

1990

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN HERITAGE COMMISSION AMENDMENT BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for the Arts, Sport,  
the Environment, Tourism and Territories, the Honourable Ros  
Kelly MP)

AUSTRALIAN HERITAGE COMMISSION AMENDMENT BILL 1990OUTLINE

This Bill gives effect to the changes to operations of the Australian Heritage Commission announced by the Minister for the Arts, Sport, the Environment, Tourism and Territories, on 18 November 1988, following a public review of the Commonwealth's role in the protection of the National Estate. Each of the amendments to the Australian Heritage Commission Act 1975 in this Bill is concerned with one or more of the following matters:

- clarification and improvement of the Commission's operational procedures;
- the inclusion in the Act of powers for the Commission to administer the National Estate Grants Program (NEGP);
- the omission of a subsection unnecessarily discriminating against Aboriginal sites;
- the exemption of authorities of the self-governing Territories and Australian Airlines Limited from the requirements of the Act, in accordance with Government policy;
- changes of an administrative nature.

FINANCIAL IMPACT STATEMENT

2. The additional costs arising from the amendments in this Bill will be met from the Commission's existing budget and no additional resources will be required.

## INTRODUCTION

### Australian Heritage Commission Act 1975

3. The purpose of this explanatory memorandum is to explain these amendments which are in the first instance outlined briefly (paragraphs 11 to 20). The clauses of the Bill are then dealt with sequentially (paragraphs 21 to 54).

4. The Act was passed by the Commonwealth Parliament in 1975 following a comprehensive report that was compiled in 1974 by a committee under the chairmanship of Mr Justice R.M. Hope ("Report of the National Estate - Report of the Committee of Inquiry into the National Estate", Australian Government Publishing Service 1974, hereafter referred to as the 'Hope Committee Report').

5. Subsequently the principal Act was amended by the following Acts:

- Australian Heritage Commission Amendment Act 1976 (No. 135 of 1976);
- Administrative Changes (Consequential Provisions) Act 1978 (No. 36 of 1978);
- Statute Law Revision Act 1981 (No. 61 of 1981);
- Public Service Reform Act 1984 (no. 63 of 1984);
- Public Service and Statutory Authorities Amendment Act 1985 (no. 166 of 1985)
- Arts, Territories and Environment Legislation Amendment Act 1989 (No. 60 of 1989).

(References in this explanatory memorandum to 'the Act' or 'Australian Heritage Commission Act 1975' are, unless otherwise stated, references to the principal Act as amended by these amending Acts).

### Review of Act

6. The Amendment Act of 1976 resulted from a review of the original legislation. The main amendments made by that Act were:

- the removal of specific powers from the Commission to advise the Government on grants of financial or other assistance to the States or other bodies or persons. The Bill aims to restore this power;
- a reduction in the number of Commissioners from 19 to 7;
- a provision to limit the Commission's power to enter Aboriginal places in the Register of the National Estate (Register) to those protected under State or Territory law or where recommended for entry by a person or body approved by the Minister. The Bill aims to repeal this provision;

- the removal of 'Permanent Head' powers from the Chairman of the Commission;
- a provision limiting the power of the Commission to appoint Committees to those approved by the Minister. The Bill aims to remove that limitation.

The other amending Acts were concerned with specific administrative issues and did not affect the principles of the Act.

7. In 1978 and 1979, the House of Representatives Standing Committee on Environment and Conservation, chaired by the Hon. John Hodges (the Hodges Committee), conducted an inquiry into the Act. In general, the Committee concluded in its report (Environmental Protection - Adequacy of Legislative and Administrative Arrangements - First Report, Australian Government Publishing Service, 1979) that the Act and the operating procedures of the Commission were satisfactory and appropriate. The Committee made eight recommendations concerning the Commission:

- no amendments should be made until the Hodges Committee report had been fully considered;
- there should be consultation with the States before amendments were made to the Act. This consultation has occurred;
- only places that had been included in a notice of intention to register by the Commission could be entered in the 'interim list' and receive the protection of the Act. The Bill aims to implement this recommendation;
- property owners, persons and organisations with identifiable interests and local authorities should be advised of the Commission's proposal to register places by mail prior to publication of such proposals. The Bill aims to implement this recommendation as far as practicable;
- a confidential register should be established for secret Aboriginal sites. The Bill aims to implement the principle of this recommendation and extend it to other vulnerable sites;
- objections to proposed listings should be heard within twelve months or the proposal will lapse. The Bill aims to implement this recommendation;
- the grouping in departmental appropriations of all maintenance costs associated with Commonwealth properties in the Register should be examined. This recommendation has yet to be considered; and
- a fund should be established to maintain redundant Commonwealth property in the Register. This recommendation has yet to be considered.

