

**Humane Society International
Tasmanian Conservation Trust
World Wide Fund for Nature (Australia)**

SUBMISSION

**TO THE SENATE STANDING COMMITTEE ON THE ENVIRONMENT,
COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS**

Inquiry into:

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

Australian Heritage Council Bill 2000

Australian Heritage Council (Consequential and Transitional Provisions) Bill

30 January 2001

1. INTRODUCTION

The Humane Society International (HSI), Tasmanian Conservation Trust (TCT) and World Wide Fund for Nature (Australia) (WWF) welcome the opportunity to make this submission to the Senate Environment, Communications, Information Technology and the Arts References Committee Inquiry into the following Bills:

- *Environment and Heritage Legislation Amendment Bill (No. 2) 2000 (the Bill)*
- *Australian Heritage Council Bill 2000 (AHC Bill)*
- *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000*

These Bills would reform the Federal heritage protection regime by amending the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) to incorporate the new heritage regime and replace the current *Australian Heritage Commission Act 1976* (Cth) (AHC Act).

2. SUMMARY – KEY POINTS

HSI, TCT and WWF supported the EPBC Act and believe it is a dramatic improvement on previous legislation. Similarly, we welcome the possible benefits of the proposed new heritage scheme, and recognise the need for better protection of Australia's heritage and reform of outdated laws. We believe the proposed scheme has the potential to mean that all the advantages of the EPBC Act could now apply to national and Commonwealth heritage.

However, there are a number of issues that need to be resolved and improvements that need to be made to the proposed new heritage regime before we would be convinced that the Bills will better conserve heritage. These include:

- a more independent and proactive role, less subject to Ministerial direction, for the Australian Heritage Council;
- express protection of heritage under sections 26 and 28 of the EPBC Act (which regulate actions relating to Commonwealth land or taken by Commonwealth agencies which may have a significant impact on the environment);
- the ongoing maintenance of a heritage database, to include surveys and inventories compiled by Commonwealth agencies;
- inclusion of Commonwealth heritage places as a specific matter of national environmental significance under the EPBC Act;
- increased obligations on Commonwealth agencies in relation to heritage places under their control;
- public consultation on the further detail required under the new regime, and in particular the draft Listing Criteria; Heritage Management Principles and the definition of 'Significant Impact';
- provisions and resources for improved enforcement of the EPBC Act and the new heritage regime.

We would welcome the opportunity to discuss these issues further during any public hearings that may be held during the Committee's Inquiry.

Note: unless otherwise specified, references below are to the proposed new sections set out in Schedule 1 of the *Environment and Heritage Legislation Amendment Bill (No. 2) 2000*.

3. NATIONAL HERITAGE LIST

3.1 Listing Criteria

The Bill provides for the Minister to establish a National Heritage List for heritage places of national significance (s324B). The public (or the Australian Heritage Council) can nominate places for the list, but the Minister may only include a place in the List if satisfied that the place has one or more national heritage values. However, the Bill currently provides no indication of the criteria for listing places on the National List. These criteria – ‘national heritage values’ - will be prescribed in Regulations (s324C).

Draft criteria for assessment of places on the National List were released last year. However, 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.

Recommendation 1.

The draft listed criteria and/or relevant national heritage values under item 324C should be released for public comment and finalised for tabling during the Parliamentary debate on these Bills.¹

3.2 The National Heritage List and the Register of the National Estate

We have a number of concerns in relation to the transition to the new regime and the future of the Register of the National Estate (RNE).

As currently drafted, when the Act first commences there will be no places on the National Heritage List. There is no indication in the Bills of the types of places that would be considered for the National Heritage List, nor any indicative initial list of places that would form the basis of the list. And as noted above, there is no indication of the criteria for listing. There is also no minimum amount of time within which the National Heritage List must be first established. It is hard to comment on the proposed National List when there is no indication of the heritage sites that will receive the added protection of being on this list.

¹ In this submission, we suggest that many documents, including draft Regulations should be tabled in Parliament and/or released for public comment. We note that many of these documents are already held by Environment Australia in draft form. Despite the short period available, we believe speedy government action would enable their publication, public consultation, and finalisation before the Bills are debated in Parliament from late March.

The Minister has 6 months to transfer places from the RNE to the Commonwealth Heritage List without formal assessment. However, there is no similar provision for places on the RNE to be transferred to the National Heritage List. We find this somewhat perplexing given that the RNE is an important and invaluable source of information on heritage places, built up over 25 years. We recognise that the RNE now contains over 13,000 items, many of which may not be regarded as places of ‘national significance’. Nevertheless, the RNE should play a role in the establishment of the National List.

