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**HERITAGE LEGISLATION:
THE *HERITAGE ACT 2004* (ACT) AND CURRENT PRACTICE**

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I INTRODUCTION

The *Heritage Act 2004* of the Australian Capital Territory (Heritage Act) commenced in March 2005. With this legislation, each of the Australian jurisdictions, the Commonwealth, the States and two self-governing Territories,¹ the Australian Capital Territory and the Northern Territory, has heritage legislation in substantially similar terms, structured around similar concepts.

This new legislation offers the opportunity for an overview of the current legislative approach. Relevant questions include: what is heritage; who should identify it; the role of politicians and experts; the special place of indigenous heritage and remedies and enforcement.

II WHAT IS HERITAGE?

A *Definitional Issues*

The Australian Capital Territory legislation and all State and Territory legislation use the word heritage in their titles.² The Commonwealth scheme for heritage protection is contained in the omnibus *Environment Protection and Biodiversity Act 1999* (Cth) (EPBC Act), which uses the term 'heritage' in Chapter, Part and Subdivision headings.³

Many people equate heritage with old buildings, even grand old buildings. Heritage practice and legislation in Australia has long ago moved on from this view. 'Grand' has elitist connotations and raises obvious objections along these lines. It may also cover an unnecessarily narrow spectrum of buildings. 'Old' is also difficult, not only in a country with a relatively recent history of substantial built structures. Finally,

1 Australian Capital Territory, the Northern Territory and Norfolk Island, *Environment Protection and Biodiversity Act 1999* (Cth) s 528, 'self-governing territories'.

2 The relevant Australian State and Territory legislation is the *Heritage Act 2004* (ACT), *Heritage Conservation Act* (NT), *Heritage Act 1977* (NSW), *Queensland Heritage Act 1992* (Qld), *Heritage Act 1993* (SA), *Historic Cultural Heritage Act 1995* (Tas), *Heritage Act 1995* (Vic) and the *Heritage of Western Australia Act 1990* (WA); The relevant Commonwealth legislation is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

3 See EPBC Act, Subdivision A World heritage and Subdivision AA National heritage in ch 2, pt 3 and ch 5 Conservation of Biodiversity and Heritage.

‘buildings’ is also limiting in the type of item to be considered for protection. Australia’s heritage legislation builds up a broader and more complex concept of heritage. The following quote gives an idea:

[i]n contemporary Australia (the) material remnants of the past, including place, buildings archaeological sites and objects are termed ‘heritage’ – ‘the things we want to keep’ – ‘places in the heart’. Places and objects contribute to a sensory and emotional perception of belonging, of home and community. We measure our lives against them; they are things that keep us anchored, the fundamental values we take our bearings from everyday.⁴

As will be shown, even this inspirational statement is more limited than the relevant definitions in Australia’s heritage legislation.

B Cultural or Natural

Implicit in the phrase ‘grand old buildings’ is the idea that heritage is a cultural concept; that heritage protection is the protection of aspects of Australia’s cultural life. This immediately raises a culture – nature distinction.

Historically, Australia’s heritage legislation, at all levels of government, has been influenced by the World Heritage Convention of 1972,⁵ which, for the first time, included both cultural and natural heritage in the one Convention.

The definitions in the EPBC Act, when amended to include heritage matters, declare that the ‘*heritage value* of a place includes the place’s natural or cultural environment’ (s 528). As will be seen below, the Heritage Act continues this trend.

The coverage of ‘natural heritage’ is, however, one of the few places where a full consensus in the legislation of the Australian jurisdictions is still to emerge. In addition to the Commonwealth, natural items are included in the definitions in the

⁴ Jane Lydon and Tracey Ireland (eds), *Object lessons: Archaeology & Heritage in Australia* (2005) 1.

⁵ *Convention Concerning the Protection of the World Cultural and Natural Heritage* opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

legislation in the Australian Capital Territory, the Northern Territory and New South Wales, while South Australia uses 'natural history'. The other States do not use the term.⁶

Heritage legislation can be a recent overlay on existing and long standing administrative arrangements in the States. The failure to include a concept of natural heritage in their heritage legislation may be less to do with ideological and political preferences than with recognition that other agencies like national parks agencies already cover this field. In addition, even at a conceptual level, when what is meant by the term natural heritage is considered, the differences between jurisdictions may be less problematical than at first appears.

