

## **Protecting routes of national significance\***

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As many of you are aware, we are heading into an era of a new national heritage system. This system is a major change for Australia. There are Bills before the Federal Parliament to establish a national heritage protection regime that, for the first time, will establish places of national heritage significance protected to the limit of Commonwealth constitutional power. These places will complement our 14 World Heritage properties as the exemplars of our natural, historic and cultural heritage.

The system will lead to new procedures for recognising and protecting places at a national level. As part of a truly national system, places recognised as having national significance will need to link with protection offered for places at a state and local level.

We are proposing to pursue a themes-based approach for assessing places of national significance. The thematic approach may result in the Commonwealth identifying and listing routes that tell a national story, for instance. Or, it may be that the Commonwealth lists as nationally significant a place or places along a route, with other places on the route having State or local protection.

Today, I will use the idea of protecting heritage places along a route or a track to illustrate the range of different protection circumstances that will be involved in the new system. I choose routes because this gives us a chance to look at examples of sites that are across state and regional boundaries and that are protected by different means. I will speak mainly from a Commonwealth perspective and will not attempt to detail the natural and cultural protection regimes that apply in the States and Territories.

Before we delve into the drier matter of legislation and administration, let's first go back to the concept of routes and tracks, as we might see it from a national perspective.

### **Routes and tracks of national interest**

The issues of recognition and conservation of cultural routes in Australia are a concern at a national level for a number of reasons. Many travel routes occur on a vast scale literally traversing Australia and linking our continent to the world beyond. As such, these routes connect places across state borders and through many jurisdictions. Many routes relate strongly to themes that are important to our national identity and understanding such as migration, the network of Indigenous law, trade relationships, or exploration, for example.

Heritage routes continue to be vitally important as a national social and economic resource. Think of the Great Ocean Road, the Canning Stock Route, the Birdsville and Strezlecki tracks. We need to have a very pragmatic approach to the future uses of these

heritage features. At the least, we need to ensure that uses such as tourism are compatible, sustainable and sensitive to the natural and cultural values found along the way. Heritage tourism is a subject that I will return to.

Finally, places along routes invariably contain points that are a convergence of activity and meaning in a vast landscape. Sites will invariably have multiple values and a close interrelationship with the natural environment. Classic examples are: the combination of natural, Indigenous and historic values around the linked series of mound springs in northern South Australia; or the similarly broad values associated with sites along the Telegraph Line. We need to continue to develop integrated approaches to heritage conservation across natural, Indigenous and historic environments and be vigilant that we are not protecting some values at the expense of others.

In protecting routes of national significance, the Commonwealth is most concerned with:

- working across state boundaries;
- working with national themes;
- promoting appropriate use and development of places; and
- promoting continued methodological development and best practice at a national level.

The Commonwealth's existing heritage conservation regime, based on the *Australian Heritage Commission Act 1975*, is now seriously outdated and subject to significant limitations. The Register of the National Estate, maintained under the AHC Act, now contains over 13,000 places. Some of these places are of national heritage significance, but many should properly be regarded as places of State or local significance.

As a result of these thousands of entries, the Commonwealth is often involved in matters that are not appropriately the responsibility of a national government. The current regime therefore creates unnecessary intergovernmental duplication and imposes unnecessary costs on the community and industry. It is also important to recognise that the AHC Act provides no substantive protection for heritage places of national significance. The limited procedural safeguards in the AHC Act fall well short of contemporary best practice in heritage conservation.

### **So what is the latest on the shape of the new national heritage system?**

The Commonwealth is introducing the most significant changes in Australia's national heritage laws for the past 25 years. These much-needed changes will result in a new national heritage system that will, for the first time, use the full suite of Commonwealth constitutional powers to protect and manage places of national heritage significance. Also for the first time, the Commonwealth will provide comprehensive and systematic protection and management arrangements for Commonwealth-owned heritage properties.

New legislation was introduced into Parliament in December 2000. It was subsequently considered by a Senate reference committee and it is expected that debate on the heritage Bills will soon begin.