8. In June 1985, the Minister for Arts, Heritage and Environment, the Hon. Barry Cohen, M.P., announced a review of the Act. The purpose was to assess whether, after ten years, the mechanisms were still adequate and appropriate, and to recommend changes where they may be necessary.

9. The Minister invited public submissions from all interested parties including State and Territory Governments, local Government, conservation groups and development groups. Over 150 submissions were received and a two-day seminar held to discuss the submissions and the review attracted over 100 participants. The results of the review, which also took into account the Hodges Committee report and representations made to the Government on the operations of the Act, were distributed to interested parties in August 1986, with an invitation for comments before final recommendations were made for amendments to the Act.

10. Following the review, the Government reaffirmed its support for the basic principles of the Act, almost doubled the staff and financial resources of the Commission and decided on a series of amendments to the Act to improve the Commission's operational procedures. These decisions were announced by the Minister for the Arts, Sport, the Environment, Tourism and Territories in a media release dated 18 November 1988.

#### Clarification and Improvements to Procedures

11. The review of the Act, together with the Hodges Committee report identified a number of desirable changes to the Act which would improve the public's awareness and understanding of the Commission's existing operational procedures, improve some of those procedures and provide for independent advice to the Commission where objections to proposed registrations had been submitted. The changes proposed are:

- the inclusion of specific criteria in the Act to assist with the interpretation of the definition of the national estate already included in the Act. The results of assessments of places by the Commission using these criteria will be available to the public. The Commission has used criteria similar to those proposed for inclusion in the Act for some time;

- the inclusion of advice in public notices that the Commission will provide a map of any place included in the notice if the location cannot readily be understood. This confirms current practice where maps are provided, on request, for places described in notices by lengthy boundary descriptions. Maps of sites vulnerable to damage by visitors or vandals need show only the general location;

- the inclusion of advice in public notices that a statement on the significance of any place included in the notice and the reasons for the Commission's decision in relation to that place will be provided on request. This also confirms current practice;

- the inclusion of a provision specifying that although objections to proposed registrations may be submitted on any grounds, the Commission will give prime consideration, in dealing with the objections, to the significance of the place in national estate terms;

- the inclusion of provisions that will require the Commission to consider objections to:

- . proposed registrations,
- . decisions not to proceed with registration, and
- . proposals to remove places from the Register,

within twelve months of the close of the objection period, unless Ministerial approval is obtained for an extension of that time. The provision for extensions is necessary to allow for possible adverse weather conditions preventing field assessments, reasonable requests from objectors for delays in assessments and to allow time, if necessary, for the completion of relevant studies or the availability of assessors. This amendment will be in accordance with one of the recommendations of the Hodges Committee;

- the inclusion of a requirement that owners of places proposed by the Commission for entry in the Register and relevant local governments be advised of the Commission's proposal prior to the inclusion of those places in a public notice. Where the number of owners is less than fifty, this advice must be by personal letter. Where there are more than fifty owners, provision is also made for the use of special advertisements in local newspapers, letter-box drops and displays in public buildings. This amendment will largely meet one of the recommendations of the Hodges Committee, except that part also recommending advice to identifiable interested persons or groups. The Government has decided that the identification of all such persons or groups would not be possible and a requirement that it be carried out would present an unattainable administrative goal for the Commission;

- the inclusion of a provision empowering the Minister to appoint independent assessors to advise the Commission in its consideration of objections to the proposed entry of places in the Register. The Commission has appointed such assessors to date;

- the inclusion of a provision empowering the Minister to direct the Commission to review the continued entry of a place in the Register;

- the inclusion of a provision to give the Commission a discretion in the description of a place in a public notice or on a map if, in the opinion of the Commission, the place would be vulnerable to damage if its precise location were to be publicly identified. This is necessary to protect sites of rare flora, fauna or geology, and Aboriginal

archaeological, sacred and secret sites and is in accordance with one of the recommendations of the Hodges Committee;

- the inclusion of a provision defining the list of places publicly proposed for entry in the Register as the 'Interim List', and clearly confining the contents of that list to places which have been included in a 'Notice of Intention to Register Places'. This meets one of the recommendations of the Hodges Committee.

