

REFORMING AUSTRALIA'S NATIONAL HERITAGE LAW FRAMEWORK

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Law reform proposals concerning Australia's national heritage laws raised important issues of relevance to Australia's international heritage standing and the role and adequacy of Commonwealth heritage laws. The proposals relate to key Commonwealth natural and cultural heritage legislation, namely the Environment Protection and Biodiversity Conservation Act 1999, the Aboriginal and Torres Strait Island Heritage Protection Act 1984, the Protection of Movable Cultural Heritage Act 1986 and the Historic Shipwrecks Act 1976. This article discusses a number of key proposals arising from an extensive public consultation process and the response of the Commonwealth Government to date. It is argued that while some useful initiatives have been adopted in response to the review of the Environment Protection and Biodiversity Conservation Act 1999, the overall response of the Government has been disappointing, focusing on refining procedural frameworks to facilitate a streamlined approach to heritage assessment and approvals rather than substantive reform to the EPBC Act. Further, there has been limited progress in reforming national laws dealing with indigenous heritage, movable heritage and historic shipwrecks.

I INTRODUCTION

The most recent assessment of the state of Australia's national heritage protection and management is found in "Australia state of the environment 2011 Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities"¹ (SoE 2011 Report).² According to the SoE 2011 Report³, Australia's natural and cultural heritage "generally remains in good condition". However the "diverse and fragmented nature" of information regarding heritage arising from differences in jurisdictional systems makes it difficult to be conclusive as to the overall condition of heritage. Further, while Australia is "recognized internationally for leadership in heritage management", natural and

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¹ State of the Environment 2011 Committee, Australia state of the environment 2011- Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra: DSEWPac, 2011.

² The Minister is required to prepare such a report every five years under s 516B of the EPBC Act.

³ SoE 2011 Report, above n 1, 692.

cultural heritage remain subject to a range of threats including natural processes (particularly climate change) and human processes (development and population pressures). The SoE 2011 Report finds that there has been a lack of adequate public sector resourcing for heritage management and protection and that Government leadership is required in relation to implementing effective approaches to heritage assessment.

These findings are timely given the recent review of Australia's key environmental legislation, the *Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act"), and law reform proposals concerning the suite of other legislation that provides the framework for Australia's national heritage laws,⁴ namely the *Aboriginal and Torres Strait Island Heritage Protection Act 1984* ("ATSIHP Act"), the *Protection of Movable Cultural Heritage Act 1986* ("PMCH Act") and the *Historic Shipwrecks Act 1976* ("HS Act"). This review/reform process has provided a unique opportunity to reshape the legal framework for heritage protection and conservation by reforming the substantive provisions of heritage legislation and harmonising laws that have been enacted on an ad hoc basis over a protracted period of time in response to developments in international heritage law.

In each case, the important issues of relevance to Australia's international heritage standing and the role and adequacy of Commonwealth heritage laws have been raised. This article discusses the key recommendations arising from the EPBC Act review and the reform proposals relating to the other heritage laws and the action undertaken by the Commonwealth Government to date. It will be seen that while some useful initiatives have been adopted in response to the review of the EPBC Act, the overall response has been disappointing, focusing on refining procedural frameworks to facilitate a streamlined approach to heritage assessment and approvals rather than substantive reform to the EPBC Act. Further, the Commonwealth has not, at the date of writing, progressed the reform of national laws dealing with indigenous heritage, movable heritage and historic shipwrecks.

II DEVELOPMENTS IN THE INTERNATIONAL HERITAGE LAW FRAMEWORK

Australia has played a leading role in the development of the international legal framework for heritage conservation. It has assisted in the negotiation of, and has ratified, numerous international conventions dealing with natural and cultural heritage,⁵ and is the only State Party to the *Convention concerning the protection of the World Cultural and Natural Heritage 1972* (the World Heritage Convention) to

⁴ This Article does not discuss the *Great Barrier Reef Marine Park Act 1975* (Cth) that establishes the marine park and its management by the Great Barrier Reef Marine Park Authority. The Great Barrier Reef was inscribed on the World Heritage List in 1981. This Act was reviewed in 2006 and amended in 2007 and 2008. Other Commonwealth heritage related legislation deals with National collections (such as the *Archives Act 1983*, the *Museum of Australia Act 1980* and the *National Gallery Act 1975*) and specific areas (such as the *Sydney Harbour Federation Trust Act 2000*).

⁵ Specifically the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970*, opened for signature 14 November 1970, 823 UNTS. 231 (entered into force on 24 April 1972), and the *Convention concerning the protection of the World Cultural and Natural Heritage 1972*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

have developed a significant body of jurisprudence on World Heritage Convention issues.⁶ Most recently, Australia ratified the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005*.⁷

However, Australia does not enjoy an untarnished international reputation in relation to heritage conservation⁸. At its 35th session in June 2011, the World Heritage Committee (WHC) examined the state of conservation of the Great Barrier Reef (GBR) World Heritage property which was inscribed on the World Heritage List in 1981. The WHC noted “with extreme concern” the approval of Liquefied Natural Gas processing and port facilities on Curtis island within the GBR World Heritage property⁹ and asked the Australian Government to invite a reactive monitoring mission to visit the Great Barrier Reef World Heritage site. Reactive monitoring is the process by which the UNESCO Secretariat and Advisory Bodies report to the WHC on the state of conservation of a specific World Heritage property that is under threat.¹⁰ The report is based on a monitoring mission to assess the overall state of conservation of the Outstanding Universal Value (OUV) of a World Heritage property.¹¹ After considering the state of conservation of a property, the WHC may take a number of steps, including placing a World Heritage property on the List of World Heritage in Danger.¹²

A reactive monitoring mission to the GBR World Heritage property was undertaken in early 2012¹³, by the WHC and the International Union for Conservation of Nature. Their joint report is to be examined by the WHC at its next session¹⁴.

Although Australia was an early supporter of developments in international heritage law, a failure to ratify a number of cultural heritage conventions has arguably diminished its leadership role in the international arena in recent years.¹⁵ Each of these Conventions is considered briefly below.

⁶ Ben Boer and Graeme Wiffen, *Heritage Law in Australia* (2008), Chapter 3. Australia is also one of the few jurisdictions to have enacted legislation specifically to enable the domestic implementation of the World Heritage Convention.

⁷ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005* (entered into force on 18 March 2007).

⁸ See discussion of the controversy surrounding the Federal Government's decision to allow mining at Jabiluka near the Kakadu National Park World Heritage property in Aplin G, “Kakadu National Park World Heritage Site: Deconstructing the Debate, 1997–2003”, *Australian Geographical Studies*, Volume 42, Issue 2, pages 152–174, July 2004.

⁹ Decision 35 COM 7B.9: paragraph 4 of states that “the WHC 4. Regrets that the State Party did not inform the Committee as per paragraph 172 of the Operational Guidelines and requests the State Party to report, in accordance with paragraph 172, its intention to undertake or to authorize any new development that may affect the Outstanding Universal Value of the property before making decisions that would be difficult to reverse”.

¹⁰ World Heritage Committee, *Operational Guidelines for Implementation of the World Heritage Convention 2011* (Operational Guidelines) [169]. Available at <http://whc.unesco.org/en/guidelines/>.

¹¹ Operational Guidelines [169].

¹² Operational Guidelines [176].

¹³ The mission was undertaken between March 5 - 14 2012: <http://whc.unesco.org/en/news/843>. See also <http://whc.unesco.org/en/decisions/4418>.

¹⁴ To be held in June/July 2012. Further, the state of conservation of the GBR World Heritage property has been included on the agenda of the 36th session of the World Heritage Committee.

¹⁵ Submission of Dr Patrick O'Keefe and Dr Lyndel Prott to the 2009 *Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations* :

A *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects 1995 (1995 UNIDROIT Convention)*¹⁶

The 1995 Unidroit Convention enables private legal claims by State Parties and individuals in relation to stolen objects. It is supplementary to the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property* that imposes on State Parties a range of obligations to recover and return stolen or illicitly exported objects, primarily through diplomatic measures.