For some years, the Australian Heritage Commission has recognised the need for reform of Commonwealth heritage legislation. In its 25 years of operation, the Commission has played a pivotal role in promoting the importance of heritage and conservation to Australians. It has been the premier heritage body, providing national leadership in recognising and promoting heritage places across the country.

Its flagship statutory inventory, known as the Register of the National Estate, lists some 13,000 heritage places. Today, many of these places are recognised as being of state or local significance and are also registered under State or Territory protection systems. However, the Commission is aware that protection mechanisms in the current Commonwealth legislation have fallen behind contemporary standards and that there are important places which are not receiving adequate protection commensurate with their status as national symbols.

In response to these issues, the new system will provide for places of national significance to be listed in a National Heritage List and protected from actions that may have significant impact on values that are recognised as nationally important. These places may have natural, historic and/or Indigenous heritage values that are of outstanding national heritage significance to Australians. Places outside of Australia that are of significance to Australians – such as Anzac Cove in Turkey and the Kokoda Trail in New Guinea – could also be recognised under the National Heritage List.

The Commission acknowledges that in the past, little has been done to protect and manage heritage places in Commonwealth ownership and control. The Commonwealth has always been quick to criticise State lapses in protection but never seriously addressed heritage issues in its own backyard. The Commonwealth Heritage List will be a list of places in Commonwealth ownership and control. These places will be protected, strategically managed and conserved for future generations.

Overseeing all of these arrangements will be the Australian Heritage Council, a team of heritage experts from across Australia. The Council will provide high-quality professional and technical advice to the Minister on heritage matters affecting the nation. The Council will continue the tradition of the Australian Heritage Commission. It will be the national focus for heritage leadership, conservation and advice.

An important point about the new systems is the definition of ‘environment’ as enshrined in the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The definition includes the natural, physical, social and cultural environment.

The Commonwealth has limited heritage protection powers under the Australian Constitution. The new heritage regime however, draws on those powers that have not before been available.

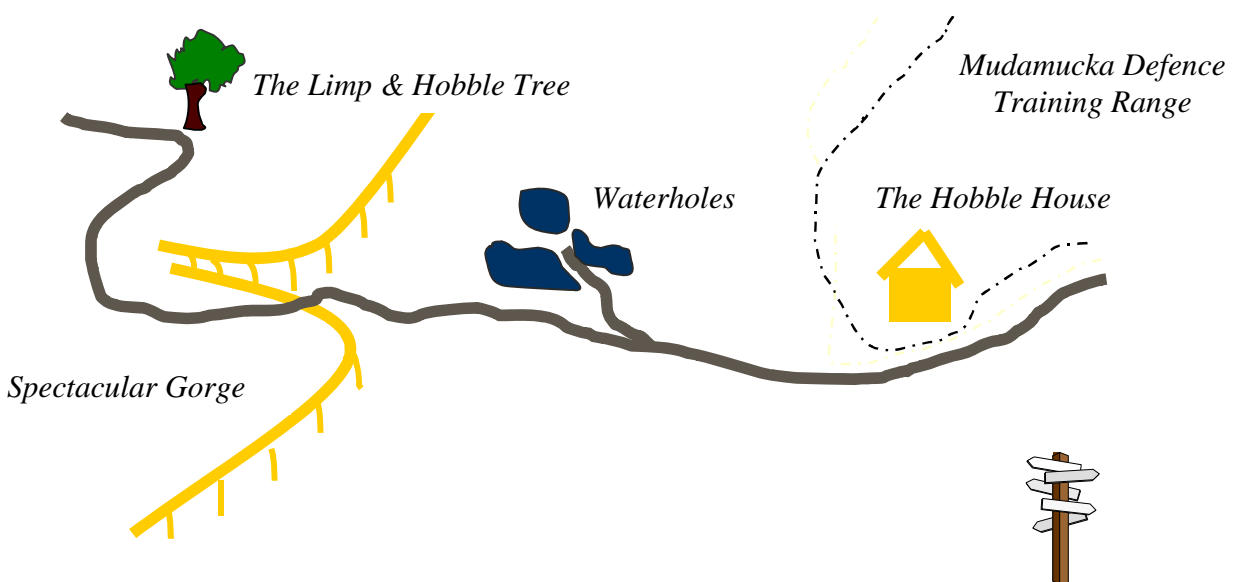
## How is heritage protection going to work in practice in the new system?