We are also concerned that all places on the RNE should be adequately protected in the transition to the new regime. Many of these places are not currently listed or protected under State or Territory regimes. We believe that all the places and items currently listed in the RNE should eventually be included in either the new National List or Commonwealth Lists or appropriate State or Territory regimes.

We understand that heritage places, including those on the RNE, already may receive the protection of sections 26 and 28 of the EPBC Act. These sections regulate actions relating to Commonwealth land or taken by Commonwealth agencies which may have a significant impact on the environment. Under s528 of the EPBC Act, ‘environment’ is defined to include:

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) natural and physical resources; and
- (c) the qualities (attributes) and characteristics of locations, places and areas; and
- (d) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c)

It is implied that this definition includes heritage places such as those listed on the RNE. Presumably this means that all places currently on the RNE continue to receive comparable protection under Commonwealth jurisdiction that is currently available under the AHC Act (although ‘action’ is defined more narrowly than the AHC Act - see further under heading **4.2** below).

Express Inclusion of Heritage in sections 26 and 28

We believe it is important for heritage places to be expressly recognised and protected under sections 26 and 28 of the EPBC Act. This could be achieved through amendment of the definition of ‘environment’ in section 528 of the EPBC Act. This amendment is crucial to provide clarity and certainty for all stakeholders. In addition, a general definition of ‘heritage’ should be included in section 528 of the EPBC Act. This definition should include, but importantly should not be limited to, National Heritage Places, Commonwealth Heritage Places, places on State and Territory heritage registers and the heritage database (as described in Recommendation 3 below).

Recommendation 2.

Amend section 528 of the EPBC Act to ensure:

- (a) the definition of ‘environment’ expressly includes heritage; and*
- (b) a general definition of ‘heritage’ is included.*

Heritage Database

The Bills should also be amended to specifically require the Minister to compile and maintain a national database of all heritage places. This database could initially comprise all sites currently on the RNE, and as with the RNE, would be publicly accessible.

Where the Commonwealth has constitutional power, heritage places in State and Territory areas must be included on the national database. We believe this would at least cover indigenous heritage places² and natural heritage places³ in State and Territory areas. If necessary, State agreement could be obtained to include cultural heritage sites. Indeed, participation of States and Territories in a national database should be sought. Such a database would assist in reducing duplication, fostering co-operation and providing certainty to government and non-government organisations.

In addition, Commonwealth agencies should be required to undertake a survey to identify heritage places under their control within three years of the commencement of the new regime. The database should then be updated to incorporate these surveys and to include all heritage in Commonwealth areas.

The preparation and maintenance of this heritage database is required to ensure that:

- (1) the Commonwealth's heritage data remains reliable and up to date for the purposes of the implementation of the new regime. In particular, the database would assist proponents, Government agencies and the community to ascertain whether any heritage items might be affected under a proposal that could trigger the requirements of ss26 and 28 of the EPBC Act.
- (2) the first recommendation in the Commonwealth's own 1996 *Report the Committee of Review – Commonwealth owned heritage properties* (Schofield Report) is addressed. That is, that the Commonwealth should implement a three-year identification program to fully identify and list heritage places under their control.
- (3) consistency between the treatment of heritage and biodiversity - under Part 12 of the EPBC Act, the Minister is required to prepare inventories and surveys of biodiversity in Commonwealth areas within 5 years, and to keep these inventories and surveys up to date. We believe there should be a similar requirement for heritage places in Commonwealth areas.

The database could indicate, where relevant, whether an item is contained on the National, Commonwealth, or State and Territory lists.

² Relying on the 'race' power in section 51(xxvi) of the Constitution.

³ Relying on the Biodiversity Convention and the external affairs power in section 51(xxix) of the Constitution.

This amendment should also allow for the Minister, on behalf of the Commonwealth, to provide financial or other assistance to any person for the purpose of identifying and monitoring heritage, consistent with the provisions for biodiversity in section 171 of the EPBC Act.

Recommendation 3.

Amend the Bills to require the Commonwealth to identify, compile and maintain a publicly accessible database of all heritage places. As first established, the inventory should include all sites currently on the RNE. It should then be updated to include surveys and inventories prepared by Commonwealth agencies, and where possible, heritage places in State and Territory jurisdictions. The Minister should also be able to provide financial or other assistance to any person for the purpose of identifying and monitoring heritage.

3.3 Protection of the National List

A place in the National Heritage List will be expressly recognised as an additional matter of ‘national environmental significance’ (NES) under EPBC Act. This means that actions that have, will have or are likely to have a significant impact on the national heritage values of a place listed in the National Heritage List will require assessment and approval under the EPBC Act (items 15B and 15C).