Firstly, nature may be valued for cultural reasons. 'In Australia the whole landscape is a cultural place, in that it is an artifact of humanity; people have been modifying or giving human meaning to the landscape for at least 60 000 years, and most of Australia has been affected by this.'⁷

An important current move is greater recognition for what are called cultural landscapes, where cultural values are reflected in natural places. The concept of the cultural landscape derives further authority from words in Article 2 of the World Heritage Convention, where 'cultural heritage 'includes' sites: works of man or the combined works of nature and man'.⁸ The important Aboriginal sites in the Northern Territory on the World Heritage List illustrate this concept, where aboriginal peoples without a history of built heritage have modified the landscape, and invested natural features with spiritual and cultural values.

This discussion has concentrated on the cultural values of nature as being heritage. The next step might be recognition of nature's intrinsic significance as also an aspect of heritage. The Australian Natural Heritage Charter, in a definition which recognises

⁶ Ben Boer and Graeme Wiffen, *Heritage Laws in Australia* (2006) 187.

⁷ Michael Pearson and Sharon Sullivan, *Looking after Heritage Places* (1995) 5.

⁸ World Heritage Convention, above n 5, art 1.

that natural heritage may be valued because of its significance for humans, also asserts that nature has an intrinsic significance. '*Natural significance* means the importance of *ecosystems, biological diversity* and *geodiversity* for their existence value, or for present or future generations in terms of their scientific, social, aesthetic and life support value'.⁹

C Expanding Definitions

While there are some differences in the inclusion of the natural as heritage, the definitions in Australia's national heritage laws follow a similar trajectory in expanding the concept of heritage in other ways. The *Australian Heritage Commission Act 1975* (Cth) (Australian Heritage Commission Act), in many ways the first in the modern series of pieces of heritage legislation in Australia, referred to:

those places, being components of the natural environment of Australia or the cultural environment of Australia, that have *aesthetic, historic, scientific, or social* significance or *other special value* for future generations as well as for the present community (s 4(1) (emphasis added)).

These adjectives are repeated in the EPBC Act, where the definition in s 528 provides:

Heritage value of a place includes the place's natural or cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians.

The other jurisdictions continue this practice, and there is a strong correlation in the words used.¹⁰

Note that, even if the word natural were omitted, the combination of the other words read together could provide a basis for recognising nature as cultural landscapes.

⁹ Australian Committee for IUCN, *Australian Heritage Charter*, art 1.2 (1996) 6. These thoughts challenge the utility of distinctions between environmental laws and heritage laws.

¹⁰ Boer and Wiffen, above n 6, 186.

The Australian Capital Territory legislation moves beyond the list of adjectives and implicitly defines heritage by reference to criteria a place or object must satisfy to be seen as having heritage significance. Included in the criteria is that a heritage place or object in the Territory:

- demonstrates a high degree of technical or creative achievement;
- exhibits outstanding design or aesthetic qualities;
- is evidence of a distinctive way of life, taste, tradition;
- is highly valued for religious, spiritual, cultural, educational or social associations;
- is part of local Aboriginal tradition;
- is rare or unique or notable example;
- has strong associations;
- is significant for understanding the evolution of natural landscapes;
- provides information on the natural or cultural history of the Australian Capital Territory
- exhibits unusual aspects of nature; or
- is a significant ecological community, habitat or locality (s 10).

The Australian Capital Territory legislation is still grounded in the tangible, focussing on a place or object. UNESCO and modern scholarship is speculating on whether and how to preserve intangible heritage, like traditional forms of knowledge and cultural practice. Australian legislation does not yet address this in any clear way.

D Place

An important way in which Australian heritage legislation extends the concept of heritage, which the Australian Capital Territory legislation continues, is by not referring to buildings. The Commonwealth, Tasmanian, South Australia and Western Australia legislation refers to 'place', the Northern Territory, Queensland, Victoria,

and now the Australian Capital Territory use 'place and object' and New South Wales, the oldest legislation, refers to 'environmental heritage'.¹¹

Place has become an important concept in Australia that has facilitated moving heritage laws and practice in Australia from a narrow focus on buildings that is often identified with a European concentration on 'monuments'.¹²

In the Australian Capital Territory legislation, place includes 'site, precinct or parcel of land' and what is associated with the place: items, structures, objects, items physically or historically associated with the land (s 10).