Let's take a hypothetical case of a route to illustrate the different protection concepts that will be encountered.

The neighbouring shires of Bogawindi and Mummlegum are interested in achieving recognition for major explorers' route that passes through their region. They see this as a major heritage feature that can be promoted to attract people into the region, although they are also concerned about the protection of the range of heritage places that occur along the part of the route that passes through their shires.

### How heritage protection will work

#### *'The Limp & Hobble Trail'*



The famous explorers Limp and Hobble passed through this region in 1832 looking for pasture country. Along the way they marked a tree which still stands with the blaze on it. This has been listed on both the State heritage register and the Register of the National Estate. The explorers' route also took them to the Spectacular Gorge where they became the first Europeans to see the Gorge's unique escarpment and waterfalls. In 2002, the

shires and state heritage agency were successful in having the Gorge placed on the National Heritage List.

During the height of summer the explorers were forced to spend three months beside a waterhole that is a place recognised for its natural and Aboriginal significance. Eventually the explorers found the pasture they were looking for, and built a stone house which now stands just inside the Mudamucka Commonwealth Defence Training Range.

Each site along the route presents us with different protection contexts. These are:

- the site on State land;
- the site on Commonwealth land;
- the site declared as having national heritage significance; and
- the site on the Register of the National Estate

The Commonwealth also recognises that a great deal of heritage is of local significance and is best managed and protected at that level through the use of effective planning instruments. The protection that is available to a heritage site will primarily depend on the tenure of the site and the nature of the heritage values involved.

### **A site on State land**

All Australian States and self-governing Territories now have heritage protection legislation, although there is no uniformity in the application of that. If the site was listed on the State heritage register for its historic values it would receive protection according to State heritage legislation. Otherwise, the site could be protected under other State heritage protection arrangements including planning instruments or other mechanisms such as those that apply to national parks or Indigenous. The level of protection depends on the nature of the heritage and in which State/Territory the site is situated.

The sites along the explorers' route would, in any case, be protected against the actions of a Commonwealth Minister or a Commonwealth agency. Under section 28 of the *Environment Protection Biodiversity Conservation Act 1999* (EPBC), the Commonwealth must not take an action that has a significant impact on the environment without prescribed environmental impact assessment or approval. The definition of *environment* under that Act encompasses the natural and cultural environment. If a route site had recognised heritage values— such as being listed on a national, state or local heritage register or instrument – then Section 28 would protect those values from actions by the Commonwealth.

Additional Commonwealth protection would apply if our hypothetical heritage route site was part of a World Heritage Area, an area listed under the *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar), contained nationally listed threatened species or communities, or contained habitat for listed migratory species. In these cases the values are, through the application of the EPBC Act, protected from the actions of anyone. This is backed by quite severe civil and criminal penalties.

### **A site on Commonwealth land**

Section 26 of the EPBC Act protects the environment on Commonwealth land from the actions of anyone. Again, 'environment' includes the natural and cultural environment. This protection is also backed by robust civil penalties. Section 28, as previously described, would also protect the site against actions of Commonwealth ministers or agencies.

The new Commonwealth heritage regime in the Bills currently before Parliament provides for the listing of places of heritage significance on Commonwealth land. These places will become part of a Commonwealth List and tied to this will be a requirement for the Commonwealth to establish a heritage management framework for each site listed. Such a listing for our heritage route site would also be an unequivocal statement of the existence of heritage values for the purposes of protection under the EPBC Act.