For WWF, TCT and HSI, this proposal means that all the advantages of the EPBC Act could now apply to National Heritage places, including, for example:

- the Minister for Environment and Heritage makes the final decision about whether or not to approve a project;
- relevant projects are subject to a transparent assessment and approval process with a range of opportunities for public participation;
- wider Commonwealth monitoring and enforcement powers, including the ability to place conditions on approvals, and to revoke approvals;
- offences for breaching the legislation, with high civil and criminal penalties for offences (including breaching conditions on approvals), and personal liability for directors and managers of companies; and
- provisions for third party standing and enforcement.

This compares very favourably to the provisions of the current AHC Act which protect places on the RNE – although the educational and persuasive role of the RNE should not be overlooked. For example, in direct contrast to the proposed amendments, the AHC Act does not place any direct responsibilities on State authorities, local government, private companies or individuals. Despite the substantial improvements to heritage protection offered by the Bills, there are some issues that need to be addressed in relation to protection of the National Heritage List.

‘Significant Impact’

Under sections 15B and 15C, actions that have, will have or are likely to have a ‘significant impact’ on the national heritage values of a place listed in the National Heritage List will require assessment and approval under the EPBC Act.

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.

Currently, ‘significant impact’ in relation to other matters of NES under the EPBC Act is not defined in the EPBC Regulations, but rather is set out in administrative guidelines produced by Environment Australia. These administrative guidelines have no statutory backing, and are not enforceable. They can also be easily changed, which has the potential to result in considerable uncertainty. 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.

Recommendation 4.

That ‘significant’ impact in relation to national heritage places (and other matters of national environmental significance) be defined in Regulations under s524B of the EPBC Act.

There has been public consultation on the definition of ‘significant impact’ in relation to other matters of NES. There should also be an opportunity for public consultation on the definition of ‘significant impact’ in relation to heritage places under ss15B and 15C.

Recommendation 5.

That public consultation occurs in relation to the definition of ‘significant impact’ in relation to national heritage places under the proposed sections 15B and 15C and the proposed definition be tabled in Parliament before the debate on the Bills.

Neglect of National Heritage Places

As currently drafted, sections 15B and 15C would require a positive action to be taken to impact on the national heritage values of the National Heritage List. However, it would appear that damage to a national heritage place through neglect or failure to provide continuing maintenance would not be regulated by the Act – except perhaps where the Commonwealth has contravened a national heritage management plan.

Ongoing maintenance of heritage items is an important consideration that should be regulated under the EPBC heritage regime. The *Heritage Act 1977* (NSW), for example, imposes minimum standards for the maintenance and repair of heritage items listed on the State Heritage Register (s118). The owner of an item on the State Heritage Register

must ensure that the item is maintained or repaired to, at least, the minimum standard (s199). Similar provisions should be included in the EPBC heritage scheme.

Recommendation 6.

Amend Subdivision AA to provide offences for failure to maintain or repair places on the National Heritage List similar to those under the Heritage Act 1977 (NSW).

National Heritage Values

As currently drafted, sections 15B and 15C cover significant impacts on the national heritage values of a heritage place, but not impacts on the place itself. We can see no reason for limiting the heritage provisions in this way. We support the protection of national heritage values and the fact that actions *outside* the boundaries of national heritage places could be subject to the requirements of the EPBC Act. However, we are concerned that 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. Sections 15B and 15C of the EPBC Act should be amended so that a person must not take an action which will have, has or is likely to have a significant impact on a *national heritage place including its associated values*.

Recommendation 7.

*Amend sections 15B and 15C of the EPBC Act so that a person must not take an action which will have, has or is likely to have a significant impact on a **national heritage place including its associated values**.*

4. COMMONWEALTH HERITAGE LIST

4.1 Listing and Transitional Issues

The Bills also provide for the establishment of a Commonwealth Heritage List (341B). This list would only apply to places in Commonwealth areas that have one or more ‘Commonwealth heritage values’. The listing processes are substantially the same as for the National Heritage List. Once again, there will not be any places on the Commonwealth Heritage List when the Act first commences. The main difference, which we welcome, is that there is provision for places on the RNE to be transferred to Commonwealth Heritage List. However, as currently drafted the Bill again contains no indication of what will be considered Commonwealth heritage values – which will form the basis of the listing criteria for Commonwealth heritage places. We believe the criteria should be the same as the current criteria for the RNE.

Recommendation 8.

That the Commonwealth heritage values under item 341C be the same as the current criteria for the RNE. If they are different, they should be released for public comment and tabled in Parliament before the Bills are debated.