#### Administration of the National Estate Grants Program

12. The National Estate Grants Program (NEGP) is the Commonwealth's principal program of financial assistance for the conservation of the national estate. It operates under section 96 of the Constitution in accordance with the Urban and Regional Development (Financial Assistance) Act 1974. Each financial year, funds are allocated in bulk to the States and internal Territories for distribution to individual grant recipients for projects approved by the Commonwealth Minister on the recommendation of the relevant State or Territory Minister. The day-to-day administration of the program rests with State and Territory Governments.

13. The Hope Committee Report recommended that this program be developed on the recommendations of the Commission, but the 1976 amendments to the Act removed the Commission's specific powers to make such recommendations to the Government. The Government has now decided to restore those powers and to transfer the responsibility for the administration of the NEGP, at the Commonwealth, level from the Department of the Arts, Sport, the Environment, Tourism and Territories (DASETT) to the Commission.

14. Since the Government's decision, a review of the program has been conducted by the Minister. No major changes are proposed to the nature or administration of the program other than the transfer of its administration from under the Urban and Regional Development Act to the AHC Act and a provision for the Minister to make grants to approved bodies directly as well as through the State and internal Territory governments.

#### Aboriginal Sites

15. The Bill provides for the repeal of subsection 23(5), which restricts the Commission's ability to enter Aboriginal sites in the Register to those protected under State or Territory law or recommended by a person or body approved by the Minister. This subsection was introduced as an amendment in 1976 to avoid possible conflicts between decisions by the Commission on the registration of land and recommendations by Land Commissioners on Aboriginal land rights. The amendment has been substantially ineffective as most States and Territories have laws providing blanket protection to most Aboriginal sites. The subsection is an unnecessary discrimination against Aboriginal sites and, on the experience to date, its removal will not result in the conflicts forecast in 1976.

### Exemption of Self-Governing Territories and Australian Airlines Limited-

16. In accordance with the Government's policies concerning the self-governing Territories and the commercial competitiveness of Australian Airlines Limited, the Bill will exclude authorities appointed under the laws of the Australian Capital Territory, the Northern Territory and Norfolk Island, and Australian Airlines Limited from the definition of "authority of the Commonwealth" and hence from the requirements in the Act for such authorities to assist the Commission (section 9 of the Act), not damage the national estate (section 30) and assist with staffing (section 33).

### Administrative Changes

17. Notices issued under sections 23 and 24 of the Act prior to 20 November 1979 contained technical defects in the preamble, namely:

- persons were advised that the Commission would consider all objections submitted, but not of their right to object;
- a postal address for objections was included in the preamble but not a street address;
- exactly three months were allowed for the submission of objections to proposed entries in the Register, whereas the Act may be interpreted as requiring a minimum of three months and one day.

The Bill will correct these defects.

18. Section 30 of the Act, which places obligations on Ministers, Departments and authorities of the Commonwealth to protect the National Estate, will be changed only to a minor degree, making it clear that the Commission has the right to comment on, as well as consider, proposed Commonwealth actions that might affect to a significant extent a place in the Register. These comments have to be made as soon as practicable.

19. The Bill will amend:

- section 10, to make it clear that the Commission has the power to enter into contracts;
- section 39, to increase the amount for which contracts may be entered into without the approval of the Minister from \$50,000 to \$200,000;
- section 45, to remove the requirement for the Minister to approve the appointment of a Committee by the Commission.

20. The remainder of this explanatory memorandum deals sequentially with the clauses of the Bill.



### Notes on Clauses

#### Clause 1 - Short Title

21. The Bill, when enacted, will be cited as the Australian Heritage Commission Amendment Act 1990. The Australian Heritage Commission Act 1975 is referred to in the Bill as the Principal Act.