### **A site listed as a place of national heritage significance**

The proposed heritage regime also establishes a list of places of national heritage significance. Places on this list will be protected in a similar manner under the EPBC Act as World Heritage sites and other matters of national environmental significance identified under that Act. The same civil and criminal penalties would apply.

We should, however, note that protection covering a national site is not quite as wide as for a World Heritage Site. Commonwealth blanket protection of a World Heritage site is possible due to the application of section 51 (29) of the Australian Constitution (external affairs). Australia has protection and management obligations for sites inscribed on the World Heritage List pursuant to its obligations as a signatory to the Convention Concerning the Protection of the World Cultural and Natural Heritage.

In the absence of blanket protection powers, sites of national heritage significance are protected to the limit of Commonwealth constitutional power:

- protection against the actions of Foreign corporations, and trading or financial corporations formed within Australia;
- protection against the actions of the Commonwealth;
- protection against the actions of Commonwealth agencies;
- protection against the actions of persons associated with interstate or international trade;
- full protection of national heritage sites in a Commonwealth area or a Territory;
- full protection of national heritage sites with indigenous heritage values; and
- full protection of national heritage sites with values relevant to Australia's obligations under Article 8 of the Biodiversity Convention.

My reading of Article 8 says that if the national heritage site were listed for any of the reasons below then the full gamut of EPBC Act protection would apply:

- a site where special measures need to be taken to conserve biological diversity;

- a site established to ensure the conservation and sustainable use of biological resources important for the conservation of biological diversity;
- a site established to rehabilitate and restore degraded ecosystems and promote the recovery of threatened species; and/or
- a site established to maintain knowledge and practices of Indigenous communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

Putting it another way:

A site on the national heritage list inscribed for historic heritage values is fully protected if the site is in a Commonwealth area or a Territory. If in a State it is only protected against the actions of the Commonwealth or a trading or financial corporation or from the actions of any person involved in interstate or international trade.

A site on the national heritage list inscribed for Indigenous heritage values is fully protected anywhere in Australia because the Federal Government has Constitutional powers to legislate for matters relating to Indigenous people. For instance, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is an example of the Commonwealth drawing on this power.

A site on the national heritage list inscribed for natural heritage values is fully protected everywhere in Australia if the protection of those values is in accord with an obligation under the Biodiversity convention. For natural values other than biodiversity values (for example, landscape features) the coverage of protection would be the same limited range as afforded to historic heritage sites.

Notwithstanding the above limitations, if a national heritage list site fell within the other protection provisions of the EPBC Act (World Heritage, Ramsar, threatened species/communities) then the full protective elements of the Act could be brought to bear.

### **Enforcement of the EPBC Act**

No discussion on the protection afforded to sites falling under any of the provisions of the EPBC Act would be complete if the enforcement provisions were not described. Normally resource management legislation prescribes penalties for offences committed under the Act or associated Regulations. EPBC certainly has its swag of penalties.

Compliance with an Act is normally a matter for the application of civil, criminal or common law. Under the new arrangements, people or organisations who have a grievance with the way in which actions are affecting the environment, may have the capacity to take the matter to court. The test here will be whether those people or organisations are deemed to have 'standing' in the eyes of the law, for example, if they have engaged in a series of activities for the conservation of the environment. In my experience, clear judgements on whether a community interest group or a person who

cares about environmental issues is deemed to have 'standing' have been quite difficult to come by.

The EPBC Act opens up the issue of engagement of the community, broadening the definition of 'interested persons' who can call into examination these issues. This is in addition to the rights bestowed under the Administrative Decisions (Judicial Review) Act (AD (JR) Act).