4.2 Protection of the Commonwealth List

Places on the Commonwealth heritage list will not be given express protection as a matter of NES under the EPBC Act. Rather, they will presumably be given ‘implied’ protection through sections 26 and 28 of the EPBC Act, on the assumption that ‘heritage’ will be included in the definition of ‘environment’. We believe Commonwealth heritage places should be expressly protected as an additional matter of NES as for place on the National Heritage List. Offences should be provide for actions that will have, has or is likely to have a significant impact on a *Commonwealth heritage place including its associated values*.

Recommendation 9.

That Commonwealth heritage places are specifically recognised as matters of national environmental significance.

If this option is not accepted, as noted earlier, at the very least that the definition of ‘environment’ in s528 of the EPBC Act should be amended to explicitly include both heritage and Commonwealth heritage places. Once again, express inclusion of Commonwealth heritage places would provide clarity and certainty for all stakeholders.

Recommendation 10.

Amend the definition of ‘environment’ section 528 of the EPBC Act to expressly include Commonwealth heritage places. [see also recommendation 2]

In either case, a definition of ‘significant impact’ in relation to Commonwealth heritage places is needed. The threshold issue of whether an action’s impact is ‘significant’ will be crucial to the Ministerial decision-making process in relation to the referrals and assessment process for Commonwealth heritage places. The current administrative guidelines on ‘significant impact’ under the EPBC Act do not provide any guidance in relation to ‘significant impact’ under sections 26 and 28.

Recommendation 11.

That ‘significant’ impact in relation to Commonwealth heritage places and/or the environment under section 26 and 28 of the EPBC Act be defined in Regulations under s524B of the EPBC Act. These draft Regulations should be released for public comment, and tabled in Parliament before the Bills are debated.

Definition of Action

The definition of ‘action’ under the EPBC Act is much narrower than under section 30 the AHC Act. For example, sections 524 and 524A of the EPBC Act exclude government decisions to grant authorisations (such as licences or permits) and the provision of grant funding. By comparison, subsection 30(4) of the AHC Act expressly includes government decisions to issue licences or permits or to grant financial assistance.

To ensure that heritage places receive at least the same protection under the proposed new regime as was received under the AHC Act, we believe that the definition of ‘action’ in the EPBC Act needs to be amended to include at least the same range of actions covered by section 30(4) of the AHC Act. In particular, we believe the definition of action should include:

- a decision by a government body to grant a governmental authorisation;
- provision of grant funding; and
- the sale or lease of Commonwealth land.

Recommendation 12.

Amend the definition of ‘action’ in Part 23 of the EPBC Act to include at least the same range of actions covered by section 30(4) of the AHC Act, and in particular, a decision by a government body to grant a governmental authorisation; provision of grant funding; and the sale or lease of Commonwealth land.

Permit system for Commonwealth heritage

We are concerned that the threshold requirement of ‘significant’ impact will not take into account all actions that may still (cumulatively or otherwise) adversely affect Commonwealth heritage. We believe it would be appropriate to include a range of lesser offences not requiring ‘significant impact’ to encompass more ‘minor’ actions – for example, altering or damaging a Commonwealth heritage place. These offences could be regulated through a permit system similar to that provided for actions impacting upon members of species in Commonwealth areas under Part 13 of the EPBC Act.

Recommendation 13.

Amend the Bills to include a permit system for actions impacting on Commonwealth heritage places similar to the system for members of species in Commonwealth areas under Part 13 of the EPBC Act.

4.3 Additional Obligations on Commonwealth Agencies

The regime should also impose additional obligations on Commonwealth agencies, consistent with the recommendations in the Schofield Report. In addition to the earlier suggestions that Commonwealth agencies be required to prepare surveys and publish inventories of heritage places under their control (see recommendation 3), each Commonwealth agency should be required to develop a heritage strategy for the management of heritage places under their control. This would not be limited to places on the Commonwealth Heritage List. Each strategy should conform to consistent guidelines, which could be prepared by the Australian Heritage Council, and should be prepared within 3 years of the commencement of the new regime.

Recommendation 14.

Amend the Bills to require all Commonwealth agencies to develop a heritage strategy for the management of heritage places under their control within 3 years of the commencement of the new regime.

Commonwealth agencies and Departments should also be required to report annually on the conservation of heritage places under their control, including the implementation of their heritage strategies. This could be done by amending section 516B of the EPBC Act to require the annual reports of Commonwealth Departments and agencies to deal with both environmental *and heritage* matters.

Recommendation 15.

Amend section 516B of the EPBC Act to require the annual reports of Commonwealth Departments and agencies to deal with heritage matters, including the implementation of their heritage strategies.