The 1995 UNIDROIT Convention establishes a uniform legal framework that includes provision for time limits for claims for restitution and compensation for innocent third parties who have acquired an object in good faith and can show that they have exercised due diligence in doing so.

Within the Asia-Pacific region, this Convention has been ratified by the Peoples Republic of China¹⁷, New Zealand¹⁸ and Cambodia.¹⁹ Australia played a significant role in the negotiation of the 1995 Convention and its ratification is one of the short term recommendations arising from the recent review process²⁰.

B *Convention on the Protection of Underwater Cultural Heritage 2001 (UCH Convention)*²¹

The UCH Convention sets out basic principles for the protection of underwater cultural heritage (UCH), a term defined as “*all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years*”.²² It provides a

<http://www.arts.gov.au/_data/assets/pdf_file/0005/87728/prott-okeefe-profs-lyndel-patrick.pdf> (accessed 12/8/2011). In addition, Australia has not adopted the 1954 and 1999 Protocols to the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* Opened for signature 14 May 1954, 49 UNTS 240 (entered into force 7 August 1956), Second Protocol opened for signature 26 March 1999, 2253 UNTS 172 (entered into force 9 March 2004). The 1954 and 1999 Protocols to the *Hague Convention* deal with the return of cultural property that is taken from an occupied territory during armed conflict (1954 Protocol) and the imposition of penalties where there is a failure to comply with the requirements for protection of cultural property during conflict or occupation (1999 Protocol). The PMCH Review Report further recommends that consultation be undertaken with relevant stakeholders (such as the Defence Department) regarding the impacts of becoming a party to the 1954 and 1999 Protocols. Recommendation 70

¹⁶ *UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects 1995* Opened for signature 24 June 1995, 34 ILM 1322 (1995) (entered into force 1 July 1998).

¹⁷ 1997.

¹⁸ 2006.

¹⁹ 2002.

²⁰ *Review of the Protection of Movable Cultural Heritage Act 1986 and Protection of Movable Cultural Heritage Regulations 1987 Report of Public Consultation 2009*; See <http://www.arts.gov.au/_data/assets/pdf_file/0003/91983/PMCH_Review_report_final_for_web.pdf> at 4 (accessed 20/4/12). A “short term recommendation” is defined as including “initiatives that are essentially standalone or can be implemented within existing resources and frameworks”. see also PMCH Review Report, above note 10, Recommendation 64.

²¹ *Convention on the Protection of Underwater Cultural Heritage 2001*. Opened for signature 2 November 2001 , 41 ILM 40 (2002) (entered into force on 2 January 2009).

²² Article 1.

framework for detailed State cooperation, requiring States to consider collaboration in relation to activities directed at UCH, the exchange of information concerning seized UCH and the provision of training and technology transfer relating to UCH.²³ The Annex to the UCH Convention sets out widely recognized “best practice” rules for the treatment and research of underwater cultural heritage.

Cambodia has ratified the UCH Convention but is the only regional jurisdiction to have done so.²⁴ New Zealand is yet to adopt the UCH Convention although “*The New Zealand government is most likely to be encouraged if Australia ratifies the convention*”.²⁵

The Commonwealth Government is “actively considering” ratification of the UCH Convention.²⁶ In May 2010, Commonwealth, State and Territory governments signed an Intergovernmental Agreement that “*establishes roles and responsibilities for the Identification, Protection, Management, Conservation and Interpretation of Australia’s Underwater Cultural Heritage*”²⁷. Clause 3 of that Agreement states that Australia supports the principles of international best practice for cultural heritage management set out in the Annex to the 2001 Convention. Further, the parties “agree to undertake all necessary activities to enable the Commonwealth to determine whether it could ratify” the 2001 Convention. However, at the date of writing, Australia had not yet ratified the 2001 Convention.

C *The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*²⁸

The *2003 UNESCO Convention for the Safeguarding of the Intangible Heritage* provides a legal framework for the identification and the safeguarding of intangible cultural heritage, a term defined to include oral traditions, oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship.²⁹

²³ Articles 2(2) and 19.

²⁴ 2007.

²⁵ Davies P and Myburgh P, “The Protected Objects Act in New Zealand: Too Little, Too Late?” (2008) 15(3) *International Journal of Cultural Property* 321 at 337.

²⁶ *Review of the Historic Shipwrecks Act 1976 and Consideration of the Requirements arising from the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage – Discussion Paper*. Available at: <<http://www.environment.gov.au/heritage/publications/shipwrecks-review/discussion-paper.pdf>> (accessed 1/4/12).

²⁷ Intergovernmental Agreement that “*establishes roles and responsibilities for the Identification, Protection, Management, Conservation and Interpretation of Australia’s Underwater Cultural Heritage*”, May 31 2010. Available at: <http://www.environment.gov.au/heritage/publications/agreements/underwater-cultural.html> (accessed 4/4/12).

²⁸ Opened for signature 17 October 2003, 2368 UNTS 3 (entered into force on 20 April 2006). The Convention entered into force on 20 April 2006 for the thirty States that had ratified it on or before 20 January 2006. The Convention enters into force three months after the deposit of an instrument of ratification, acceptance, approval or accession with respect to any other State.

²⁹ Article 2.

The ICH Convention has been ratified or accepted by a large number of jurisdictions in the Asia Pacific region³⁰, including Japan, China, Republic of Korea, India, Vietnam, Cambodia, Philippines, Indonesia, Sri Lanka, Papua New Guinea, Democratic People's Republic of Korea, Bangladesh, Lao People's Democratic Republic, Fiji, Tonga, Vanuatu and Palau.

Ratification of the *2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* remains a critical step required to bring Australian cultural heritage law into line with international heritage law. In 2009, Australia signed the *United Nations Declaration on the Rights of Indigenous Peoples*.³¹ Article 11 of the Declaration provides that:

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

The ICH Convention provides a legal framework that reflects a consensus as to the intrinsic relationship between human rights and intangible cultural heritage protection as a fundamental component of the human rights framework.³² However, despite widespread support among human rights, heritage management and international law experts in relation to ratification of the ICH Convention,³³ no reference was made to this Convention in the recent heritage law review process.

III REVIEW AND REFORM OF AUSTRALIA'S DOMESTIC HERITAGE LAWS

A *Environment Protection and Biodiversity Conservation Act 1999*

The EPBC Act was enacted in part to "assist in the co-operative implementation of Australia's international environmental responsibilities"³⁴. However, it is above all, reflective of the political compact between the Commonwealth, the States and Territories in the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment³⁵. Following significant amendments to the

³⁰ Japan ('04 - acceptance), China ('04), Republic of Korea ('05 - acceptance), India ('05), Vietnam ('05), Cambodia ('06), Philippines ('06), Indonesia ('07 - acceptance), Sri Lanka ('08 - acceptance), Papua New Guinea ('08), Democratic People's Republic of Korea ('08), Bangladesh ('09), Lao People's Democratic Republic ('09), Fiji ('10), Tonga ('10 - acceptance), Vanuatu ('10), Palau ('11).

³¹ Adopted by United Nations General Assembly Resolution 61/295 on 13 September 2007. Australia signed the Declaration on 30 April 2009: see http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (accessed 15 March 2012).

³² Australian Human Rights Commission, *Submission to the Department of Environment, Water, Heritage and the Arts on Ratification of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage*, (24 September 2008) <http://www.hreoc.gov.au/legal/submissions/2008/20081024_UNESCO.html> (accessed 1/4/12).

³³ See, eg., the submission of the Australian Human Rights Commission above note 32.

³⁴ Opened for signature on 5 June 1992, 1760 UNTS 79 (entered into force on 29 December 1993).

³⁵ <<http://www.environment.gov.au/epbc/publications/coag-agreement/index.html>> (accessed 1/4/12). See also the National Heritage Protocol Statement of Roles and Responsibilities 2004 available at <http://www.environment.gov.au/about/publications/annual-report/06-07/outcome1-heritage.html> (accessed 14 March 2012).