The AD (JR) Act allows an aggrieved person concerned about a decision or decision making process to apply to the Federal Court for an order of review on one or more of the following:

- (a) a breach of the rules of natural justice;
- (b) required procedures not observed;
- (c) no jurisdiction;
- (d) not authorised by the enactment;
- (e) an improper exercise of enactment power;
  - taking an irrelevant consideration;
  - failing to take a relevant consideration;
  - an exercise of a power for a purpose other than that which was conferred;
  - an exercise of power in bad faith;
  - an exercise of power at the behest of another person;
  - an exercise of power without regard to the merits of the case;
  - an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - the exercise of the power is uncertain;
  - any abuse of the power;
- (f) an error of law;
- (g) fraud;
- (h) no evidence to justify the making of the decision;
  - no evidence whereby the decision maker could reasonably be satisfied that the matter was established;
  - the decision was based on the existence of a particular fact that did not exist; and/or
- (j) contrary to law.

### **Places on the Register of the National Estate**

If we look at our heritage route today, prior to the passage of legislation, then the Register of the National Estate can provide a limited measure of protection. Section 30 of the Australian Heritage Commission Act 1975 imposes a duty on Commonwealth Ministers and authorities

- A Commonwealth authority shall not take any action that adversely affects a place in the Register unless satisfied that there is no feasible and prudent alternative and that all reasonable measures will be taken to minimise adverse effects.



- Before a Commonwealth authority takes the action they shall inform the Commission and give them a reasonable opportunity to comment.

There are no other protection measures afforded to a place on the Register (unless it is listed under a State regime). There are no penalties for non-compliance.

Under the Commonwealth's new heritage regime, the Register will continue to be used as a valuable national information resource of all those places that have been assessed as significant over the past 25 years. It will also be used as an indicator of heritage value for the purposes of the EPBC Act. Places on the Register already enjoy stronger protection under this Act than they do under the AHC Act which imposes less stringent obligations on Commonwealth agencies.

### **Community backing**

It is all very well to have a heritage protection system based on heavy civil and criminal penalties. The reality however is that recourse to penalties is a last resort. The best protection outcome is based on a strong community commitment that a place is worth looking after and damage to the heritage values is unthinkable. A well constructed and managed heritage regime will be respected and loved rather than loathed and feared because of heavy handed enforcement action.

### **Making the most of our heritage assets**

Tourism is an integral part of the new national heritage system. For the past two years, the Australian Heritage Commission has been advocating a regional approach to tourism that can responsibly promote and use natural and cultural heritage places. Such an approach can benefit communities and heritage managers and provide a valuable education process about the place.

Additionally, responsible heritage tourism can complement legislative protection by encouraging greater community and therefore, economic valuing of heritage assets. Heritage that is economically valuable will be heritage that is looked after. In turn, places on the National List will be inevitably become valuable assets to the tourism industry.

The value of tourism to rural and regional areas is increasing as traditional industries decline. Farm aggregation, fluctuating resource prices and structural change have impacted on the established economic structure of rural and regional areas. Tourism is a significant growth industry that is labour intensive and has the potential to diversify the employment base. In 1997-98 tourism accounted for 4.5% of GDP, 6% of national employment and 11.2% of export earnings (Tourism Satellite Account, ABS). In addition, average annual growth forecast over the next decade is 7% for international visitors and 1.6% for domestic tourists (Tourism Forecasting Council).

Heritage tourism is an excellent way for specific regions to tap into this growth by emphasising the natural, Indigenous and historic places on tracks and routes that enhance

their distinctive regional character. The Bureau of Tourism Research recently reviewed their research relevant to heritage tourism and concluded that the economic contribution of heritage tourism is significant. They also found that in 1998 72% of all inbound visitors, 25% of all domestic overnight trips and 15% of all domestic day trips involved participation in at least one of the activities they classified as a heritage tourism based activity (BTR).

In October 1999, the Commission supported a recommendation at the Regional Australia Summit, that regional heritage tourism strategies be implemented as a model for promoting regional business development. In February 2000 we released the document *Heritage Tourism: Bringing People to the Bush* where we detailed some of the heritage, economic and social benefits of developing heritage tourism on a regional scale.