The influential Burra Charter of Australia ICOMOS¹³ provides a good explanation of 'place', and how it links to significance. This quote shows how expansive this concept is:

1.1 *Place* means site, area, land, landscape, building or other work, group of buildings or other works, and may include components, contents, spaces and views.

Place as used in this charter has a broad scope: it is geographically defined and includes its natural and cultural features. Place can be used to refer to small things, such as a milestone, and large areas, such as a cultural landscape. A memorial, tree, the site of an historical event, an urban area or town, an industrial plant, an archaeological site, a stone arrangement, a road or travel route, a site with spiritual and religious connotations – all of these can fit under the term.

¹¹ *Heritage Act 2004* (ACT) s 10; *Heritage Conservation Act* (NT) s 3; *Heritage Act 1977* (NSW) s 4A; *Queensland Heritage Act 1992* (Qld) s 4; *Heritage Act 1993* (SA) s 3; *Historic Cultural Heritage Act 1995* (Tas) s 3; *Heritage Act 1995* (Vic) s 3; *Heritage of Western Australia Act 1990* (WA) s 3.

¹² See William Logan, 'Introduction: Voices from the periphery: the Burra Charter in context' (2004) 18(1) *Australia ICOMOS Historic Environment* 2.

¹³ Australia ICOMOS, *Australia ICOMOS Charter for Places of Cultural Significance*, see Peter Marquis-Kyle and Meredith Walker, *The Illustrated Burra Charter: Good Practice for Heritage Places* (2004).

1.2 *Cultural significance* means aesthetic, historic, scientific, social or spiritual value for past, present or future generations.

Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects.

Places have a range of values for different individuals or groups.¹⁴

E Values of the place

The EPBC Act protects the *values* of a heritage place,¹⁵ and not, as under the former Australian Heritage Commission Act and the Australian Capital Territory legislation, the place itself. The significance of this change is not clear. Could it, for example, allow underground mining in a national park, where the values of the place focus on above-ground features?

III HERITAGE OBJECTS

In the past, heritage law has maintained the traditional legal distinction between land and objects as real and personal property. This distinction is becoming less relevant in modern heritage legislation, and the Australian Capital Territory legislation replaces legislation that made this distinction.¹⁶

The Commonwealth EPBC Act, provides for the listing of a ‘place’, which is defined to include:

a building or other structure, or group of buildings or other structures (*which may include equipment, furniture, fittings and articles associated or connected with the building or structure, or group of buildings or structures*)...(s 528(b), emphasis added).

¹⁴ Marquis-Kyle and Walker, above n 13, 11.

¹⁵ See, eg, in relation to World Heritage Properties, EPBC Act, s 15A.

¹⁶ *Heritage Objects Act 1991 (ACT)*.

The Australian Capital Territory legislation has a similar provision and includes in Part 2 'Important Concepts' a definition of Place and object:

8. (1) In this Act:

Place includes the following:

- (a) a site, precinct or parcel of land;
- (b) an item at the place;
- (c) a building or structure, or part of a building or structure, at the place;
- (d) an object at the place that could be registered separately;
- (e) an item historically or physically associated with the place, if the primary importance of the item derives, completely or partly, from that association;
- (f) equipment, furniture, fittings and articles at, or historically or physically associated with, the place.

Examples of things that place may include:

- 1 landforms
- 2 plantings
- 3 animal habitats

(2) An object means a natural or manufactured object, including an Aboriginal object, but does not include a place.

Objects may be moved and lose their association with the place. This definition provides that they may still be included in the registration of the place at which they were formerly located, although this may present practical difficulties. The definition can also cover objects, separated from a place, that nonetheless retain significance despite that separation, and objects whose significance never depended on an association with a place but are valued as natural or manufactured objects.

Beyond its definitional concerns, the Australian Capital Territory legislation applies the same protective provisions to heritage places and heritage objects. Similarly, the heritage criteria referred to above are a measure of the significance of heritage places and objects in the Territory.