#### Clause 2 - Commencement

22. The Australian Heritage Commission Amendment Act 1990 will commence on the day it receives the Royal Assent.

#### Clause 3 - Interpretation

23. The definition of 'authority of the Commonwealth' in section 3 of the Principal Act will be amended to remove the authorities or bodies established under the laws of the Australian Capital Territory, the Northern Territory or Norfolk Island, and Australian Airlines Limited from the requirements of the Act. This is in accordance with the Government's policy on treating the self-governing Territories as States in most respects and with its decision to make Australian Airlines more commercially competitive.

24. The definition of Aborigines will be removed (paragraph 3(b) of the Bill) as it is used only in subsection 23(5) of the Act which this Bill will omit (see paragraph 37 of the explanatory memorandum below).

25. Terms used in the proposed new Part VA of the Principal Act, which provides for the administration of the NEGP by the Commission, are defined in paragraph 3(c) of the Bill. The States and internal Territories will designate one of their own Ministers as the person to consult with the Commonwealth Minister on the development of, or variation to, that part of the program to be administered by them. The definition also provides for acting State/Territory Ministers and for the delegates of Ministers to perform these functions. Grants may be made to a State, an internal Territory or an approved body. 'Approved body' is defined in the Bill as comprising authorities of the Commonwealth, States or Territories (including external Territories), local governments or any body corporate not constituted to acquire gain for its members. National Estate projects carried out under the NEGP are defined in the Bill as projects related to the identification of places that are part of the national estate and the conservation, improvement or presentation of places that are in the Register or the Interim List.

26. Paragraph 3(c) of the Bill will also insert definitions of the Interim List and of the term 'owner' as used in describing those persons whom the Commission must inform before publishing a

notice of intention to register a place (see clause 9 of the Bill - paragraph 38 and 39 of the explanatory memorandum below). 'Owner' is defined to mean the person in whom any fee simple is vested or Crown lessees, such as residents in the Australian Capital Territory or graziers in western Queensland, who have been traditionally classed as owners by the public. Lessees with leases of a limited nature are not included in the definition.

#### Clause 4 - National Estate

27. Subsection 4(1) of the Act defines the national estate in general terms. This clause will insert into the Act specific criteria against which places under consideration for entry in the Register will be measured. The generality of the present definition of the national estate will be preserved.

#### Clause 5 - Functions of Commission

28. Paragraph 5(a) of the Bill will to a large extent reinstate the wording of paragraph 7(a) of the Act as originally passed and extend its provisions to allow the Commission to give advice on identification of the national estate as well as its conservation, improvement and presentation. The reinstatement of subparagraphs 7(a)(ii) and (iii), which concern advice on expenditure by the Commonwealth and grants made by the Commonwealth for conservation of the national estate, is required in view of the Government's decision to transfer the administration of the NEGP to the Commission.

29. Paragraph 5(b) of the Bill will amend section 7 of the Principal Act by conferring an additional function on the Commission to administer the NEGP.

#### Clause 6 - Powers of Commission

30. Existing section 10 of the Act empowers the Commission to accept gifts, devise and bequests and to act as trustee of money and property. Clause 6 of the Bill will change the structure of section 10 of the Act and insert a specific power to allow the Commission to enter into contracts. No other powers have been added.

#### Clause 7 - Register of the National Estate

31. Subsection 22(5) of the Act provides for the removal of a place from the Register. Clause 7 of the Bill will provide for the removal of part of a place from the Register, together with the administrative procedures that must be followed.

#### Clause 8 - Entry of place in Register

32. Subsection 23(2) of the Act describes the public notification process which must be followed when the Commission intends to enter places in the Register. In summary, a notice of intention to enter a place in the Register must be published and anybody may submit objections to the Commission's intention within the period specified in the notice (a minimum of three months). Paragraphs 8(a) and (b) of the Bill will insert new

subparagraphs 23(2)(v) and (vi) which, respectively, will require that:

- . the Commission give prime consideration, in dealing with objections to the proposed registration of a place, to the significance of that place in national estate terms,

- . the Commission provide, on request, location maps (where locations cannot be readily understood from the notice) and statements of significance for places included in the public notice.

