Environmental Defender's Office ACT Inc

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Heritage Unit
Environment and Sustainable Development Directorate
GPO Box 158
CANBERRA ACT 2601

Via email: anna.gurnhill@act.gov.au

Dear Sir/Madam,

Re: Heritage Legislation Amendment Bill 2013

The Environmental Defender's Office (ACT) Inc ('EDO') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental law reform and policy formation, and offer educational publications and programs designed to facilitate public participation in environmental decision-making.

This submission comments on the Heritage Legislation Amendment Bill 2013 ('the Bill').

The EDO supports a robust and far-reaching heritage framework. Whether an item is of environmental, cultural or Indigenous significance, matters of heritage are of great value to the ACT and its communities. In many ways the *Heritage Act 2004* (ACT) achieves this, and although we are supportive of some of the changes proposed in the the Bill, we question others which have the potential to undermine the Heritage Act's overarching objects.[1]

The removal of appeal provisions

Amendments introduced by the Bill (at cl 73 Schedule 1) seek to limit the range of decisions that are reviewable. For example, the Bill removes an appeal right against a decision of the Heritage Council ('the HC') not to provisionally register a place or object. The rationale for this amendment is that what ought to be a reviewable decision should be 'brought in line' with other jurisdictions. It is also suggested that there is 'no strong natural justice argument for retaining this provision particularly as the concerned party can provide a fresh nomination to the HC with a new or redeveloped argument and evidence for

[1] Section 3 *Heritage Act 2004* (ACT)

provisional registration' and 'A decision not to provisionally register a place or object is unlikely to impose significant impacts on a person'.[2] Reliance is also placed upon the ability to apply to the Minister to exercise a call-in power also proposed by the Bill. The call-in power is discussed further below.

Comments

The decision making process regarding the provisional registration of a place or object can have significant consequences, and the EDO does not support a reduction in the ability of third parties to participate in this process. The capacity of interested parties to request a merits review is a fundamental right exercised in circumstances where public interest environmental litigation may be essential or at the very least warranted. The ability to challenge the merits of environmental decision making is a primary function of such litigation, and the EDO opposes amendments aimed at curbing this.

The EDO submits that the inclusion of appeal rights should be retained, as historically their inclusion has not led to a flood of claims, and rights of appeal aid in the effective implementation of the Act. Decisions made under the Act ought to be subject to review if the heritage regime is to remain transparent, legitimate and accountable. Certain merit reviews allows the Administrative and Civil Appeals Tribunal (ACAT) to test the effectiveness of any condition placed upon a decision, for example to provisionally register a place or object or, in the case of the new Part 7A, by the Minister to cancel a registration (for economic reasons).

In relation to a further rationale, namely the 'natural justice' argument, the EDO submit that the rules of natural justice were developed by the common law to ensure administrative decision makers conduct proceedings that are free from bias and to allow parties the right to a fair hearing. The rules of natural justice apply where a decision may affect or interfere with the interests of an individual. The appeal provisions of this Act, or any Act, are a safeguard to protecting these interests. If an individual has a legitimate right or expectation, then the right to a fair hearing should follow, and the very notion of the rules are that a person, with such legitimate rights, ought not be penalised by such decision, but rather be afforded the opportunity to answer and present their argument. The rules of natural justice are invoked by the mere fact that a decision may affect rights or interests.

In the 2003 High Court case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6, the Honourable Chief Justice Gleeson AC explained the notion of natural justice as follows:

> *Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.*

[2] ACT Government, 'Heritage Legislation Amendment Bill 2013: Summary statement' **(2013)** <http://www.environment.act.gov.au/heritage/review_of_the_heritage_act_2004/heritage_legislation_amendment_bill_2013_summary_statement>

The EDO respectfully submits that the use the natural justice argument to support the proposed removal of the right of appeal against a decision of the HC not to provisionally register a place or object should be reconsidered.

Further, a decision made by the Minister under the new Part 7A (the proposed call-in power in relation to registration and cancellation decisions) is final, and is not a reviewable decision. Clause 40 provides that the Minister must present to the Legislative Assembly the grounds for the decision.

We comment in more detail below on the new Ministerial call-in power (cl 40). However in relation to the provisions that render the decision by the Minister not amenable to review, the EDO is concerned that interested parties will be disadvantaged relative to development proponents.

Historically there has been a low level of enforcement action by the HC and so it is crucial that third parties are given the opportunity to test decision making processes. The EDO strongly opposes the removal of ACAT review options for Ministerial decisions.

Environmental law involves matters that affect the public. Access to justice requires that the public can avail itself of the opportunity to seek redress in courts and tribunals. Public interest environmental litigation is essential for challenging the (often honest) mistakes of government regulators, and for contributing to the development of legal principles that will help ensure that development is sustainable.