EPBC Act in 2003, the protection and conservation of heritage was included as a matter of national environmental significance,³⁶ with this objective to be achieved through the identification and protection of World Heritage, “National” and “Commonwealth” heritage places.

An independent review of the EPBC Act was commissioned by the Minister for the Environment in 2008 pursuant to s 522A of the Act³⁷. The Review's final report, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Review Report) was presented to the Minister in October 2009.³⁸ The Commonwealth Government's response to the EPBC Review Report was released on 24 August 2011 “as part of a broad package of reforms for Australia's national environment law.”³⁹

The operation of the EPBC Act has been the subject of a number of parliamentary inquiries⁴⁰. However, the cultural heritage provisions of the EPBC Act had not received any specific attention until the independent review under s 522A.

As the first review of the EPBC Act following ten years of its operation, a number of key recommendations were made in the EPBC Review Report to reform the overarching framework of the Act in its application to all matters of national environmental significance, including natural and cultural heritage. These recommendations call for an improvement in the efficient operation of environmental impact assessment (EIA) provisions of the EPBC Act and State/Territory processes⁴¹; and an augmented role for strategic assessments and regional plans to enhance the

³⁶ EPBC Act, section 3(ca).

³⁷ Section 522A requires the EPBC Act to be reviewed every 10 years.

³⁸ *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (“Review Report”) :<<http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>> (accessed 1/4/12).

³⁹ Australian Government response to the Report of the independent review of the *Environment Protection and Biodiversity Conservation Act 1999*, Department of Sustainability, Environment, Water, Population and Communities, 2011 (“Commonwealth Response”), <<http://www.environment.gov.au/epbc/reform/index.html>> (accessed 19/3/12).

⁴⁰ The Commonwealth Auditor General, Audit Report No.31 2006–07 *Performance Audit The Conservation and Protection of National Threatened Species and Ecological Communities* (2007): <http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/research/2006-07_Audit_Report_311.pdf> (accessed 1/4/12); Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999 First report* (March 2009): <http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/report.pdf> (accessed 1/4/12). At paragraph 1.6, the Report states that “*This Inquiry did not address the cultural heritage aspects of the Act as the terms of reference were focused on lessons to be learned in protecting Australia's unique plants, animals, threatened species and ecological communities. However, as providing for the protection and conservation of heritage is one of the objects of the Act, the effectiveness of the Act and the performance of the advisory bodies and departments overseeing heritage should be similarly evaluated in the future*”; Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999 Second and Final Report* (April 2009): <http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/final_report/report.pdf> (accessed 1/4/12)- this Report dealt with the effectiveness of Regional Forest Agreements in protecting conservation values.

⁴¹ Recommendation 4.

protection of the environment.⁴² The Commonwealth Government has accepted the recommendations which are outlined in more detail below.

B *EIA and Accreditation of State/Territory Assessment and Approval Process*

The EPBC Act enables bilateral agreements for the accreditation of State and territory assessment and/or approval processes that meet “best practice” criteria.⁴³ This co-operative approach to environmental regulation is consistent with the 1992 Intergovernmental Agreement on the Environment (under which the Commonwealth is to facilitate the development of national environmental standards and guidelines)⁴⁴ and the 1997 Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment. Currently, there are bilateral assessment agreements between the Commonwealth and each State and Territory⁴⁵ which accredit the particular State or Territory’s environmental impact assessment process for the purposes of evaluating a project’s impacts on ‘matters of national environmental significance’. Such projects are exempted from the EPBC Act’s requirements for an assessment overseen by the Commonwealth Department of Sustainability, Environment, Water, Population and Communities, or an approval issued by the federal Environment Minister, depending on the scope of the relevant bilateral agreement. Only one bilateral assessment and approval agreement exists between the Commonwealth and a State.⁴⁶

The Commonwealth Government has agreed to amend the existing accreditation mechanisms in the EPBC Act⁴⁷ to provide for the accreditation of State, Territory or Commonwealth systems for individual project approvals that meet national standards of minimum requirements for both assessment (including public consultation) and approval. The new national standards will be set by the Minister. While the agreement of States and Territories on the proposed national standards must be sought by the Minister, standards may be promulgated if agreement cannot be reached. Under the proposed framework, the Minister must be satisfied that the national standards would deliver equivalent protection of matters of national environmental significance to the protection provided by the EPBC Act.

While these recommendations will clearly assist in giving effect to the subsidiarity principle that underpins the operation of the EPBC Act, key concerns are raised by the accreditation recommendations. For example, should the new standards aim not simply to meet but to exceed the level of protection available under the EPBC Act? The effectiveness of monitoring/audit regimes and the extent to which the Commonwealth retains the capacity to “step in” where State or Territory processes

⁴² Recommendation 6.

⁴³The EPBC Act accreditation process has not escaped criticism. For example, the Commonwealth-NSW assessment bilateral agreement accredited assessments under the former Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) - Part 3A exempted certain developments from assessment under a range of NSW environmental laws, including the *Heritage Act 1977* and the *National Parks and Wildlife Act 1974*.

⁴⁴ 1992 Intergovernmental Agreement on the Environment: <<http://www.environment.gov.au/about/esd/publications/igae/index.html>> (accessed 1/4/12).

⁴⁵ <<http://www.environment.gov.au/epbc/assessments/bilateral/index.html>>.

⁴⁶ Agreement between the Commonwealth and New South Wales dated 22 December 2005 relating to the Sydney Opera House.

⁴⁷ Sections 45-49.

are not adequately implemented will also be critical. In this regard, the Government has stated that the Act will include amendments that specify the process for withdrawing accreditation in the case of non-compliance or “a failure to achieve adequate environmental protection outcomes”. Monitoring, performance audit and oversight powers will be incorporated to “ensure” that accredited Commonwealth, State and Territory systems and processes achieve their intended results.⁴⁸

As matters of national environmental significance, any action within or outside World Heritage and National Heritage places that has, will have or is likely to have a “significant impact” on heritage values currently requires approval under the EPBC Act. Such actions will fall within the expanded EIA accreditation framework for assessment and approvals.

A collaborative approach to project approvals under the EPBC Act is further illustrated by the Commonwealth Government's agreement to amend the Act to provide for the establishment of joint State/Territory and Commonwealth assessment panels to ensure that Commonwealth interests are considered at the same time as State or Territory interests during the EIA process.⁴⁹

At its March 2012 meeting, the Council of Australian Governments (COAG) identified six areas of major reform priority necessary “to lower costs for business and improve competition and productivity”. These reform priorities include “addressing duplicative and cumbersome environment regulation”.⁵⁰ COAG members reaffirmed their commitment to “high environmental standards, while reducing duplication and double-handling of assessment and approval processes” and agreed to an ambitious reform timetable in relation to the development of bilateral arrangements for accreditation of state assessment and approval processes.⁵¹

C *Strategic Assessments and Regional Plans*

The efficacy of EIA and approval processes was a key area of criticism in submissions to the EPBC Act Review. In particular, the case by case approach to assessment under the Act gives rise to the issue of how the cumulative impacts of actions are taken into account. The Government has agreed to a number of recommendations to revise the EPBC Act to improve the planning process⁵² by expanding the role of strategic assessment and bio-regional planning. It is hoped that such an approach will consider the cumulative impacts of actions at the planning stage and in so doing, provide a “proactive and holistic strategic approach is more likely to result in the best environmental outcomes”.⁵³

⁴⁸ Recommendations 4(5) and 61.

⁴⁹ Commonwealth Response above note 39 at 13.

⁵⁰ Council of Australian Governments (COAG) Meeting, Canberra, 13 April 2012 Communiqué. Available at: <http://www.coag.gov.au/> (accessed 30/4/12).

⁵¹ Fast-track the development of bilateral arrangements for accreditation of state assessment and approval processes, with the frameworks to be agreed by December 2012 and agreements finalised by March 2013; develop environmental risk- and outcomes-based standards with States and Territories by December 2012; and examine and facilitate removal of unnecessary duplication and reduce business costs for significant projects: see COAG above note 50.

⁵² Recommendation 6.

⁵³ Commonwealth Response above note 39 at 15.