33. Paragraph 8(c) of the Bill will insert subsection 23(2A) into the Act, requiring the Commission to make decisions on objections to intended registrations within 12 months of the close of the period allowed for the submission of those objections. It will also provide for the Minister to extend that 12 month period if requested to do so by the Commission. Extensions might be sought because of adverse field conditions, the request of an objector or to allow time for completion of relevant research or for an appropriate assessor to become available. If the Commission does not make decisions on objections within the 12 months or the extended period granted by the Minister, the Commission's intention to register the places affected will lapse.

34. Subsection 23(3) of the Act provides for the Commission to reverse, wholly or partly, its publicly announced intention to register a place (that is, it provides for the removal of a place or part of a place from the Interim List). This subsection also provides for the submission of objections to that reversal. Paragraph 8(d) is a consequential amendment. Paragraph 8(e) of the Bill will insert new provisions similar to those inserted by paragraph 8(a) for notices of intention to register places:

- . objections will be considered primarily in terms of the national estate significance of the place,

- . maps (where necessary for locations to be readily understood), statements of significance and reasons for the reversal of the original decision will be provided on request.

35. Similarly, paragraph 8(f) of the Bill inserts a requirement into subsection 23(3) of the Act that the Commission consider objections to decisions not to proceed to register a place within 12 months of the date set for the receipt of such objections. Again, the Minister will be able to extend the 12 month limit if requested to do so by the Commission.

36. When the statutory preliminary processes have been completed and the Commission enters a place in the Register, subsection 23(4) of the Act requires the Commission to state by public notice that the entry has been made. Paragraph 8(g) of the Bill will require the Commission to provide maps (where necessary) and statements of significance on request for such entries.

37. Subsection 23(5) of the Act limits the Commission's power to register Aboriginal places to those protected under State/Territory law or those recommended by a person or body approved by the Minister. This has proved to be an unnecessary and ineffective provision (see paragraph 15 of the explanatory memorandum) and paragraph 8(h) of the Bill will omit the subsection.

Clause 9 - Insertion of new clauses: Notification before publication of public notice and appointment of assessors

38. This clause inserts proposed new section 23A to require the Commission to notify, by personal letter, the owners of each place that it intends to enter in the Register at least seven days before the notice of intention to register the place is published. Similarly, the Commission must give prior notification to the relevant local government authority. Special provisions apply for places which have more than fifty owners, viz, notification by personal letter may be replaced by advertisements in local newspapers, by letters addressed to "The Owner" being sent to the address of each property comprising the place or by displays in public buildings in or near the place. Whilst such notification will be compulsory, failure to give notice will not invalidate the relevant public notice or subsequent registration of a place.

39. This clause also inserts proposed new section 23B to provide for the Minister to appoint independent assessors to advise and assist the Commission on the assessment of objections received to published proposals to enter places in the Register. Assessors are to be paid such fees and allowances as are determined by the Commission.

Clause 10 - Removal of place from Register

40. Subsection 24(1) of the Principal Act provides for the removal of a place from the Register where the Commission considers that that place should no longer be recorded as part of the national estate. Paragraph 10(a) of the Bill will replace this subsection with a new subsection 24(1) which will include the current provisions and, in addition, provide mechanisms for the removal of parts of places from the Register and for the Minister to direct the Commission to conduct a review of the significance of a place in the Register to examine whether it should remain in the Register. Paragraph 10(a) of the Bill also inserts a new subsection 24(1A) to require the Commission to remove a place or a part of a place from the Register if the Commission determines that it should not be recorded as part of the national estate. Paragraph 10(b) of the Bill is a consequential amendment.

41. Paragraph 10(c) of the Bill sets out the content of a public notice announcing the Commission's intention to remove a place or part of a place from the Register. In addition to the provisions of the present Act, it will provide for statements in the public notice that objections submitted to proposals to remove places will be considered primarily on national estate grounds and that maps (where necessary to understand written locations) and

statements of significance will be provided on request. Paragraph 10(d) of the Bill will insert a requirement that objections to the removal of places from the Register must be considered by the Commission within 12 months of the close of the objection period unless an extension of that period is granted by the Minister. Paragraph 10(e) of the Bill is a consequential amendment.