The ability to review a decision to extend (or not extend) the five month provisional registration period is also proposed to be removed. Instead there is a provision that the Council can extend the provisional registration period, with the Minister able to overturn this decision within ten working days. The EDO does not support this amendment, and we comment in more detail in relation to this provision below under 'Administrative and Technical Amendments'.

In relation to amendments to remove an appeal right against a decision of the HC to extend or not to extend the period of public consultation, we apply our comments above, and reiterate that we oppose the removal of review options for individuals and communities affected by decisions.

Ministerial call-in provisions (and economic considerations)

The heritage significance criteria is to be amended to include the 'HERCON criteria' adopted at the 1998 Conference on Heritage (HERCON), and the Australian Heritage Commission's criteria for the former Register of the National Estate as the basis for assessment of places and objects. The EDO commends this inclusion. However the HERCON criteria do not provide for economic considerations to form part of the process for significance assessment. Clause 40 of the Bill creates a new Part 7A that enables new ministerial call-in powers to affect some registration decisions where he or she believes there is a need to do so for reasons of public benefit and government policy, including economic considerations. Specifically the heritage Minister will have the ability to call in a decision:

- not to provisionally register a place or object;

- to (or not to) provisionally register a place or object for which a request for urgent decision has been made;
- to (or not to) register a place or object; and
- to (or not to) cancel the registration of a place or object.

The stated policy justification for these amendments is that ACT legislation should be brought in line with other Australian jurisdictions and to 'achieve the best outcomes for heritage protection and conservation while also addressing the future needs, growth and prosperity of the ACT'.[3]

The clause also establishes the criteria under which the Minister may utilise the call-in power, being

- the likelihood of a heritage decision by the council that is not in the public interest; or
- a major policy issue being raised; or
- a substantial effect on the achievement or development of an object of the Territory Plan.

The criteria under which the Minister may use the call-in provision may enable consideration of the economic implications of heritage registration, where there is a need to do so for reasons pertaining to the three above described criteria under which the Minister may call-in a decision.

In using a call-in power to affect a registration decision, the Minister must give consideration to the heritage finding prepared by the Heritage Council, and any other matter prescribed by regulation.

There is no right of review against a matter decided by the Minister pursuant to this provision, however the Minister must present the grounds for the decision in the Legislative Assembly. Where the Minister utilises the call-in power to provisionally register a place or object, this is taken to be final registration. There is no mechanism for public consultation or right of review.

Clause 14 sets out new sections 19A to 19C which require the HC to notify the Minister ahead of decisions about a registration or cancellation matter (to bring it into line with the new part 7A).

Comment
The Heritage Council is a specialist agency. It is qualified to make assessments against the statutory criteria, especially considering the wide range of evidence and specialist advice that they are provided with.

A HC assessment determines that a matter possesses heritage significance and sets the parameters for matters such as the boundaries in relation to an item located on an area of land. The Minister can approve a development and even a demolition based on wider criteria, including social or economic considerations. If the site is degraded to an extreme level, the HC may amend the registration status, for example, as occurred in some locations in the aftermath of the 2003 bushfires.

[3] 'Heritage Legislation Amendment Bill 2013: Summary statement', above n 1.

We oppose the amendment at (cl 19B) which requires the Minister to be notified about the making of a heritage finding before a 'heritage decision' is made. As a specialist and independent agency, the HC should be free to determine its own criteria and to apply those to determine heritage significance.

The EDO also opposes amendments allowing the Minister to require the HC to consider additional considerations, *for example economic considerations,* when determining whether an item should be registered or not (cl 39). This provision could result in a situation where the Minister will not register an otherwise significant matter should that registration have the potential to obstruct a development. These circumstances would have the potential to thwart the purpose of the Act.

The EDO submits that heritage considerations (as specified in HERCON) should be the only guide for a Minister's decision about whether an item ought to be registered. The overriding consideration must always be whether an item possesses these qualities so as to qualify it as significant. To do otherwise undermines the Act's objects and further diminishes the legitimacy and credibility of the Act. Considerations such as economic impact should only be relevant where an application is made to develop in an area that might affect a heritage item and in that instance a developer ought to be called upon to pay for any work required to protect the heritage item.

The EDO also does not support provisions which will allow the Minister to cancel a registration and thereby remove an item from the register. It appears this power could be utilised when the Minister is of the opinion that conservation is not desirable when taking into account, for example, economic considerations. In light of these provisions, the EDO is concerned about government-owned heritage, which is at a high level in the ACT, for example would government owned heritage be less likely to be nominated or listed without input from the independent ACT heritage council?

The EDO would argue that listings should be made on the best available information and that this obtained from the professionals on the HC with input from the community, affected parties and other specialists.