In particular, the Commonwealth will be permitted to develop regional environment plans in partnership with States and Territories outside Commonwealth areas and to do so unilaterally as a last resort where the Minister is satisfied that “all reasonable efforts to agree on a cooperative approach...have been unsuccessful”.⁵⁴ Importantly, the Act will be amended to allow flexibility in the process for delineating a region to ensure that planning is undertaken at an appropriate scale.⁵⁵ Such amendments will contribute to the provision of “thorough and comprehensive assessments” that are called for in the SoE 2011 Report to enable the identification of adequate areas of protected land and comprehensive heritage inventories.

Notably, the Government has not agreed to a recommendation that the strategic assessment provisions be amended to include a ‘call in’ power for State or Territory plans, policies and programs that are likely to have a significant impact on matters of national environmental significance.⁵⁶ Such a coercive approach to strategic assessment would clearly undermine the use of this measure in a “cooperative and inter-jurisdictional” manner.⁵⁷

D *Heritage Specific Protection and Management Reforms*

The key issues and recommendations of the EPBC Review Report relating specifically to heritage and the Commonwealth Government’s responses are outlined below.

1 *Deciding What is Protected*

At a fundamental level, the Commonwealth heritage framework reflects the tensions inherent in debates within the heritage conservation profession and the broader community concerning why heritage matters, what is protected and how to protect and manage conservation. Implicit in all such decisions is a judgment concerning what is worthy of protection and what is not – decisions that shape a sense of “national identity”.

The National Heritage List is a “written record of places and their heritage values”.⁵⁸ Under the EPBC Act, a place may be included in the List if the Minister is satisfied that it has any “national heritage value” (natural, historical or indigenous) by meeting one of the criteria set out in the *Environment Protection and Biodiversity Conservation Regulations 2000*.⁵⁹ “Place” is defined to include not only natural and built heritage sites but also “objects associated or connected with” a site.⁶⁰

Inevitably, issues arise as to the extent to which such a list is representative of the “national heritage”. It has been argued that the overall strategic importance and purpose of the National Heritage List is not clear. Some submissions to the review

⁵⁴ Commonwealth Response above note 39 at 18.

⁵⁵ Commonwealth Response above note 39 at 18.

⁵⁶ Recommendation 6 (2)(b)(iv). Nor did the Government agree to amend the term ‘action’ to incorporate these plans, policies or programs.

⁵⁷ Commonwealth Response above note 39 at 20.

⁵⁸ EPBC Act, section 324C.

⁵⁹ EPBC Act, section 324D (1)- see EPBC Regulation 10.01A.

⁶⁰ EPBC Act, section 528.

queried whether listing under the EPBC Act provides only limited additional protection to that afforded under State and Territory heritage laws.⁶¹ The SoE Report notes that “the nation’s protected natural and cultural resource is not adequately identified and protected.”⁶²

The Commonwealth Heritage List includes places that have one or more Commonwealth heritage values (natural, historical or indigenous) by meeting one of the criteria set out in the *Environment Protection and Biodiversity Conservation Regulations 2000* and are either entirely within a Commonwealth area; or outside Australian jurisdiction and owned or leased by the Commonwealth or a Commonwealth Authority.⁶³

A number of conflicting views were expressed in submissions to the EPBC Act review regarding the protection of indigenous heritage under the EPBC Act. Some submissions were critical of the inclusion of indigenous heritage within the EPBC Act and called for the development of separate legislation to provide roles for indigenous Australians in identifying and conserving their cultural heritage.⁶⁴ Other submissions sought to strengthen the protection afforded to indigenous cultural heritage under the EPBC Act. For example, the Indigenous Advisory Committee (IAC) established under the Act⁶⁵ argued that by encompassing a broad range of matters, the approach of the Act “has largely failed Indigenous Australian’s [sic] aspirations for the protection and management of our heritage and environments”.⁶⁶ The IAC proposed that indigenous heritage should be included as a separate matter of national environmental significance and called for the development of national standards to identify and protect indigenous heritage.

The EPBC Review Report recommended that the EPBC Act be amended to incorporate the requirements of the ATSIHP Act to avoid duplication and overlaps in heritage assessment and authorisation processes. The Government has agreed to “consider” this recommendation, noting that as part of its consideration of the review of the ATSIHP Act, it will consult with the IAC to ensure that “a consolidation of the two Acts is the most effective mechanism to achieve ongoing protection of traditional heritage”.⁶⁷ The review of the ATSIHP Act is discussed below.

⁶¹ See, eg, Australian Council of National Trusts Review submission at 19: <<http://www.environment.gov.au/epbc/review/submissions/pubs/039-aust-council-of-national-trust.pdf>> (accessed 1/4/12); and ICOMOS Australia submission at 5: <<http://www.environment.gov.au/epbc/review/submissions/pubs/117-australia-icomos.pdf>> (accessed 1/4/12).

⁶² SoE 2011 Report at 704.

⁶³ EPBC Act, section 341C.

⁶⁴ See, eg., submissions of Museums Australia and the Australian Human Rights Commission: <<http://www.environment.gov.au/epbc/review/submissions/pubs/170-museums-australia.pdf>> (accessed 12/3/12); <<http://www.environment.gov.au/epbc/review/submissions/pubs/193-aust-human-rights-commission.pdf>> (accessed 12/3/12).

⁶⁵ The role of the Indigenous Advisory Committee (IAC) is “to advise the Minister for the Environment, Heritage and the Arts on the operation of the [EPBC Act, taking into account the significance of Indigenous people’s knowledge of the management of land and the conservation and sustainable use of biodiversity; and Indigenous Protected Areas”]: <<http://www.environment.gov.au/indigenous/committees/iac.html#role>> (accessed 1/4/12).

⁶⁶ Indigenous Advisory Committee submission at 3: <<http://www.environment.gov.au/epbc/review/submissions/pubs/210-iac.pdf>> (accessed 1/4/12).

⁶⁷ Commonwealth Response above note 39 at 105.

2 *Nomination and Listing Process*

Nomination and listing processes for heritage were extensively criticised in submissions to the Review as overly complex and cumbersome in implementation, and as failing to deliver a flexible, responsive approach to protection. The EPBC Review Report recommended that nomination, prioritisation, assessment and listing processes for both National and Commonwealth Heritage Lists be simplified.⁶⁸ The Government has agreed to amend the EPBC Act to “deliver a coordinated nomination process with a single priority assessment list.”⁶⁹

A number of recommendations for enhancing consultation and transparency in the nomination, assessment and listing decision procedures have been accepted by the Government. The EPBC Act will be amended to require:

- The production of guidelines on heritage nomination documentation requirements
- Notification of the owner of a heritage nominated place that is to be assessed
- Public consultation when places are added to the Priority Assessment List and when the potential heritage values of those places are identified
- Publication of AHC advice and recommendations at the time of the Minister’s listing decision.⁷⁰

3 *Listing Decisions*

Under the EPBC Act, the Minister is entitled to consider a range of matters in addition to the AHC’s advice concerning heritage significance before reaching a listing decision⁷¹, including comments arising from public consultation undertaken by the AHC and information or advice that the Minister may seek from any source. The failure to separate decisions concerning heritage protection and other matters (such as heritage management issues) was a key issue raised in a number of submissions that argued the potential for such an approach to distort the importance of heritage significance in the listing decision.⁷²

No recommendations specific to heritage listing decisions are made in the EPBC Review Report, although it states that:

The Minister should not have regard to social and economic factors when making listing decisions... If ...considerations for listing decisions are broadened to include social and economic considerations, a decision not to list a heritage place on social or economic grounds should be constrained to exceptional situations where the social or economic costs of listing are overwhelming and the heritage benefits are known to be slight.⁷³

⁶⁸ Review Report above note 38, Recommendation 28.

⁶⁹ Commonwealth Response above note 39 at 59.

⁷⁰ Commonwealth Response above note 39 at 60.

⁷¹ EPBC Act s 324JJ (5).