Clause 11 - Insertion of new clauses: Consideration of objections, supply of materials and discretion of the Commission

42. This clause inserts proposed new section 24A to require the Commission to give primary consideration to the national estate significance of a place when considering any objection submitted under the provisions of the Act. All public notices published under the amendments proposed in the Bill will inform the public of this requirement. Objections may still continue to be submitted on any ground, but, consistent with the intention of the Act to identify the national estate, it is the significance of the place in national estate terms which will be the first consideration of the Commission.

43. This clause also inserts proposed new section 24B to define the information that will be available to the public, on request, concerning the location and significance of places included in public notices. It will place a requirement on the Commission to provide this material as soon as practicable. In the case of maps, it limits the Commission's obligation to the supply of maps to those cases where the location given in writing in the notice cannot be readily understood. Thus, in general, a map of a place with an unambiguous street address would not have to be supplied.

44. Proposed new section 24C will allow the Commission a discretion to use a general location description in a public notice under the Act and to provide a map showing only the general location of a place, where the Commission considers that the place would be significantly damaged by visitors. This provision would be used to protect the precise location of such vulnerable places as fossil sites, rare archaeological sites, secret Aboriginal sites and sites of rare flora and fauna.

Clause 12 - Interim List

45. Existing section 26 of the Act establishes a list of places that might be entered in the Register and requires the Commission to enter places in this list where a notice of intention to register the place has been published under the provisions of the Act. Clause 12 of the Bill will define this list as the "Interim List" in accordance with the use of that term by the Commission and the public. It will also ensure that only places which have been included in a notice of intention to register under paragraph 23(2)(a) of the Act can be entered in the Interim List. At present the Act would appear to allow the entry of a place in the Interim List without such a notice.

Clause 13 - Duties of Ministers and authorities

46. Existing section 30 of the Act requires Commonwealth Ministers and authorities to refer proposed actions that might

significantly affect a place in the Register to the Commission for consideration. In practice this has allowed the Commission to comment on those proposals and paragraph 13(a) of the Bill will insert into the Act the right of the Commission to do so. Paragraph 13(b) of the Bill inserts new subsection 30(3A) into the Act to require the Commission to provide those comments as soon as practicable.

#### Clause 14 - Insertion of new Part: National Estate Grants Program

47. Clause 14 inserts new Part VA into the Act. Proposed section 31A defines the bodies that may apply for grants under the NEGP. States and internal Territories will continue to draw up programs from applications received by them for submission to the Commonwealth Minister for approval. Approved bodies will also be able to make direct application to the Commonwealth.

48. New section 31B empowers the Commission to give advice to eligible applicants on the preparation of their project applications.

49. New section 31C will allow the Minister to make grants to:

- . the States or internal Territories for expenditure by them, by their authorities or by approved bodies, and
- . directly to approved bodies

in such amount, and subject to such conditions, as the Minister determines. The Minister is required to consult with the appropriate State/Territory Minister before approving grants to a State or internal Territory government and to have regard to any matters prescribed for the grant of financial assistance under the NEGP.

50. New section 31D empowers the Minister to vary the amount of or the conditions attached to any approved grant after consultation with the appropriate State or internal Territory or the approved body receiving a direct grant.

51. New section 31E requires that NEGP grants must only be provided out of money appropriated by Parliament for that purpose.

#### Clause 15 - Power to purchase and dispose of assets

52. Section 39 of the Act includes a requirement that the Commission must obtain the approval of the Minister before entering into a contract involving the payment or receipt of an amount exceeding \$50,000. Clause 15 of the Bill will increase the amount to \$200,000, reflecting inflation and the growth of the Commission.

#### Clause 16 - Committees

53. Section 45 of the Act empowers the Commission to appoint Committees. The original Act of 1975 placed no restrictions on the appointment of Committees by the Commission, but the

amendments of 1976 inserted a requirement for the Commission to obtain the approval of the Minister before appointing a Committee. This is no longer considered necessary or appropriate and the Bill will restore the original wording of the section.

Clause 17 - Saving-notices under section 23 or 24 of the Act

54. Notices published prior to 20 November 1979 contained a preamble subsequently found to be technically deficient (see paragraph 17 of the explanatory memorandum). These defects were minor in nature and the amendment proposed in the Bill will validate the notices which included them.



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