The EDO urges the removal of this amendment as it exposes the process of determining heritage status to political influence whereby stakeholders may succeed in having their interests prioritised ahead of matters of heritage. These provisions have the potential to undermine the credibility and integrity of the *Heritage Act 2004*.

Land development applications

Under the current *Heritage Act 2004*, specifically s 60(1), the HC may give written advice to the ACT Planning and Land Authority (ACTPLA) concerning any place or object nominated for provisional registration. Clause 44 will prevent the HC from providing advice on a place or object nominated for provisional registration, and instead allows it to provide advice on a nominated place or object that, in its opinion, is likely to have heritage significance. Further, under the current s 61(3)(a), this advice may set out proposed conditions on any approval of the development, including conditions that must be complied with, such as prudent and feasible measures to conserve the heritage significance of the place

or object. Clause 46 replaces this subsection with (a) if it is not reasonably practicable for the development to avoid harming the place or object – the reasonable steps that must be taken to minimise the extent of the harm'. Clause 47 inserts a new Part 10B to make provision for the application and approval processes for excavation permits, statements of heritage effects and conservation management plans. The former two are new terms introduced to the Act to allow for additional exceptions to the Part 13 offence provisions.

The Summary Statement for the Bill explains that the changes are necessary to accommodate more measures to authorise disturbance to a site where this is an essential part of development or other form of activity.[4]

Comment
The thrust of the argument behind these amendments is to speed up development approvals and increase efficiencies for developments, or 'streamlining'.

The EDO supports an efficient and effective process, but also a thorough assessment process as these are essential for the transparency, credibility and legitimacy of the Act. The *effectiveness of the* HC's *decisions* should not be sacrificed by a focus on reducing timeframes to achieve a cutting of 'redtape'.

Administrative and Technical Amendments:
The Bill amends statutory timeframes and legislated administrative processes around registration decisions with a view to improving efficiency and effectiveness. The amendments are aimed at eliminating or reducing current administrative difficulties with the Act, and go towards making the timeframe around the registration process more achievable.

Comment
The EDO supports initiatives for the efficient and effective implementation of the Act. However we also submit that there ought to be an overall increase in resources at the HC to enable it to deal with matters such as applications for provisional registration. Previously, the EDO has advocated for more resources for monitoring and enforcement, and we argue for similar measures in support of the heritage framework.[5]

The EDO notes the extension of some timeframes and supports such measures. However any changes to administrative processes, including the repeal of current provisions concerning provisional registrations, and in particular the ability to appeal a decision by the HC to extend (or not extend) the five month provisional registration period, needs to be considered with caution. For genuine protection we recommend a temporary increase in resources to implement an intensive program to deal with the backlog of outstanding nominations for a finite period. The inability to appeal provisional registration

[4] Ibid.
[5] EDO (ACT), submission regarding the Budget Consultation Process 2013-14, April 2013. Available at: <http://www.budgetconsultation.act.gov.au/__data/assets/pdf_file/0003/441372/103-Environmental-Defenders-Office-ACT.pdf>

decisions will affect many individuals and groups who often commit a lot of time, resources and effort into preparing nominations. This amendment is not only unfair but it strikes out the current assurance that measures are available to have provisional matters eventually assessed. We also recommend an extension of the five month provisional registration period.

Some administrative changes may lighten the load of administrative decisions, however again there is a risk that difficult or complex matters may be avoided in this way. We submit this is contrary to the objects of the Act and principles of good governance.

Re Planning and Development:
The provisions of the *Heritage Act 2004* in relation to planning and development matters largely remain. One key exception is that the HC is no longer able to provide advice on a development application affecting a nominated place unless it is reasonably likely the place has heritage significance and will eventually be registered.

Comment
The risk with this amendment is that the exclusion of the HC's role in this area of decision making could have potential to be part of a broader trend developing in other states that tend to integrate approval requirements with the focus of control positioned within the planning authority, namely ACTPLA, and thereby centralising the decision-making power. The consequence of this amendment is that valid heritage considerations may be regarded with less than due concern, when major developments are assessed. This undermines the legitimacy of the *Heritage Act 2004*. Any integration of heritage provisions with the *Planning and Development Act 2007* (ACT) needs to be coupled with an assurance or a safeguard. For example, mandatory considerations requiring that heritage items are protected.

Newly proposed heritage is often most at risk, as it may have come to light due to a development proposal. Preventing any HC input on development proposals is against the Burra Charter's framework, against the precautionary principle, and is likely to result in a loss of heritage.