⁷² This separation is fundamental to effective heritage conservation practice as reflected in the 1999 *Burra Charter*: see Australia ICOMOS The Burra Charter (The Australia ICOMOS charter for places of cultural significance): <<http://australia.icomos.org/publications/charters/>> (accessed 1/4/12).

⁷³ Review Report above note 38, at 171-172.

A connected issue is the extent to which the EPBC Act adequately prioritises the protection of the environment over other concerns. In this regard the EPBC Review Report recommended that the objects of the EPBC Act be revised to provide that:

- the primary object of the Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.
- the primary object is to be achieved by applying the principles of ecologically sustainable development in s 3A; and
- the Minister and all agencies and persons involved in the administration of the Act must have regard to, *and seek to further*, the primary object of this Act [emphasis added].⁷⁴

This recommendation was not agreed to by the Government.

4 *The Role of the Expert Bodies under the EPBC Act*

Established under the *Australian Heritage Council Act 2003*, the Australian Heritage Council (“AHC”) has a broad range of functions relating to the identification, protection and management of heritage. In particular, the AHC’s functions include undertaking heritage assessments, advising the Minister on a range of matters including conserving and protecting places included, or being considered for inclusion, in the National Heritage List or Commonwealth Heritage List; nominating places for inclusion in the National Heritage List or Commonwealth Heritage List; national policies relating to heritage; and monitoring of the condition of places included in the National Heritage List or Commonwealth Heritage List.⁷⁵

However, while the AHC provides expert advice to the Minister on heritage nominations, the Minister makes all key listing decisions including World Heritage listing nominations, determination of heritage themes, priority assessment lists and decisions concerning the addition and removal of a place from the National and Commonwealth Heritage Lists. The Government has accepted the recommendation of the Review Report to incorporate the provisions of the *Australian Heritage Council Act 2003* (Cth) into the EPBC Act “in a way that retains the role, functions and independence of the AHC”.⁷⁶

The EPBC Review Report proposed an enhanced role for the AHC in developing a strategic approach to nominations. Such a role would invite targeted nominations to encourage “a ‘broad reaching national conversation’ that would raise awareness of our national heritage and its relevance to local communities”⁷⁷. In 2010 the Australian Government announced its intention to develop an Australian Heritage Strategy that will “highlight the importance of heritage to all Australians and provide common direction for the recognition, protection, commemoration and celebration of Australian heritage over the next decade.”⁷⁸ A public consultation paper concerning the Australian Heritage Strategy was recently released.⁷⁹

⁷⁴ Commonwealth Response above note 39 at 9.

⁷⁵ Section 5 AHC Act 2003.

⁷⁶ Commonwealth Response above note 39 at 113.

⁷⁷ Review Report above note 38 at para 8.23.

⁷⁸ See <http://www.environment.gov.au/heritage/strategy/index.html> (accessed 2/5/2012).

⁷⁹ See <http://www.environment.gov.au/heritage/strategy/submissions.html#paper> (accessed 2/5/2012).

In responding to the EPBC Review recommendations concerning the role of the AHC, the Commonwealth Government has stated that the Minister, in consultation with the AHC, is to retain responsibility for establishing the assessment list. However, the EPBC Act will be amended to permit the AHC to identify 'study areas' for investigation before it defines the scope of the final assessment, including areas being considered under regional environment planning or strategic assessment processes, as discussed above.⁸⁰

The limited role of the Indigenous Advisory Committee (IAC) was raised in a number of submissions to the Review. The IAC provides advice to the Minister on "the operation of the Act, taking into account the significance of indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity."⁸¹ However, as the Commonwealth Government has noted, the EPBC Act currently does not provide for any formal link between the functions and responsibilities of the IAC and those of the AHC. The Government has agreed to amend the EPBC Act to establish a formal link between the IAC and the AHC, noting that consultation with Indigenous stakeholders is required by the National and Commonwealth Heritage Management principles outlined in EPBC Regulations 10.01E and 10.01D.⁸²

5 *Heritage Management Plans*

The objective of heritage management is to "identify and protect conserve present and transmit to all generations" the national heritage values of a place.⁸³ National Heritage places are managed according to the heritage management principles set out in the EPBC Regulations.⁸⁴

The key instrument for heritage conservation is a management plan that is required for each place under the Act⁸⁵. The obligation of the Commonwealth Government under the EPBC Act is to use its "best endeavours" to ensure the development and implementation of management plans for World Heritage properties, National Heritage places and Ramsar wetlands and to work co-operatively with the owners/managers of these sites (generally States and Territories) in this regard⁸⁶.

According to the EPBC Review Report:

In June 2006 DEWHA commissioned an independent review of management plans for Australia's World Heritage properties and National Heritage places. The review noted that of the 31 places included in the National Heritage List at that time, only two met the formal requirements of the Act and another eight had generally adequate management plans in place.⁸⁷

⁸⁰ Commonwealth Response above note 39 at 59.

⁸¹ EPBC Act s 505B.

⁸² Commonwealth Response above note 39 at 112.

⁸³ EPBC Regulations Schedule 5B.

⁸⁴ EPBC Act s 324Y, EPBC Regulation 10.01E and Schedule 5B.

⁸⁵ EPBC Act ss 324S and 324X.

⁸⁶ EPBC Act section 324X(2).

⁸⁷ Review Report above note 38 at para 9.45. Note that deficiencies in the management planning for Commonwealth heritage places were detailed in the June 2009 report of the Commonwealth Ombudsman: *Delays in preparation of Heritage Strategies by Australian Government agencies:*

Although the EPBC Review recommended unilateral Commonwealth action where management plans initiated by States and Territories are absent or inadequate,⁸⁸ the Commonwealth Government did not agree to such a recommendation where “collaborative processes have not produced effective plans” in relation to World Heritage properties, National Heritage Places and Ramsar wetlands.⁸⁹

A number of submissions to the Review noted the need for greater flexibility in the form and content of management plans and the importance of focussing on heritage outcomes rather than processes. The need to recognise alternative management arrangements that achieve equivalent or superior heritage outcomes (for example under State heritage legislation) was also noted in submissions to the Review.⁹⁰

The Commonwealth Government has agreed to a number of recommendations dealing with management plans. In particular, the EPBC Act is to be amended to recognise outcomes focussed management and enable a flexible approach to format and content arrangements. The Government has noted that such flexible management arrangements are also consistent with international heritage practice as reflected in the UNESCO Operational Guidelines for the implementation of the World Heritage Convention.⁹¹

6 *Cumulative Impacts*

During the review process, heritage bodies suggested that management plans need to have the capacity to anticipate and advise on mitigating cumulative impacts.⁹² The EPBC Review Report called for better policy guidance regarding the significance of impacts on heritage values and places for each World Heritage and National Heritage Place and recommended that the EPBC Act be amended⁹³ to require that management plans identify and provide guidance on what is likely to have a “significant impact” on areas protected by the Act.

The Government has agreed “in principle” to the inclusion of place-specific guidance on impacts in management arrangements, including guidance on likely significant impacts on the values or ecological character of protected areas. However, although the agreed amendments to the EPBC Act will include guidance on what constitutes a significant impact, the Government response indicates that the Minister may decide that this requirement is not to apply if the necessary information is not available at the relevant time⁹⁴ (management plans can be amended subsequently to include significant impact guidance).

implementation of s 341ZA of the Environment Protection and Biodiversity Conservation Act 1999: <www.ombudsman.gov.au/files/investigation_2009_09.pdf> (accessed 1/4/12).

⁸⁸ Review Report above note 38 at 187.

⁸⁹ Commonwealth Response above note 39 at 64.

⁹⁰ Review Report above note 38 at para 8.68- for example statutory plans made under State or Territory heritage laws that can meet or contribute to achieving the outcomes desired for EPBC Act listed heritage places.

⁹¹ Commonwealth Response above note 39 at 63 & 64. See WHC Operational Guidelines above note 10.

⁹² Review Report above note 38 at 174.

⁹³ Review Report above note 38 at 187.

⁹⁴ Commonwealth Response above note 39 at 65.