Sale or Lease of Commonwealth Heritage Places

As currently drafted, the proposed sections 324X and 341Z require that when a Commonwealth agency sells or leases Commonwealth land that includes a national or Commonwealth heritage place, it must ensure that the contract includes a covenant to protect the heritage values of that place. We are concerned that covenants may not provide strong enough protection for those heritage places, and in particular may not bind successive buyers in perpetuity. These provisions should be strengthened in order to ensure that national and Commonwealth heritage places receive the strongest possible protection if they are sold or leased by the Commonwealth. For example, these sections could be amended to require a conservation agreement under Part 14 of the EPBC Act to be entered into with the new landholder prior to the execution of the contract for the sale or lease of that land.

Recommendation 16.

Amend sections 324X and 341Z to strengthen the protection for Commonwealth heritage places that are proposed to be sold or leased by the Commonwealth.

5. AUSTRALIAN HERITAGE COUNCIL

5.1 The Council's Role

One of the more controversial aspects of the proposed new scheme will undoubtedly be the role of the Australian Heritage Council (the Council), particularly when compared with the Australian Heritage Commission under the *Australian Heritage Commission Act 1975* (Cth) (AHC Act).

In the second reading speech, it is stated that 'the Council will have a vital role to play in ensuring the success of the Government's new heritage protection regime'. However, under the proposed clause 5 of the AHC Bill 2000, the Council's role would be almost purely advisory and subject to a high degree of Ministerial direction. The Council can nominate places for inclusion in either the National Heritage List or Commonwealth Heritage List of its own accord, but is otherwise completely dependent on the Minister's direction.

By comparison, the Australian Heritage Commission is an independent statutory authority which has the power to enter places on the RNE and is able to undertake a range of functions on its own motion (s7 AHC Act).

We believe the Council's role is excessively limited under the proposed new regime. The Council should be able to be more proactive and independent and less subject to Ministerial direction. In particular, we believe the Council should decide which places are to be included on both the National Heritage and Commonwealth Heritage Lists. It is appropriate for independent heritage experts to make this decision. Where necessary, the Minister could have the ability to call-in the Council's decision to include a place on the National or Commonwealth Heritage List.

Recommendation 17.

The Council should make the final decision as to whether to include a place on the National or Commonwealth Heritage List. Where necessary, this decision could be subject to a Ministerial call-in power.

We believe the Council should also have a more proactive, independent role in other areas rather than being almost entirely dependent on the direction of the Minister. Clauses 5(b) and 5(c) of the AHC Bill 2000 should be amended to enable the Council to undertake functions at the Minister's request or on its own motion. The Council should also be able to provide advice to any person or organisation, and not just to the Minister, and clause 5 should be amended accordingly.

Recommendation 18.

Amend clause 5 of AHC Bill to enable the Council to undertake functions at the Minister's request or on its own motion; and to provide advice to any person or organisation, not just the Minister.

5.2 Appointments to the Council

Finally, we believe the requirements for appointments to the Council need to be amended to ensure the Council is sufficiently independent and has adequate expertise. In particular, we recommend that the requirements for heritage qualifications of members in clause 7 be strengthened to require members of the Council to have *substantial relevant* experience or expertise.

Recommendation 19.

Amend clause 7 to require the Chair and other members of the Council have substantial relevant experience or expertise.

6. MANAGEMENT OF HERITAGE PLACES

As the management processes are substantially the same for both the National and Commonwealth Heritage Lists, these will be dealt with together in this section.

6.1 Management Principles

Both the proposed national heritage management principles (s324W) and Commonwealth heritage management principles (s341W) are not set out in the Bills. It is proposed that these principles would be contained in instruments published in the Gazette. Yet these 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.

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 completely up to Ministerial discretion, and will not be subject to any formal public scrutiny. It is particularly important that these instruments are released for public comment, given that they may not be disallowable (see further below).

Recommendation 20.

The draft national heritage and Commonwealth heritage management principles should be released for public comment, and tabled in Parliament before the Bills are debated.

Furthermore, these management principles would only be contained in instruments published in the Gazette. It appears that this instrument would not be disallowable. This means that the Minister would not be formally accountable for these principles, as they would not be subjected to any Parliamentary scrutiny. If the principles were contained in Regulations, the principles would be disallowable, which would provide the ability to veto the principles if they are unacceptable. This approach is also inconsistent with the Ramsar wetland management principles (s335) and the World Heritage management principles (s323), which are contained in (disallowable) the EPBC Regulations.

Recommendation 21.

As a minimum, the national heritage management principles (s324W) and Commonwealth heritage management principles (s341W) should be contained in Regulations, rather than an instrument published in the Gazette.