### **Regional heritage tourism action plans**

A regional heritage tourism action plan is a way of helping regional communities to develop sustainable tourism-based industries using their heritage assets. It is an important part of promoting heritage tracks and routes and is a locally driven process. We suggest these would contain:

- Guidelines for identifying issues and gathering data on;
  - understanding the heritage resource;
  - existing tourism businesses; and
  - community knowledge and aspirations.
- Analysis of existing heritage and tourism data and issues, including tourism impacts, environmental sustainability and a feasibility study of tourism opportunities.
- Development of a Regional Action Plan which sets priorities for;
  - targeted infrastructure development;
  - regional access and visitor services;
  - regional badging and signage;
  - tourist education and awareness; and
  - a marketing and community development plan.
- A guide to the development of small business plans

The regional heritage tourism action plan would provide the framework for implementing regional heritage tourism ventures funded by public and private investment over the next one to five years. This will integrate with, and build upon, existing tourism strategies and other planning processes.

The Commission was recently successful in brokering funding for the Lake Eyre Basin Coordinating Group to produce Australia's first regional heritage tourism action plan. The plan will cover the Lake Eyre Basin, an area that takes in one-sixth of the continent.

The funding comes from the Regional Solutions Program, a Department of Transport and Regional Services initiative. The project, to be completed in June 2002, is known as the *Inland Rivers - Outback Tracks: a heritage tourism strategy for the Lake Eyre Basin*. This pilot project will identify key actions required to build a sustainable heritage tourism industry in the Lake Eyre Basin, and provide a model for possible further development of regional heritage tourism plans as outlined above.

In addition, the Commission and Heritage South Australia are undertaking a historic heritage survey of the Birdsville and Strezlecki tracks as part of another regional heritage tourism action planning process. There are three main objectives of the Birdsville and Strezlecki Tracks Historic Heritage Survey. The first is to assess historic heritage resources associated with the Birdsville and Strezlecki Tracks. The second is to test assessment methodologies and recommend places for listing in National, State and local historic heritage registers. The third is to provide input to developing a regional heritage tourism strategy for the Lake Eyre Basin.

The project will make recommendations about the potential and suitability of historic heritage places within the survey area for use in heritage tourism itineraries. It will also investigate how these places are currently being used or managed, their condition, and how they might be used thematically, and in conjunction with natural and/or Indigenous heritage places in the survey area. It is an exciting process and one that will have strong implications for future partnerships between the tourism and heritage sectors.

These activities build on the Australian Heritage Commission's broader work encouraging responsible use of Australia's heritage assets for tourism, for which a key reference and supporting document is the recently launched *Successful Tourism at Heritage Places* guide. This Guide is the subject of a separate paper at this conference from Nicholas Hall.

## **A final word**

In conclusion, the Commonwealth is interested in the identification and protection of the heritage of routes and journeys – many of these have a national dimension and National Heritage List places may certainly be involved. In playing our part, we will need to work collaboratively with local communities, regional interests and state agencies, as we are doing in our Lake Eyre pilot program, to achieve heritage protection aims.

Our approach to protection is threefold. It includes the legal, economic and community dimensions of heritage. The promotion of regional heritage tourism plans is one of the mechanisms we are advocating and using for the protection of tracks and routes and the places along them.

If a sequence of sites was together determined to have national heritage values, there then may be an opportunity to work toward Commonwealth/State-Territory agreements to achieve an adequate uniform protection of a route. More likely without such

agreements, we will be dealing with a more complex range of protection issues depending on the nature of the sites in question. This will mean grappling with the range of heritage protection circumstances that I have described.

Whatever the scenario for protecting routes of national significance, it is certainly going to require a collaborative approach between the Commonwealth, State, regional and local interests. The ideal scenario is one where a national list is developed on a thematic framework and where, for any one theme, a collaborative approach has identified national sites, sites of State significance and sites of local significance – all protected by instruments available to each level of government. Such a package would be ideally placed to exploit for its regional development opportunities, marketing potential and integrated government infrastructure and management support – all focusing on the theme in question.

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