As discussed above, the Government has also agreed to amend the EPBC Act to allow the accreditation of management plans that comply with the requirements of the EPBC Act and Regulations.⁹⁵ Such accreditation would be subject to performance auditing. The accreditation of management plans and arrangements is provided for under the provisions of the EPBC Act that deal with bilateral agreements between the Commonwealth and State/Territory governments.⁹⁶ Accreditation requirements for heritage management arrangements are to be consistent with the principles outlined above in relation to EIA and accreditation reform generally.⁹⁷

E *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

The ATSIHP Act was designed as a short-term measure to enable the protection of Indigenous traditional areas and objects in situations where relevant State and Territory laws are ineffective in protecting heritage. Under the ATSIHP Act, the Minister for the Environment, Heritage and the Arts can make declarations to protect traditional areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition from threats of injury or desecration, upon request from an Indigenous person (or a person representing an Indigenous person). A request can be made under the ATSIHP Act regardless of whether the Minister has assessed the action under the EPBC Act.

The deficiencies of this legislation are well documented and will not be canvassed in detail here. In 2009 the Commonwealth Government released a discussion paper, *Indigenous Heritage Law Reform – For discussion August 2009: Possible reforms to the legislative arrangements for protecting traditional areas and objects* (the IH Discussion Paper)⁹⁸ proposing extensive reforms to the ATSIHP Act. The IH Discussion Paper states that the Act

has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.⁹⁹

1 *Heritage Identification*

Under the current legislation, a declaration can be made if the Minister is satisfied that a place or object is of "of particular significance to aboriginals in accordance

⁹⁵ Review Report above note 38 at 179.

⁹⁶ EPBC Act, sections 45-49.

⁹⁷ Commonwealth Response above note 39 at 65.

⁹⁸ Commonwealth Government *Indigenous Heritage Law Reform – For discussion 2009: Possible reforms to the legislative arrangements for protecting traditional areas and objects* ("IH Discussion Paper") at 4-5. Available at: <<http://www.environment.gov.au/heritage/laws/indigenous/lawreform/pubs/discussion-paper/pubs/discussion-paper.pdf>> (accessed 1/4/12). A number of the proposed reforms seek to implement recommendations made in the Evatt Report nearly 15 years ago: *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by the Hon Elizabeth Evatt AC, Commonwealth of Australia, August 1996: <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/evatt/> (accessed 1/4/12).

⁹⁹ IH Discussion Paper above note 98 at 4.

with aboriginal tradition".¹⁰⁰ A key issue with the existing Act and the reforms proposed in the Discussion Paper is the limited scope of matters protected (the focus is on the tangible elements of indigenous heritage: places and objects). At an international level, a holistic approach to heritage has been adopted that acknowledges the relationship of intangible heritage to the physical environment and the role of living cultural heritage that is critical for many indigenous communities. For example, the *World Heritage Convention* recognizes and enables the protection of "cultural landscapes" that represent the "combined works of nature and man".

The current reform process provides an opportunity for Australia's indigenous cultural heritage legal framework to adopt a more expansive approach to the concept of indigenous cultural heritage consistent with this Convention.

2 *Protection of Heritage*

Central to the reform proposal is the development of a nationally consistent approach to the protection of Indigenous heritage under which Commonwealth legislative power is used to supplement State and Territory laws "where necessary". State and Territory governments are to continue to have primary responsibility for protection of traditional objects and processes.¹⁰¹

The IH Discussion Paper proposes an accreditation framework similar to that implemented under the EPBC Act.¹⁰² Where State and Territory laws meet specified standards, it is proposed that the Minister will accredit such laws. According to the IH Discussion Paper, the incentive for State and Territory governments to do so is to "stop the Australian government from overriding its decisions."¹⁰³ Accordingly, the role of the Commonwealth Government in relation to indigenous heritage will continue to be one of intervention where State and Territory laws are judged to be inadequate.

The success of this reform proposal (if adopted) will rely on the extent to which the proposed standards reflect best practice in indigenous cultural heritage protection. There has already been extensive reform of State legislation in this area over the past decade although approaches to reform have not been uniform.¹⁰⁴

The proposed standards are outlined in very general terms in the IH Discussion Paper. They include placing the onus on proponents to avoid or minimise potential impacts on heritage, providing for consultation and agreement frameworks, ensuring that decisions regarding heritage protection are based on expert advice of indigenous people, protection mechanisms for secret or sacred traditional information, transparency in decision-making and enabling an "interested person" to obtain reasons for decisions and to seek a review of the decision. The IH Discussion Paper

¹⁰⁰ ATSIHP Act sections 3 and 4.

¹⁰¹ IH Discussion Paper above note 98 at 3.

¹⁰² IH Discussion Paper above note 98: proposal 3- see Part 5 EPBC Act.

¹⁰³ IH Discussion Paper above note 98 at 15.

¹⁰⁴ See, eg, *Aboriginal Heritage Act 2006* (Vic), and the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

does not indicate whether such a review would be on the merits of the decision or limited to judicial review.¹⁰⁵

Under the reform proposal, the accreditation of a State or Territory regime would not preclude nomination for protection under the EPBC Act where a traditional area appears to have national heritage values¹⁰⁶. However in all other cases, the Commonwealth Minister will refer applications for protection to the relevant State or Territory Minister. Accreditation may be revoked where the Minister is satisfied that standards are not being complied with or where a State or Territory enacts legislation that exempts an area or activity from normal assessment and approval processes that were the basis for the original decision to provide accreditation.

As discussed earlier in the context of amendments to the EPBC Act, an important component of any accreditation framework will be the extent and effectiveness of Commonwealth monitoring and oversight measures. The IH Discussion Paper states that required standards would include provision for the Commonwealth Government to "influence key decisions when necessary", although no detail is given as to the situations in which this might be appropriate. However, while assessment and approval functions may be devolved to State and Territory Ministers under the proposal, the Commonwealth Environment Minister should have the capacity to intervene in, and determine applications in certain situations, including applications relating to matters of national indigenous cultural interest or matters that relate to Australia's obligations under relevant international agreements (including the *International Covenant on Civil and Political Rights*¹⁰⁷, the *International Convention on the Elimination of All forms of Racial Discrimination*¹⁰⁸, the *International Covenant on Economic, Social and Cultural Rights*¹⁰⁹, the *World Heritage Convention* and the *2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions*).¹¹⁰

F *Protection of Movable Cultural Heritage Act 1986*

The PMCH Act 1986 was enacted¹¹¹ to give effect to the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property* (the 1970 Convention).¹¹²

¹⁰⁵ IH discussion Paper above note 98 at 18.

¹⁰⁶ Places with indigenous heritage values have been included in the National Heritage List and the Commonwealth Heritage List, for example, Budj Bim, Cook's Landing Place at Kurnell, Brewarrina Aboriginal Fish Traps, Hermannsburg Historic precinct, the Cyprus Hellene Club-Australian Hall in Sydney, the Wave Hill walk-off route, the Myall Creek Massacre Site, the Dampier Archipelago –Burrup Peninsula and the Jervis Bay Territory.

¹⁰⁷ Opened for signature 16 December 1966, 999 UNTS 171, art 9(1), (entered into force March 23 1976).

¹⁰⁸ Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹⁰⁹ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹¹⁰ Opened for signature 20 October 2005 (entered into force 18 March 2007): <<http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>> (accessed 1/4/12).

¹¹¹ The PMCH Act came into operation on one July 1987 and was reviewed in 1991 and 1995.

¹¹² Opened for signature 14 November 1970, 823 UNTS 232 (entered into force 24 April 1972). The preamble to the PMCH Act states that it is to "protect Australia's heritage of movable cultural objects to support the protection by foreign countries of their heritage of movable cultural objects and all related purposes".

A key role of the PMCH Act is the identification and protection of objects which are "significant" to Australia. The term "movable cultural heritage" is defined¹¹³ as "a reference to objects that are of importance to Australia, or to a particular part of Australia, for ethnological, archaeological, historical, literary, artistic, scientific or technological reasons", being objects falling within one or more of the categories set out in the Act¹¹⁴. The *Protection of Movable Cultural Heritage Regulations 1987* prescribe the National Cultural Heritage Control List of objects that constitute the movable cultural heritage of Australia and that are subject to export control as required under the Convention¹¹⁵.