6.2 Management Plans

Preparation of management plans

The minimum time period within which plans must be prepared is not specified in sections 324Q or s341Q. This will be set out in the Regulations. We believe management plans should be prepared within 2 years after the place is included in the Commonwealth Heritage List.

Recommendation 22.

As a minimum, management plans for both national and Commonwealth heritage places must be prepared within 2 years after the place is included in the Commonwealth or National Heritage List.

Public consultation on management plans

There appears to be a lack of transparency in the preparation of management plans. Although the Minister is required to published a notice that a management plan has been made, there appears to be no provision for public participation in the development of management plans.

Recommendation 23.

Amend the Bills to include a process for public consultation on the draft management plans – similar to the provisions in s368 of the EPBC Act for preparation of management plans for Commonwealth reserves.

Compliance with Plans

Sections 324S and 341S provide that the Commonwealth or a Commonwealth agency must not contravene National or Commonwealth Heritage management plans, without any reference to any penalties for non-compliance. These sections should provide an appropriate penalty such as 500 penalty units.

Recommendation 24.

Amend sections 324S and 341S to provide a penalty of 500 penalty units for non-compliance with heritage management plans

Review of Management Plans

Under the proposed sections 324U and 341V, management plans for national and Commonwealth heritage places must each be reviewed only every 7 years. This time period is too long. It is also inconsistent with the requirements under the EPBC Act for Ramsar wetland and World Heritage management plans, which must be reviewed every 5 years (s319, s331).

Recommendation 25.

Amend sections 324U and 341V so that, as a minimum, management plans for national and Commonwealth heritage places must each be reviewed at least every 5 years.

The Council's Role

The Council should also have a role in the preparation and review of management plans. Currently, the Council is only consulted in relation to making, amending, or revoking and replacing management plans for Commonwealth heritage places (s341Q(5)), but not in relation to management plans for national heritage places (s324Q). We believe the Council should be consulted in the management planning process for both Commonwealth heritage places and national heritage places.

Recommendation 26.

Amend section 324Q to require the Minister to consult with the Council before making, amending or revoking and replacing management plans for a national heritage place.

Where the Minister consults with the Council under these provisions, the Minister should be required to take into account the Council's advice, and publish reasons where he does not follow that advice.

Recommendation 27.

Amend sections 324Q and 341Q to require the Minister to take into account the Council's recommendations, and publish reasons where he does not follow the Council's advice.

Overlapping Management Plans

Subsections 324R(1) and 341S(1), which restrict the ability to make plans if they are already covered by a plan for a Commonwealth reserve, seems to suggest that managing places for their national heritage values is somehow a lesser matter than managing such places for other matters covered by the EPBC Act. Accordingly these subsections should be deleted. In their place, sections 324Q and 341Q should be amended to allow management plans for Commonwealth reserves to satisfy the requirements for heritage plans – provided it meets the requirements in subsections 324Q(3) and (4) or 341Q(2) and (3) – that is, that the plan is consistent with the relevant heritage management principles.

Recommendation 28.

Delete subsections 324R(1) and 341S(1) and amend sections 324Q and 341Q to allow management plans for Commonwealth reserves to satisfy the requirements for heritage plans if they are consistent with the relevant heritage management principles.

7. OTHER ISSUES

7.1 Review of Heritage Lists

Under sections 324Z and 341ZB, it is proposed that the National Heritage List and Commonwealth Heritage List will be reviewed only every 10 years. This time period is excessive, and it would be more appropriate for the lists to be reviewed more frequently. At the very least, these lists should be reviewed every 5 years, consistent with the timeframe for State of the Environment Reports under s516B of the EPBC Act.

Recommendation 29.

Amend sections 324Z and 341ZB to provide for the National Heritage List and Commonwealth Heritage List to be reviewed at least every 5 years.

The requirements for the content of the Reports are also fairly limited (324Z(2) and 341ZB(2)). Currently, only details of the number of places on the respective lists, damage, how many plans made, operation of any conservation agreements, any other matters considered relevant. We believe the report should include a much wider range of matters, for example, 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 level of compliance with the EPBC Act requirements relating to national and Commonwealth heritage places.

Recommendation 30.

Amend sections 324Z(2) and 341ZB(2) to ensure that reports must include a wider range of information.

7.2 Express Recognition and Inclusion of Heritage in Title of Act

‘Heritage’ should be more expressly recognised in the amendment EPBC Act – not only by amending the definition of environment as discussed above, but by including the word ‘heritage’ in the title of the Act, for example: the ‘Environment Protection and Biodiversity and Heritage Conservation Act’.

Recommendation 31.

Amend the title of the EPBC Act to include the word ‘heritage’ in the title of the Act.

