

The Heritage Amendments

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The *Environment and Heritage Legislation Amendment Act 2003*, *Australian Heritage Council Act 2003* and the *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003* (collectively known as 'the Heritage Amendments') have been passed through parliament. Coming into force in February next year, the Heritage Amendments will introduce sweeping changes to the current Commonwealth heritage regime.

The Heritage Amendments:

- introduce two new lists to which the EPBC Act assessment procedures will apply: the National Heritage List and the Commonwealth Heritage List;
- introduce a transparent approval and assessment process for Heritage properties that allows for the public to participate;
- impose civil and criminal penalties for breaches; introduces a regime whereby the Australian Government is required to proactively protect Australia's national heritage places;
- repeal the *Australian Heritage Commission Act 1975* ('the AHC Act');
- replace the Australian Heritage Commission with the Australian Heritage Council; and
- retain the Register of the National Estate,

1. What are we gaining under the new approvals process?

(a) The heritage values of properties on the National Heritage List become the 7th matter of National Environmental Significance under the *Environmental Protection & Biodiversity Conservation Act 1999* ('the EPBC Act'), triggering the approvals process under that Act.

(b) The new regime creates an approval process that will apply to all actions that are likely to have a significant impact on:

- the National Heritage values of a place on the National Heritage List; or
- the Commonwealth Heritage values of a place on the Commonwealth Heritage List.

[There was more of a consultative process rather than an approval process under the AHC Act]

(c) The approval requirements will apply to all persons and actions that fall within the Constitutional powers of the Australian Government.

[The AHC Act only applied to the actions of Australian Government Ministers and authorities of the Australian Government]

(d) The Australian Government Minister for the Environment and Heritage (the "Minister") will make the decisions on whether an action requires approval and whether actions should be approved (unless a bilateral agreement is made that transfers the power to approve actions to a State or Territory).

[This means the Minister will have wider powers to protect Australia's heritage]

(e) Before the Minister decides whether an action requires approval or whether an action should be approved, members of the public will be given an opportunity to make submissions and these submissions must be taken into account when the relevant decisions are made.

[The AHC Act did not provide members of the public with an opportunity to comment on decisions to take an action that may damage a place on the Register]

(f) Substantial penalties can be imposed where there is a failure to obtain proper approval to take an action. Maximum penalties for taking an action without a required approval include 7 years imprisonment and/or a fine of up to \$550,000 for an individual and a fine of up to \$5.5 million for a corporation. The offender may also be required to pay to reduce or repair any environmental damage caused by the unauthorised action. If the approval was conditional, there are also penalties for contravening a condition of an approval including 2 years imprisonment and/or a fine of up to \$110,000 for an individual and \$1.1 million for a corporation.

[There were no penalties for non-compliance with the requirements of the AHC Act]

(g) Documents concerning decisions under the new regime will be publicly available (including on Department of the Environment & Heritage's website).

[Documents relating to actions that trigger the AHC Act were not required to be made publicly available under the AHC Act.]

2. What are we gaining under the new assessment process?

(a) All actions that require approval under the new regime will also be required to be assessed under the EPBC Act.

Note: There are three exemptions from this rule. Assessment under a bilateral agreement; assessment under another Commonwealth assessment; the Minister can exempt actions from the assessment process if the Minister considers it is in the "national interest" that the action be exempt from this process.

[There was no formal assessment process under the AHC Act and the Commission's assessments were carried out in a manner determined appropriate by the Commission.]

(b) Members of the public will be provided with an opportunity to comment on assessment documentation prepared under the new regime.

[The AHC Act did not allow members of the public to comment on "assessments" being carried out by the Commission.]

(c) Documents concerning assessments will be publicly available (including on the Department of the Environment & Heritage's website).

[Documents concerning "assessments" under the AHC Act were not publicly available.]

3. What are we gaining in reference to actions of the Australian Government?

(a) The Australian Government, its agencies and other ministers are now required to obtain approval from the Minister if they intend to take an action that is likely to have a significant impact on the Commonwealth Heritage values of a place on the Commonwealth Heritage List.

[There were no approval requirements for Australian Government actions under the AHC Act]

(b) Australian Government agencies will also be required to:

- "take into account" Commonwealth Heritage values and to "minimise impacts" on these values when taking actions that relate to places on the Commonwealth Heritage List; and
- seek the advice of the Minister prior to taking an action that is likely to have a significant impact on a Commonwealth Heritage place.

[This has significantly increased the obligations of Australian Government agencies not to adversely impact the heritage values of Commonwealth Heritage Listed properties]

4. What are we gaining in expanded public rights to protect Heritage?

(a) The new regime broadens the rules of standing for persons involved in the protection and conservation of the "environment" (which now includes cultural and indigenous heritage groups) to enforce public rights, obtain injunctions to stop damage and to appeal against decisions made under the Act.

[The public had no rights under the AHC Act to take action to ensure that heritage properties were protected from destruction]

5. What are we gaining in terms of management planning?

(a) The new regime includes a process for the preparation and implementation of management plans for places on the National and Commonwealth Heritage Lists.

(b) All Australian Government agencies are now required to prepare heritage strategies and to maintain heritage registers for the places they own or control.

(c) Where management plans are prepared for places on these lists, the Australian Government is expected to provide resources for the implementation of the plan and to ensure the values of the place are maintained.

6. What are we gaining for Heritage places outside Australia?

The Heritage Amendments enable places outside Australia to be included on the National and Commonwealth Heritage Lists. This listing will effect actions by Australians at those sites.

[The AHC Act only allows places within Australia to be included on the Register.]

7. What are we gaining in terms of Conservation Agreements?

The Heritage Amendments will enable the Minister to enter into "conservation agreements" with the owner of any place that has heritage significance. Conservation agreements are like covenants, they are legally binding on the Australian Government, the owner and any person who subsequently acquires an interest in the place.

[The AHC Act had no equivalent provision]

8. Where do we go from here?

In the past couple of years many have argued against the amendments because they felt that the amendments do not go far enough. However, the amendments will offer real and tangible protection to properties and places on the lists, they introduce an approval process with penalties for breach, and they allow the Australian community to have a say in the protection of Australia's heritage. These are significant gains. The amendments offer substantial protection above and beyond the notional consultative process that AHC Act could provide.