An "Australian protected object" is a Class A or Class B object on the List. An item listed in Class A may not be exported, while Class B items may be exported subject to the issue of a permit or certificate by the Minister in accordance with the act.

In 2009 the Commonwealth Government released the *Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations Discussion Paper*¹¹⁶. Key issues raised in the PMCH Discussion Paper relate to the effectiveness of the National Cultural Heritage Control List in capturing Australia's most "significant" cultural objects, the approach to defining "significance" under the PMCH Regulations, the extent to which indigenous cultural heritage objects are adequately protected under the PMCH Act, and whether Australia should consider ratifying the 1995 *UNIDROIT Convention* (discussed above).

The Commonwealth Government recently released the *Review of the Protection of Movable Cultural Heritage Act 1986 and Protection of Movable Cultural Heritage Regulations 1987 Report of Public Consultation 2009* ("PMCH Review Report").¹¹⁷ The PMCH Review Report contains 74 recommendations that, if adopted by the Commonwealth Government, will "involve a staged process of short, medium and longer term goals based on significant further consultation with relevant stakeholders".¹¹⁸

1 *Heritage Identification*

One of the more controversial aspects of the PMCH Act and Regulations is identification of the classes of objects that are to be protected. A lack of consensus in submissions to the Review concerning this issue appears to have prompted recommendations for additional consultation before any amendments to the Act and or Regulations are made in this regard.

¹¹³ PMCH Act, section 7.

¹¹⁴ PMCH Act, section 7(1).

¹¹⁵ PMCH Act, section 8.

¹¹⁶ See <http://www.arts.gov.au/__data/assets/pdf_file/0006/86289/pmch-discussion-jan09.pdf> (accessed 1/4/12).

¹¹⁷ See <http://www.arts.gov.au/__data/assets/pdf_file/0003/91983/PMCH_Review_report_final_for_web.pdf> (accessed 1/4/12).

¹¹⁸ PMCH Review Report above note 117 at 4.

(a) *The Control List*

The range of objects included in Class A is extremely limited¹¹⁹ and ad hoc in nature with no clear policy framework underpinning the selection of the objects listed. Experts within the field of museum and cultural heritage studies have suggested that a preferable approach would be to adopt a thematic basis for selection similar to the approach adopted under the EPBC Act with respect to nominations for the National Heritage List.¹²⁰

Class B objects, which require a permit to be exported, must meet additional threshold criteria relating to monetary value, age and “significance to Australia”. The age and monetary value thresholds vary depending on the part of the Control List that covers the object. The arbitrary nature of these thresholds was criticized in a number of submissions.¹²¹

The PMCH Review Report recommends that the classes of objects protected and the Control List thresholds be reviewed every 5 years and that further “targeted consultation with relevant stakeholders” is required to consider cases made for extending Class A protection to additional objects or classes of objects of exceptional national significance and expanding Class B objects and classes.¹²² An amendment that would allow the Minister (in consultation with the expert National Cultural Heritage Committee (NCHC) established under the Act) to determine that objects are of national significance where they do not meet age or monetary value thresholds is also recommended.¹²³

(b) *‘[S]ignificance to Australia’*

When considering denial of an application for an export permit for certain categories of Class B objects, the Minister and the NCHC must be satisfied that the “object is of such importance to Australia, or a part of Australia... that its loss ... would significantly diminish the cultural heritage of Australia”¹²⁴. However, there is a lack of clarity as to the meaning of the term “significance to Australia”. Under the Regulations, this term is broadly defined to mean that an object is of Australian origin, has substantial Australian content, or has been used in Australia and meets one of the additional requirements set out in the Regulations¹²⁵. However, other parts of the Regulations refer to various significance criteria of “Australia-related”; an association with a person, activity, event place or business enterprise “notable in

¹¹⁹ It currently comprises Victoria Cross medals awarded to Australian service personnel; pieces of the suit of metal armour worn by bushranger Ned Kelly at the siege of Glenrowan, and Aboriginal and Torres Strait Islander objects comprising sacred and secret ritual objects, bark and log coffins used as traditional burial objects, human remains, rock art and carved trees (dendroglyphs).

¹²⁰ See Museums Australia submission to the Review at 8: <http://www.arts.gov.au/_data/assets/pdf_file/0003/88032/museums-australia.pdf> (accessed 1/4/12).

¹²¹ Museums Australia above note 120 at 8.

¹²² PMCH Review Report above note 117, Recommendations 4, 5, and 9.

¹²³ Ibid Recommendation 11.

¹²⁴ PMCH Act section 10.

¹²⁵ PMCH Regulation, regulation 2(1).

Australian history",¹²⁶ and a lack of adequate representation in Australian public collections.

The range of criteria and their interpretation has (understandably) resulted in uncertainty in the administration of the Act¹²⁷. The PMCH Review Report recommends the amendment of the PMCH Act to adopt the definition of "significance" developed by the Collections Council of Australia, *Significance 2.0 guide to assessing the significance of collections (2009)*. The CCA Guide specifies assessment criteria for aesthetic, social and spiritual significance.¹²⁸ To the extent that such an amendment can provide greater certainty in the administration of the Act and a more holistic approach to significance assessment, it is a welcome recommendation.

(c) *Indigenous Objects*

The protection of Indigenous objects is an issue that attracted widely diverging views in submissions to the Review, particularly in relation to the adequacy of significance assessment and protection of indigenous fine or decorative art of secret, sacred and/or exceptional significance.¹²⁹

The PMCH Review Report recommends that further investigation be undertaken into appropriate methods of protecting indigenous cultural heritage items, with particular focus on questions of the definition and categorization of different forms of indigenous heritage; indigenous consultation on assessment; and the relationship between the PMCH Act, the EPBC Act and the ATSIHP Act with respect to protecting indigenous cultural heritage.

(d) *The relationship between the EPBC Act and the PMCH Act*

The EPBC Act and the PMCH Act each seek to identify and protect cultural heritage through different mechanisms. The EPBC Act focuses on the assessment of whether a proposed action has an unacceptable impact on heritage places, while the PMCH Act restricts the export of Australian protected objects. The permitting regime under the PMCH Act operates similarly to the process for obtaining wildlife trade permits under Part 13A of the EPBC Act which enables Australia to comply with its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.¹³⁰ However, while the EPBC Review Report recommended that the EPBC Act be amended to incorporate the requirements of the PMCH Act, the Government has not accepted this recommendation, citing "limited policy, stakeholder and subject matter linkages between the two Acts."¹³¹

¹²⁶ See Parts 5 and 9 of the Control List.

¹²⁷ PMCH Review Report above note 117 at 48.

¹²⁸ PMCH Review Report above note 117 at 53.

¹²⁹ PMCH Review Report above note 117 at 53.

¹³⁰ Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975). See EPBC Review Report above note 38 at 299.

¹³¹ Commonwealth Response above note 139 at 106.

G *Historic Shipwrecks Act 1976*

The HS Act protects historic shipwrecks and their associated relics by preventing the treatment of wrecks and relics as commercial salvage. It applies to all shipwrecks and relics located in ‘Australian waters’¹³² and the continental shelf, with the exception of waters within State limits. Under the HS Act the Minister may declare protected zones around historic shipwrecks. A permit is required to carry out prescribed activities (including trawling, diving or mooring or using ships in a protected zone). The HS Act permits the Minister to delegate powers to State and Territory officials and the Act is administered jointly by the Australian Government and (generally) the State delegate responsible for historic shipwrecks in their State waters under State and territory shipwrecks legislation.