With a sense, now, of how expansive the concept of heritage is, the provisions in Australian heritage legislation that protect places can be addressed.

IV IDENTIFYING HERITAGE

A Inventories

The basis for protection for heritage places and object under the Heritage Act is to isolate items for protection and enter them in a heritage list or inventory. As in other Australian heritage legislation, in the Australian Capital Territory the isolated item, a place or object, is entered in the register of heritage places and heritage objects, called the heritage register (s 20). The heritage register contains registration details of each place and object, heritage guidelines, heritage directions and enforcement orders (s 20(3)).

Australia has inventories at the national, and State and Territory levels, and, in the States, at the local government level. The administrative arrangements derive from an agreement of the Council of Australian Governments (COAG) in 1997.¹⁷

The Australian Capital Territory heritage register, therefore, operates alongside Commonwealth lists created under the EPBC Act:

- declared world heritage properties - places inscribed on or being considered for the World Heritage List under the World Heritage Convention;¹⁸
- National Heritage List – a limited number of iconic places of national significance;¹⁹ and

¹⁷ Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, November 1997, art 6, downloaded from <<http://www.coag.gov.au>> at 15 February 2007.

¹⁸ EPBC Act, ch 5 pt 15: Protected Areas, div 1 Managing World Heritage Properties.

- Commonwealth Heritage List - heritage places located in a commonwealth area.²⁰

B Whose Heritage?

The COAG Agreement raises further interesting questions as to ‘what is heritage’. Commonwealth, State and Territory heritage legislation is now based on the idea that heritage significance corresponds to the political units of the Federation, and can be designated as of world, national, State or Territory significance, and, in the States, as of State or local significance. Whether heritage can be so neatly divided in this way is still being argued.

The concept of the national estate under the repealed Australian Heritage Commission Act gave a largely undifferentiated national significance to heritage in Australia, which contrasts to the new layered view of heritage under the new order of heritage legislation.

While the older view of significance may have reflected the more nationalistic discourse of the 1970s, the current practice, attempting an even more precise attribution of heritage with national, state and territory significance, may also be challenged. It may end the downplaying of internal complexity, but, if much of heritage is valued for its State and Territory or local significance, not focus much attention on broader connections.

Another practical and political concern, voiced in the Senate debates on the legislation that was to form the Commonwealth’s part of the new scheme, was whether the new scheme would result in pushing responsibility for heritage from the Commonwealth down to the States and Territories. The Register of the National Estate contained more than 13 000 elements of the national estate, recorded between 1976 and 2003. By contrast, there are 33 places entered on the National Heritage lists of places of

¹⁹ EPBC Act, above n 18, div 1A Managing National Heritage places.

²⁰ EPBC Act, above n 18, div 3A Managing Commonwealth Heritage places.

outstanding significance, and 335 places entered on the Commonwealth Heritage Places as Commonwealth owned places of significant heritage value.²¹

V ADMINISTRATIVE RESPONSIBILITY FOR HERITAGE

A Heritage Officials

The Heritage Act divides responsibility between a Minister in the Territory government and a heritage council, an expert body consisting of 11 members. This also follows the pattern in Australian heritage legislation, which to a large extent is facilitative and empowers public officials to take action to protect heritage. All legislation divides heritage responsibilities in this way between the Minister administering the Act, and an appointed expert body called the Heritage Authority in South Australia, and the Heritage Council in the other jurisdictions. Important tasks for these officials include the identification of items that satisfy the criteria, the decision whether they should be listed and what activities, that might affect the item, will be permitted.

The Heritage council has a wide range of advisory and consultative functions (s 18). This analysis will focus on its power to list items in the heritage register (Division 6.2).

B Listing process

The heritage lists or registers on which Australian heritage protection is based require a listing process. Listing usually requires two processes: a process that can offer immediate protection, followed by a more considered evaluative process. In the Australian Capital Territory, provisional registration is followed, after time for study and assessment, by registration. Provisional listing, or in other jurisdictions, interim registration, provides protection for an item while its significance is assessed.

²¹ Numbers from the website of the Commonwealth Department of Environment and Heritage <www.deh.gov.au> at 15 February 2007.