7.3 Enforcement of the New Regime

The effective implementation of the new Commonwealth heritage regime will ultimately depend on adequate enforcement of the regime. We have been closely monitoring the implementation of the EPBC Act as it currently standards in its first six months of operation. We believe there may be problems with the enforcement of the EPBC Act to date. For example, we would query whether all relevant activities are being referred to Environment Australia.

The level of referrals in the first six months has been quite low. As at 16 January 2001, in the first 6 months of the EPBC Act, we have counted only around 120 referrals under the EPBC Act.⁴ Further, this low number of referrals have predominantly come from only a few industry sectors, particularly urban developments (22 referrals), mining (around 30), land transport (13) and energy (10). We have been surprised that there has only been 1 agricultural referral and only 3 referrals for vegetation clearance. Yet these activities are quite likely, by their very nature, to impact on matters of NES such as threatened species and endangered communities, and Ramsar wetlands.

In terms of regions of Australia where these referrals have originated, table 1 shows that a high proportion of the referrals are coming from only a few States. For example, the ACT constitutes a tiny proportion of the jurisdictional area covered by the EPBC Act, but has generated 11% of the referrals. Yet Western Australia has only generated 6%.

⁴ These statistics have been compiled based on the notifications published on the Environment Australia EPBC website: www.environment.gov.au/epbc

Table 1: Referrals Received under the EPBC Act by Region (as at 16.01.00)

| State/Region | Number of Referrals | Percentage of Referrals |
|------------------------------|---------------------|-------------------------|
| New South Wales | 25 | 21 |
| Queensland | 22 | 18 |
| Commonwealth Marine Area | 20 | 17 |
| Victoria | 20 | 17 |
| Australian Capital Territory | 13 | 11 |
| Western Australia | 7 | 6 |
| Tasmania | 5 | 4 |
| South Australia | 4 | 3 |
| Northern Territory | 1 | 1 |
| Commonwealth Land | 3 | 3 |

We are quite concerned that these disproportionate statistics, along with our own on the ground experiences, show that there is a large number of activities occurring around Australia that may trigger the EPBC Act that are not being referred to the Minister. In many cases, we believe this is simply a result of lack of awareness of the new laws, and question whether the community is sufficiently aware of their obligations under the EPBC Act. In other cases, our groups have explored the options to enforce the EPBC Act ourselves through injunctions, but have found that legal action holds such great financial risks that has not been a viable option to date.

In order to ensure that the proposed new heritage regime meets its full potential, and that other matters of NES are properly protected, we believe these issues should be resolved in these heritage amendments. There are a few key measures that need to be taken to help ensure compliance with the EPBC Act and therefore the new heritage regime.

Sufficient Resources for Education and Monitoring

First, there should be a greater emphasis on, and adequate resources for, ensuring adequate awareness of the regime's requirements among key stakeholders, interest groups and the general community. Sufficient resources also need to be provided for appropriate monitoring of compliance with the requirements of the new regime.

Recommendation 32.

That sufficient resources be provided for ensuring adequate awareness of the EPBC Act's requirements and to allow for monitoring of compliance with the new regime.

Wider Referral Provisions

Section 70 of the EPBC Act should be amended to allow the Minister to refer a relevant proposal. Currently, only proponents are required to refer relevant proposals (s68), while States or Territories can refer proposals if they choose to do so (s69). Commonwealth agencies – except the Minister – can also refer proposals (s71). The Minister only has a limited 'call in' power to request proponents to refer relevant projects (s70). 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. This problem should be remedied by strengthening the referral mechanisms to allow the Minister to refer a relevant proposal under an amended section 70 of the EPBC Act.

Recommendation 33.

Amend section 70 of the EPBC Act to allow the Minister to refer a relevant proposal.

Broader Standing Provisions

Finally, we believe the standing requirements in section 475 of the EPBC Act should be amended to provide standing for ‘any person’ to apply for an injunction, rather than being limited to ‘interested persons’. This would provide a greater number of community groups and individuals with an ability to enforce the EPBC Act.

Recommendation 34.

Amend section 475 of the EPBC Act to allow ‘any person’ to apply for an injunction.

7.4 Bilateral Agreements and Accreditation Of State Regimes

Under the proposed new heritage regime, the Commonwealth would also be able to enter into ‘bilateral agreements’ in relation to national heritage places.

Assessment Bilateral Agreements

In general, we support the provisions for assessment bilateral agreements. However, it is essential that separate, additional standards should be developed before State or Territory heritage regimes are accredited under assessment bilateral agreements, and that these standards are subject to public consultation. These additional criteria in relation to heritage places should ensure that only best practice heritage protection standards are accredited. For example, accredited State processes should be contained in legislation, rather than unenforceable administrative guidelines.