The EDO submits that the approval role of the HC needs to be fully integrated with the planning and development process. Such a mechanism supports the effectiveness of the Act and distracts from what appears to be a widening of the discretion exercisable by ACTPLA and the Minister for Planning. Further, the amendment runs the risk of the HC being unable to advise on matters of heritage significance which may come to light after the window for development consideration has closed. The result is the potential for a development application to be approved on the basis of invalid data and more importantly, at the risk of losing a matter of heritage significance.

Aboriginal Heritage:

Protection of Aboriginal and Torres Strait Islander culture and heritage is a central concern of the EDO offices nationally. Through litigation work and law reform and policy work the EDOs have had substantial involvement with the attempts to protect this heritage and culture.[6] We support those aspects of the Bill which seeks to strengthen the recognition and protection of Aboriginal places and objects in the ACT and approve the broadening of definitions to ensure that all Aboriginal places and objects are protected under the Act regardless of their registration status.

We support the expansion of the consultative process to ensure representative Aboriginal organisations (RAOs) are involved in all aspects of relevant decision making.

We also wish to emphasise the importance of implementing processes for the protection of Indigenous culture and heritage that are substantive rather than symbolic. The EDOs support processes that aid the facilitation of Indigenous control over heritage outcomes and those that actively empower traditional owners and other Indigenous stakeholders to decide what constitutes their own culture and heritage.[7]

A heritage framework must recognise Aboriginal and Torres Strait Islanders as the owners of their culture and heritage, and empower them to decide how this culture and heritage should be utilised. This includes ensuring that free, prior and informed consent is given to any proposal to deal in any way with Indigenous culture and heritage, and especially any proposal that involves destruction of such heritage.[8]

As the Commonwealth *State of the Environment* report notes, present systems for surveying, assessing and listing Indigenous heritage places are inconsistent around Australia, with the result that 'there is no readily available national perspective on the nature and extent of the Indigenous resource – neither what is being listed nor what is potentially being destroyed.'[9]

The EDO recommends proactive action, in consultation with Indigenous communities, to develop a nationally consistent approach to Indigenous heritage matters.

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[6] Law reform work: ANEDO provided a submission to the Expert Panel on the Recognition of Aboriginal and Torres Strait Islander People in the Australian Constitution: see www.edo.org.au/policy/110929constitutional_reform.pdf. In November 2009, ANEDO provided a submission on the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*: see www.edo.org.au/policy/09106.pdf. In December 2011, EDO NSW contributed to the Aboriginal Culture and Heritage Reform Working Party on Aboriginal Culture and Heritage Legislative Review and Reform: see www.edo.org.au/edonsw/site/pdf/subs/111219culture_heritage_reform.pdf. EDO NSW has also prepared a discussion paper on reforming New South Wales' Laws for the Protection of Aboriginal Cultural Heritage: see www.edo.org.au/edonsw/site/pdf/subs/090000reforming_aboriginal_cultural_heritage_laws_discussion%20paper.pdf Litigation work: EDO Tasmania assisted the Tasmanian Aboriginal Centre in its efforts to oppose the Brighton Bypass being built over a significant Aboriginal heritage site. EDO NSW has acted in in a number of cases for Aboriginal clients seeking to challenge consents to destroy Aboriginal cultural heritage (see *Anderson & Anor v D-G, Department of Environment and Climate Change* [2008] NSWLEC 182; *Munro & Nean v Minister for Planning & Moree Plains Shire Council*).

[7] ANEDO submission on the Australian Heritage Strategy Public Consultation Paper, 15 June 2012, p 2. Available at: < http://www.edo.org.au/120615Heritage_Strategy_letter.pdf>

[8] Ibid p 3.

[9] Australian State of the Environment Committee, *Australia State of the Environment 2011*, 715.

Public authorities:
The Summary Statement for the Bill explains that while public authorities are responsible for appropriately managing any place or object of heritage significance under its ownership or care, regardless of whether or not it is registered, the ACT Government recognises that the workload to determine the heritage significance of any place or object under control of a public authority, and not identified through the ACT Heritage Register, is not considered feasible. Such an approach would require each agency to engage an appropriately qualified heritage consultant to undertake a comprehensive and exhaustive assessment of each place and object for which the agency is responsible. However, the ACT Government will continue to encourage public authorities to 'flag' any potential places or objects of heritage significance, and will encourage appropriate conservation and maintenance of those places.

Comment
Government agencies should be resourcing the ability to manage matters of heritage significance through their respective asset budgets. To operate without identifying the heritage significance puts the places and objects at serious risk of being damaged or destroyed. It also makes it more likely to cause conflicts when development/changes are proposed and research on heritage significance has yet to be undertaken. The EDO supports the requirement that Government agencies must report on their heritage assets and submit that this reporting ought to include data as to the adequacy of their maintenance and restoration.

Please contact the EDO <edoact@edo.org.au> should you wish to discuss any matter arising.

Yours sincerely
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Camilla Taylor
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