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Provisional registration lasts from five to eight months. An extension may be granted to allow further time for consultation with Aboriginal organisations, or for an appeal against a decision not to register a place or object (Division 6.1).

Whether the Minister or the expert heritage council should have the power to list a place on the Heritage Register is a contentious issue. An item on the Register has, in all jurisdictions, statutory protection. The extent of the protection that is necessary or appropriate to safeguard the heritage significance of a place is not necessarily immediately clear and requires another decision. This second issue can be complicated, for example, by consideration of the economic and social consequences that protecting a place may have. Thus, implicit in the allocation of responsibility for listing, are two questions: the identification of significance and the management of the identified item.

[a] major issue in heritage conservation is the need to clearly separate heritage places and their values from their management. Past experience warns that where these matters are dealt with together, management issues can cloud or otherwise influence decisions about whether a place has certain heritage values, or any value at all.²²

If this quote is read in light of the Australian practice of dividing heritage responsibility between the two players of the Minister and a heritage council, the conclusion might be that the best division of power would be to leave it to the expert council to identify places and their values, that is to list, and to the Minister their management, that is what actions that might affect the identified values should be allowed. Heritage advocates, of course, might like to exclude a political role altogether

[h]eritage in some sense is a political issue but primarily it should be a technical issue:
Does this have cultural aesthetic value to the community? Heritage can be very prone to

²² Senate Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Report on *Environment and Heritage Legislation Amendment Bill (No 2) 2000*, *Australian Heritage Council Bill 2000*, and *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2000*, 8 May 2001, 3.6 quoting the submission of the Environmental Defender's Office; See Boer and Wiffen, above n 6, 125.

political pressure and political mood swings, and there is a sense it needs to be raised above that.²³

The Australian legislation tends to disagree with these views. The strongest position is in the EPBC Act, where all functions are given to the Minister, with the Australian Heritage Council performing only an advisory role. More commonly, the Minister decides the technical issue, being given the role of listing approval, with the Heritage Council in the jurisdiction playing an initial advisory role, and then a subsequent role of considering what works that might impact on heritage significance should be allowed.

The Australian Capital Territory legislation is unusual in Australian legislation being consistent with the views quoted above. The heritage council decides questions of value and significance and whether to list an item. It also has a significant role in setting out the parameters for the management of listed places and objects. This issue will be returned to below.

VI HERITAGE MANAGEMENT

A Regulatory Mechanisms

What may be done to a place or object after it has been listed? Australian heritage legislation is moving from a concentration on the control of one off activities to more long term planning. Provision for planning is most explicit in the EPBC Act, possibly because the legislation's heritage provisions were added to existing complex planning provisions in the legislation for protecting the environment and conserving biodiversity.

In the Australian Capital Territory legislation, the relevant management devices are heritage guidelines issued by the heritage council and heritage directions issued by the Minister.

²³ Ibid 2, quoting Submission of Australia ICOMOS 2; See Boer and Wiffen, above n 6, 125.

B Heritage Guidelines

Heritage guidelines are more general and are made by the heritage council to guide functions under the Act relating to the conservation of places and objects, including:

- advising the planning and land authority on the effect of a proposed development on heritage significance and ways to avoid or minimise it;
- giving heritage directions;
- making heritage orders;
- making heritage agreements (s 25).

While heritage directions, heritage orders and heritage agreements raise wider issues, it is convenient to introduce them here to understand the division of responsibility for what has been called the management of heritage items under the Act.

C Heritage Directions

Heritage directions are given by the Minister to the owner or occupier of a place or object to do or not do something to conserve its heritage significance. In an explanatory note, the legislation gives the examples of directions to do essential maintenance, not to adversely affect a significant feature, or not to undertake a development affecting the heritage significance of a place without development approval.

Heritage direction are made on the recommendation of the heritage council and are in accordance with applicable heritage guidelines, and when the Minister is satisfied that there is a serious and imminent threat and immediate protection is necessary (s 62). It is an offence if a person intentionally contravenes a heritage direction (s 65).