Recommendation 35.

That additional criteria be specified for assessment bilateral agreements in relation to heritage places to ensure best practice heritage protection standards, and that these be tabled in Parliament before the Bills are debated.

At present, bilateral agreements delegating assessment functions to the States are being negotiated with nearly all States. The first such agreement, between Tasmania and the Commonwealth, was signed in December 2000. We have been disappointed at the level of consultation during the finalisation of this agreement. Although the formal requirements of the EPBC Act were met, TCT feels that the Minister’s promises of consultation with the TCT were not fulfilled to their satisfaction and TCT’s submission on the draft agreement was ignored. We are still awaiting reasons for the Minister’s decision to enter into the bilateral agreement.

Recommendation 36.

Ensure full and proper consultation with stakeholders in the negotiation, drafting and finalisation of all assessment bilateral agreements.

Approval bilateral agreements

We do not support approval bilateral agreements under which the Commonwealth can accredit State assessment *and approval* processes in certain circumstances. We believe it is inappropriate for Federal approval powers in relation to all matters of ‘national’ environmental significance – including national heritage places - to be devolved to the States. Approval decisions are highly discretionary in nature, and we are concerned that State and Territories could make approval decisions based on State economic interests rather than national environmental interests. We also have major concerns as to the enforceability of bilateral agreements.⁵ Fortunately, the current Commonwealth Government has indicated that it will not move quickly to delegate approval functions to the States. We recognise that there are significant hurdles before approval bilateral agreements can be entered into, and under the proposed section 51A(2) the Minister may only accredit a management plan for the purposes of an approval bilateral agreement if he or she is satisfied that the plan will promote the management of the place concerned in accordance with the national heritage management principles. Nevertheless, we believe that the provisions for approval bilateral agreements should be removed altogether from the EPBC Act.

Recommendation 37.

Remove the provisions for approval bilateral agreements in Part 5 of the EPBC Act

7.5 Ministerial Declarations

The provisions for Ministerial declarations under Division 2, Part 4 of the EPBC Act, which would apply equally to heritage places under the proposed new regime, should be amended to ensure that they are consistent with the bilateral agreement provisions. In particular, declarations should expire and be reviewed every 5 years as with bilateral agreements (sections 65 and 65A).

Recommendation 38.

Amend Division 2, Part 4 of the EPBC Act to provide for the expiry and review of Ministerial declarations every 5 years.

7.6 Indigenous Heritage

Given the significant implications of the regime for indigenous heritage, indigenous groups, including the Indigenous Advisory Committee established under the EPBC Act, should be consulted in relation to the new regime. The special needs of indigenous people and indigenous heritage should be adequately met and addressed in the new regime.

⁵ See further McGrath, C. “Bilateral Agreements: Are They Enforceable?” (2000) 17 *Environment and Planning Law Journal* 485.

7.7 Bioregional Planning to include Heritage

Division 2, Part 12 of the EPBC Act allows for the preparation of bioregional plans. We believe bioregional plans should consider a broad range of regional issues, including heritage. The Bills, as currently drafted, have not provided for the incorporation of heritage issues into bioregional plans. Section 176 of the EPBC Act should be amended to expressly allow bioregional plans to include provisions relating to heritage.

Recommendation 39.

Amend section 176 of the EPBC Act to allow bioregional plans to include heritage provisions.

7.8 Emergency Listing

We welcome the provisions for emergency listing of both National and Commonwealth heritage places. In fact, although it may be somewhat outside the range of the Senate's inquiry, we suggest that the EPBC Act should also contain provisions for emergency listing of potential threatened species and ecological communities, in order to extend similar interim protection to species and communities at risk.

Recommendation 40.

We recommend that Part 13 of the EPBC Act be amended to provide for emergency listing and interim protection of threatened species and ecological communities at risk.

7.9 Other Issues

There are also a number of other issues that need to be considered and addressed in relation to the new regime, including:

- funding from the Commonwealth for heritage places other than those included on the National or Commonwealth Heritage Lists;
- the inclusion of moveable cultural heritage in the National and Commonwealth Heritage Lists;
- Commonwealth compliance with State and Territory planning and heritage laws, as intended by the 1997 Council of Australian Governments (COAG) Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment;
- Removal of the exemption for forestry operations covered by regional forest agreements in sections 38-42 of the EPBC Act;
- Amendment of the definition of 'heritage value' to include the places that have significance to 'a part of the Australian community'; and
- Amendment of the definition of 'indigenous heritage value' to include places that have significance to indigenous persons in accordance with their traditions *or* 'contemporary life'.