes could be achieved.

50 According to the EDO, the Schofield Report (A Presence for the Past) further noted that for a number of years the Commonwealth has not been providing consistent directives to its departments on preserving heritage. EDO, Submission 21, p 20.