An authorised person under the Act may enter relevant premises and carry out a heritage direction. Reasonable costs incurred are a debt owing to the Territory by the person to whom the direction was given (s 66). Order to enforce exercise of functions

D Heritage Orders

Heritage orders are made by the Supreme Court on the application of the heritage council, or any other person in the public interest with leave of the Court (s 67, s 68). They are made in relation to certain offence provisions under the Act when necessary to avoid material harm to the heritage significance of a place or object. Defined offence provisions include contravening a heritage direction, diminishing the heritage significance of place or object and damaging an Aboriginal place or object (s 69).

E Heritage Agreements

Heritage agreements are made by the Minister for the conservation of the heritage significance of a place or object with the owner or the owner's consent. They may only be made with the heritage council's advice. The place or object need not be registered. Regulations under the Act may provide that other Territory laws do not apply to a place to which a heritage agreement applies (s 99). A heritage agreement may include provisions about:

- conservation;
- financial, technical or other professional advice or assistance;
- review of the valuation of the place or object;
- restrictions on use, or on work that may be carried out;
- requirements to carry out work and the standards of the work;
- public appreciation and availability for public inspection (s 100).

A heritage agreement is binding on subsequent owners of the land and is noted on title (s 103). A party to a heritage agreement may apply to the Supreme Court for an enforcement order to give effect to the agreement (s 104).

The Australian Heritage Council is an advisory body under the EPBC Act. In the other jurisdictions the State and Territory heritage councils play a more active role. In the other jurisdictions political control is also important, usually exercised through the

important feature that, except in South Australia,²⁴ the Minister approves what is to be listed. In the Australian Capital Territory this role, too, is given to the heritage council. While the important devices of the heritage direction, heritage order and heritage agreement are made by others, they are subject to the advice or consent of the council. Even the power of the Supreme Court to make a heritage order is to give effect to any applicable heritage guidelines of the council. On an initial assessment the heritage council of the Australian Capital Territory is the most powerful in the country.

VII OTHER CONVERSATION MEASURES

Australia's heritage legislation provides for a range of measures that contribute to the conservation of heritage places and objects. The three devices of heritage guidelines, heritage directions and heritage agreements in the Australian Capital Territory legislation substitute for a range of measures for the conservation of heritage places and objects common to other legislation. These include:

- Suspension of other laws so that heritage laws prevail over other laws that might affect the heritage significance of a place;²⁵
- Financial assistance for the owners of heritage places;
- Orders for maintenance and repair of places after listing;
- Other protective orders, such as stop work orders, to protect heritage items in emergencies;
- Acquisition or resumption.²⁶

²⁴ *Heritage Act 1993 (SA)* s 18.

²⁵ *Heritage Act 1977 (NSW)* s 129; *Historic Cultural Heritage Act 1995 (Tas)* s 56; *Heritage of Western Australia Act 1990 (WA)* s 38.

²⁶ See *Land Acquisition Act 1994 (ACT)*.

VIII ENFORCEMENT

Australia's heritage legislation has been criticised for weaknesses in its enforcement provisions and a feature of recent drafting has been the attention paid to this issue. The different Acts approach the drafting of offences in different ways. The Australian Capital Territory legislation has a general offence of diminishing the heritage significance of place or object (s 74), creating a strict liability offence (100 penalty points) and separate offences of carrying out the action recklessly (1 000 penalty points) or negligently (500 penalty points). Similar provisions relate to damaging an Aboriginal place or object. There is no offence if the person carrying out the activity was engaging in conduct in accordance with a heritage guideline direction or agreement or other approval (s 76(2)).

The heritage council may make an information discovery order when it has reasonable grounds for suspecting that a person has knowledge of information it reasonably requires for the administration or enforcement of the Act, or relevant documents containing that information (s 95). It is an offence to contravene an information discovery order intentionally (s 96).

The Australian Territory legislation contains enforcement powers and processes that would be adequate to underpin the protective provisions of the Act. Analysis in other jurisdictions is now focusing on whether the improved enforcement provisions of Australia's heritage legislation are being used.²⁷

IX GOVERNMENT OWNED HERITAGE ITEMS

All Australian governments and their agencies own heritage places, and use them in carrying out their general responsibilities, like heritage schools, railway stations and hospitals.

²⁷ See Andrew Macintosh and Debra Wilkinson, Environment Protection and Biodiversity Conservation Act A Five Year Assessment (Discussion Paper Number 81, The Australia Institute, 2005).