In 2009, the Commonwealth Government announced the first review of the HS Act. In addition to the operation and scope of the Act, the terms of reference of the review included legislative mechanisms that could enable Australia to ratify the UNESCO 2001 *Convention for the Protection of the Underwater Cultural Heritage*.¹³³ Key issues raised in the *Review of the Historic Shipwrecks Act 1976 and Consideration of the Requirements arising from the UNESCO 2001 Convention for the Protection of the Underwater Cultural Heritage – Discussion Paper*¹³⁴ include:

- whether the scope of the HS Act should extend beyond shipwrecks and associated relics to include other underwater historical archaeological sites and relics to comply with the provisions of the *UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage*¹³⁵ (the UCH Convention);
- whether criteria are required where the Minister is declaring a site to be an underwater site of historical significance; and
- whether human remains should be specifically protected.

1 *Heritage Identification*

Under the HS Act, blanket protection is afforded to all shipwrecks that are at least 75 years old, whether their location is known or unknown, and any associated relics. The Minister can also protect shipwrecks that have been sunk for less than 75 years if they are of historic significance¹³⁶. In the latter case, the Minister is required to decide whether a shipwreck is of “historic significance” although no criteria are provided in the HS Act.

The scope of underwater cultural heritage protected under the UCH Convention is considerably broader than heritage protected under the HS Act. It encompasses “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years” such as sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; vessels and aircraft together with their archaeological and natural context; and objects of prehistoric character.¹³⁷

¹³² HS Act s 3(1) definition: “the territorial sea of Australia and waters of the sea (not being State waters) on the landward side of the territorial sea of Australia”.

¹³³ See <<http://www.environment.gov.au/heritage/shipwrecks/review/terms-reference.html>>.

¹³⁴ See <<http://www.environment.gov.au/heritage/publications/shipwrecks-review/discussion-paper.pdf>> (accessed 1/4/12).

¹³⁵ Discussion Paper above note 134 at Section 1:4.

¹³⁶ HS Act section 5.

¹³⁷ Article 1.

This definition recognizes the improved accessibility of such heritage through modern technology and the accompanying risks that such access poses to its protection. Most submissions to the Review support the ratification of the UCH Convention and the amendment of the HS Act to ensure consistency with the scope of heritage protection afforded under that Convention.

2 *Protection of Heritage*

The key protection mechanism under the HS Act is the declaration of a protected zone around a wreck¹³⁸ and accompanying restrictions on activities that may be undertaken within a protected zone. The size of a protected zone cannot exceed 200 hectares.¹³⁹ Clearly this may not be adequate to enable the protection of the archaeological and natural context of a wreck site if the UCH Convention is ratified. Some submissions to the Review proposed that the protection of the wreck sites should follow more closely the protected areas management approach of including a buffer zone within the protected zone.¹⁴⁰

While the HS Act seeks to protect historic shipwrecks, it does not adopt the approach of the EPBC Act and impose a threshold requirement of a “significant impact” test before the approval mechanisms of the Act become operative. The Government has indicated that the EPBC Act “might” be amended to cross reference the HS Act, specifically with reference to impacts.¹⁴¹

At the date of writing, no review report had been released by the Commonwealth Government in relation to the HS Act.

III EVALUATION OF NATIONAL HERITAGE LAW REFORM PROPOSALS

The review process has revealed a fragmented legal framework for Commonwealth heritage protection, with procedural and substantive duplication and gaps between the statutory regimes established under each Act.¹⁴² Clearly, issues of overlap, duplication and legislative lacunae arise due to the progressive implementation of legislation over time in response to developments in international environmental law. For example, the ATSIHP Act, the PMCH Act and the HS Act predate Australia's ratification of the Biodiversity Convention and the 1997 COAG Heads of Agreement that provided the agreed basis for the Commonwealth Government's ongoing role in the protection and management of those aspects of the environment that are of “national environmental significance”.

¹³⁸ HS Act ss 7 and 14. To date, 19 protection zones have been declared – see Discussion Paper above note 134 at 14.

¹³⁹ HS Act s 7.

¹⁴⁰ See submission of Australia ICOMOS at 5: <<http://www.environment.gov.au/heritage/shipwrecks/review/pubs/submissions/australia-icomos.pdf>> (accessed 1/4/12).

¹⁴¹ Commonwealth Response above note 39 at 106. The EPBC Review Report proposed the incorporation of the HS Act through the inclusion of a new subdivision relating to historic shipwrecks. The Government has not accepted this recommendation, noting that “The approach to conservation in the [HS Act] is significantly different from that in the EPBC Act”.

¹⁴² For example, Indigenous cultural heritage is encompassed within the EPBC Act, the ATSIHP Act and the PMCH Act.

The consolidation of all biodiversity and heritage related legislation into a single act would be consistent with the Commonwealth Government's policy objective of deregulation to reduce and simplify regulatory burdens on people, businesses and organisations, "while maintaining appropriate and efficient environmental standards".¹⁴³ In this regard, the EPBC Review Report recommended¹⁴⁴ that the ATSIHP Act, the PMCH Act and the HS Act should be incorporated into a proposed new "Australian Environment Act". An evident basis for this recommendation is that each Act seeks to protect an aspect of the environment by prohibiting certain actions and limiting actions that may have an impact on the environment. As noted above, the Commonwealth Government has rejected this recommendation with respect to the PMCH Act and the HS Act.

The proposed expansion of the accreditation and bilateral agreement provisions of the EPBC Act and the proposed accreditation regime for the ATSIHP Act will clearly have the effect of delegating further key assessment and approval roles concerning matters of national environmental significance to State and Territory governments. However, such reforms must be accompanied by safeguards in the form of detailed standards required to be satisfied before accreditation is forthcoming, together with appropriate audit and monitoring processes and a statement of those circumstances (if any) in which Commonwealth intervention in decision making may be warranted.

The key mechanisms for enhancing the identification and management of heritage under the EPBC Act require significant improvements to the extent and quality of strategic planning, the development of regional plans and more flexible and tailored heritage management plans. These are important and welcome reform proposals given that current use of these mechanisms under the EPBC Act has been limited (for example, the regional planning procedure available under s 176 has thus far been used only in the context of Commonwealth marine areas). However, a key issue will be the adequacy of heritage funding at the national level. The SoE 2011 Report discloses that funding for the Department of Sustainability, Environment, Water, Population and Communities was reduced from \$15 million to \$13 million between 2006–07 and 2011–12 resulting in a reduction in heritage staffing levels. The SoE 2011 Report notes that "The reduction adversely affects listing programs, and reduces capacity for delivery of advice, proactive planning and reactive monitoring of heritage places".¹⁴⁵ In the light of current budgetary constraints, the extent to which the Commonwealth Government's heritage initiatives will be effectively implemented is unclear.

V CONCLUSION

Australia is clearly lagging behind other countries in the Asia-Pacific area in failing to have ratified the 1995 UNIDROIT Convention, the ICH Convention and the UCH Convention. However, substantive reform of national heritage laws needs to be considered against the framework of developments in international heritage law. This is occurring in the context of the HS Act and to a more limited extent, the PMCH Act. However, the ICH Convention is not referred to at all in the IH Discussion Paper. The failure to recognize the relationship between human rights and heritage that is

¹⁴³ EPBC Review Report, above note 38 at 292.

¹⁴⁴ EPBC Review Report, above note 38 at 300.

¹⁴⁵ SoE 2011 Report above note 1 at 766.

embodied in the ICH Convention would suggest that there is some way to go before indigenous heritage protection in Australia meets the requirements of the international framework.

There is little doubt that the recent reviews of Commonwealth heritage legislation will result in much needed updating and streamlining of procedures relating to heritage identification, protection and management, particularly in the context of the EPBC Act. The proposed expanded role of strategic assessment and regional planning should enable a more holistic and proactive approach to heritage planning that can reduce the scope for conflict between development and environmental interests in the longer term.

The concerns of COAG to address “duplicative and cumbersome environmental regulation” are not new and are clearly warranted in striving to address business concerns regarding costs, competition and productivity. However, it is critical that any expansion of the accreditation and bilateral agreement process (under the EPBC Act and any reform to indigenous heritage laws) does not deal with these concerns at the expense of environmental protection. Unless the reforms provide adequate safeguards, the extent to which the Commonwealth can be said to be discharging its obligations with respect to protecting matters of national environmental significance must be queried.