Australia's heritage legislation, unlike much legislation imposing regulatory requirements, does not exclude governments and their agencies, but generally 'binds the Crown',²⁸

The Heritage Act relies on other strategies that also appear in other legislation. There may be an advantage that these strategies are more precise, than a general blanket provision.

A public authority makes an annual heritage report to the heritage council detailing its heritage places and objects (s 108). It must also carry out a heritage audit to identify any heritage place or object for which it is responsible. If the audit identifies a heritage place or object, the authority must nominate it for provisional registration.

The heritage council may direct a public authority to prepare a conservation management plan for a heritage place or object for which the authority is responsible (s 110).²⁹

X INDIGENOUS HERITAGE

The Heritage Act illustrates a recent evolutionary trend in drafting legislation to protect indigenous heritage that 'recognises the Aboriginal and Torres Strait Islander heritage as part of a living and still developing set of traditions, to which present day Aboriginal people and Torres Strait Islanders can directly relate'.³⁰

Indigenous heritage is dealt with in broadly the same way as other heritage places and objects. The criteria for heritage significance in the Territory, referred to above, include that a place or object 'is significant to the ACT because of its importance as part of local Aboriginal tradition' (s 10(c)).

²⁸ See, eg, EPBC Act, s 4; *Heritage Act 1977* (NSW) s 5.

²⁹ See also *Heritage Act 1977* (NSW) s 170 Heritage and Conservation Register.

³⁰ Boer and Wiffen, above n 6, 265.

XI HERITAGE AND LAND DEVELOPMENT

Another major issue in heritage law and practice in Australia is the relationship between heritage and land use planning. In the States, heritage items of local significance are generally dealt with through the planning system and planning legislation. Heritage significance is another consideration which must be taken into account in the assessment of development applications by local authorities. Planning laws do not apply to items of State significance. The Australian Capital Territory legislation does not provide protection to listed items from planning decisions, but sets up an integrated system.

In the Australian Capital Territory, the Australian Capital Territory planning and land authority gives the heritage council a copy of development applications that relate to places or objects registered, or nominated for provisional registration, under the Heritage Act.³¹ The council gives advice to the authority about the potential effect of the proposed development on the heritage significance of a place or object. The heritage council outlines the effect of the development and gives advice on ways to avoid or minimise its impact. The council may propose conditions on any approval (s 61). If the planning and land authority rejects the advice, the heritage council may apply to the AAT for a review of the planning and land authority's decision to approve or refuse to approve a development application.

An initial assessment that the heritage council of the Australian Capital Territory is the most powerful in the country must now be qualified. In other jurisdictions, protection given a heritage place by being entered on a national, State or Territory Register prevails over other laws and legislative schemes. In the Australian Capital Territory protection through registration can be qualified by the intervention of the planning system. Administratively this could be explained in that the protection of

³¹ *Land (Planning and Environment) 1991 (ACT) s 229.*

heritage places in the Australian Capital Territory is considered by one of two important statutory authorities:

the heritage council; or, when a development application is lodged for work in respect of the place - the Land and Planning Authority,

but, compared with general Australian practice, the provisions are surprising.

XII HERITAGE: A DISCRETIONARY SYSTEM

A Accountability

Australian heritage legislation, of which the Heritage Act is the latest example, sets up a very discretionary system. While this paper has stressed the similarities between the legislation and the legislation of the other Australian jurisdictions, it may be that its greatest innovation in the way it deals with this aspect. While the Act reproduces and even extends traditional mechanisms of accountability and public participation, in an interesting move it makes important decisions of the minister and the heritage council reviewable.

Statutory heritage protection can be viewed as often a seemingly closed system shared between a political decision maker and an expert body, usually appointed by that decision maker. The Australian legislation approaches this problem with a range of familiar accountability mechanisms, reproduced in the Australian Capital Territory, that opened up the processes to scrutiny.

B Accountability

Firstly, the Australian practice of having some forms of delegated legislation placed before the legislature is employed in heritage. Three decisions are designated disallowable instruments, which are referred to the Legislative Assembly and are liable to disallowance.

Two are decisions of the Minister:

- criteria for deciding whether an entity is a representative Aboriginal organisation;
- appointments to the heritage council (s 17(5) Note 2);
and one is a decision of the heritage council:
- heritage guidelines (s 25(2)).

Australian heritage legislation has comprehensive provisions calling for submissions on proposals, and public notification of decisions.

In the Australian Capital Territory, some decisions or actions of the Minister or the Council are opened up for public scrutiny as notifiable instruments, and, as such, are noted on the ACT legislation register.³² These decisions seem to be more specific administrative decisions, or require a period of public consultation. Notifiable instruments include important decisions relating to registration:

- consultation notice about heritage guidelines (s 26);
- an extension of provisional registration (s 36);
- notice of a decision about registration (s 42);
- notice of a proposal to cancel registration. (s 44(2));
- notice of cancellation of registration (s 49); and
- the heritage council 's approval of an internet site, which will contain a copy of the Register (s 21(6)).

Other decisions under the Heritage Act require public consultation, for example, when information is declared to be restricted information (s 54).

³² *Legislation Act 2001 (ACT)* s 19.

XIII UNSYMPATHETIC DECISION MAKERS

Where there has been little attention in heritage legislation is to the danger that in a system with two major players, the Minister and an advisory Council, the definition of heritage may become restricted by their views.

It may also happen that heritage authorities, particularly the political actor, are not sympathetic to the registration of heritage places? 'What can be done if the decision makers with the right to list ... are not sympathetic to heritage issues?'³³

Lack of sympathy need not be evidence of corruption. All modern economies face a strong imperative for development and wealth creation, which the preservation of heritage may be seen as hindering. Is relying on a discretionary decision making system in the legislation for the protection of heritage a problem?

Australia's heritage laws at the various levels of government are of a type common in democratic systems in being facilitative, empowering and controlling public decision-making. They control excesses by systematising decisions and guiding decision makers in the use of their powers, but do not force an unsympathetic decision maker to exercise discretion by say listing a heritage place, thereby protecting it.

XIV REVIEW

A Role for the courts?

Most of the Australian heritage legislation does not provide for appeals against the decisions of the Minister in the national or State government whether or not to list a heritage place. Decisions of Ministers are usually seen as political decisions, subject to scrutiny by the electorate at elections. This is consistent with a 'separation of powers' approach.

³³ Australia ICOMOS, NSW Branch, Law & Heritage Seminar, 17 August 2006, Programme note.

Use of the courts is also difficult in Australia because of the absence of a Charter of Rights, under which heritage questions might be argued as, say, human rights issues.

B Administrative law review

Interestingly, the Australian Capital Territory heritage legislation allows appeals from a number of decisions including not to list a place on the Territory's Heritage Register. Since that is a decision of the heritage council not the Minister in the Territory government, the reason may be that the decision is seen as administrative. An appeal can be taken to the Territory's Administrative Appeals Tribunal (AAT). This is an interesting development and may give the question of, 'What is heritage?', as the argument for a second forum.

There is a long list of reviewable decisions (s 112). Some are fundamental questions in a heritage protection system based on lists. The most fundamental are the decisions by the heritage council not to provisionally register a place or object (s 112 (a)), and whether to register, or not register, or to cancel the registration of a place or object. Thus the AAT may review the Council's decision whether to investigate the heritage significance of the place. The AAT may also review a decision of the Minister whether to enforce the protective provisions of the Act, that is, whether to make a heritage direction, and, once made, whether to revoke a direction.

While it is too early to judge, the involvement of the Administrative Appeals Tribunal in heritage decisions in the Australian Capital Territory may lead to a jurisprudence of heritage.

XV CONCLUSION

Heritage legislation in the nine jurisdictions that make up the Australian federation follows a strong common model. The legislation has developed a wide definition of heritage significance and sophisticated administrative and legal procedures. Some dissatisfaction is being voiced that the legislation does not deal adequately with a changed political culture that may be less sympathetic to the preservation of items

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from the past, and the allocation of resources to their care. Processes like public participation and judicial review, although designed, no doubt, to keep decision makers in check, may be useful for opening up the heritage decision making system to other voices. An important innovation in the Australian Capital Territory allows the Territory's Administrative Appeals Tribunal to review major ministerial and bureaucratic decisions in heritage.