

Some Observations on the Operation of the Australian Heritage Commission Act

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This article seeks to explain two aspects of the *Australian Heritage Commission Act 1975* (Commonwealth) that are important to its operation. Both relate to the process of listing places on the *Register of the National Estate* and an understanding of them helps make sense of the operation of the Act as a whole. Both are raised, directly or indirectly, by the current litigation between *Mount Isa Mines Limited and the Australian Heritage Commission*.¹ The first aspect of the Act that will be discussed is whether or not the fact that a place is part of the national estate is a jurisdictional fact or whether it is determined conclusively by the Australian Heritage Commission. The second is where the Commission has discretion in the process of listing places on the *Register of the National Estate*. If these two issues are understood then it much easier to make sense of the operation of the Act and to give the Act an interpretation consistent with parliament's intent.

The Purpose of the Legislation

The Act is a remedial one. Its purpose is to prevent, in a constitutionally unobjectionable way, the destruction of the national estate. The national estate consists of "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). The remedial purpose of the legislation is plain from the comments of the Minister in the second reading speech.²

"In broad terms the aims of the Bill are these: To set up an Australian Heritage Commission on a broad and representative basis to advise the Government and the Parliament on the condition of the National Estate and how it should be protected; to establish and maintain a register of the things that make up the National Estate; to require that the Australian Government, its departments and agencies, and those acting on its behalf, respect the National Estate and do all they can to preserve it."

Later in the second reading speech the Minister referred to the need for State governments also to pass complementary legislation. That, according to the Minister "would provide a complete set of laws that would guard against the wilful and mindless pillaging of our National Estate".³ Some may regard the parliamentary language as ungraceful, but the intention of the legislature is clear.

The principal means by which the protection of the national estate is to be achieved is through the identification of places that comprise the national estate and the listing of those places on a Register "so the planning of future public works programs can be assessed in terms of impact on the National Estate".⁴ Consequently the listing process is central to the operation of the Act and the achievement of parliament's intention.

Jurisdictional Fact or Not

A jurisdictional fact is a fact upon which the existence of statutory jurisdiction depends. Thus it has been held that whether or not the details on an immigrant's passenger card were false was a fact upon which the jurisdiction of an immigration officer to, for example, arrest or interrogate a person depended.⁵ Whether or not the details on the passenger card were correct was a fact that could be reviewed by a court. What this means is that even if jurisdiction has been exercised, if a court later finds that the jurisdictional fact did not exist then the exercise of jurisdiction was ultra vires.

1 *Mount Isa Mines Limited v Australian Heritage Commission* (1995) 56 FCR 219; *Australian Heritage Commission v Mount Isa Mines Limited* (1995) 60 FCR 456; an appeal to the High Court is pending.

2 Hansard 14 May 1975, Vol H of R 94 at 2243-2244.

3 Hansard 14 May 1975, Vol H of R 94 at 2246.

4 Hansard 14 May 1975, Vol H of R 94 at 2245.

5 *Minister for Immigration and Ethnic Affairs v Naumovska* (1983) 88 ALR 589 at 601.

The question was raised in the Mount Isa Mines litigation whether the status of a place as part of the national estate was a jurisdictional fact which could be challenged in the courts. Both Drummond J and, on appeal, a majority of the Full Federal Court (Beaumont and Beazley JJ) found that it was.⁶ That is, the Court found that it is open to challenge the decision of the Commission to list a place on the Register on the ground that it does not in fact meet the requirements outlined in s 4 of the Act. Drummond J and the majority in the Full Federal Court are, with respect, wrong.⁷

The decision about whether or not a place meets the definition of "national estate" involves a value judgment. For example, it might involve a judgment as to the social significance or other special value of a place for future generations (see s 4). Speaking generally, it seems clear that the reason a specialist body like the Australian Heritage Commission was established was to make such judgments and that it is totally beyond the realm of possible legislative intentions that, having made such a value judgement, it would be open to challenge in a court which would then have to finally determine whether the place had "social significance or other special value for future generations".

Whether or not the existence of a specified fact is one upon which the jurisdiction of a statutory decision-maker depends is a matter of construction of the statute involved.⁸ The dissent of Black CJ in the Federal Court outlines a number of factors that indicate that the question of whether or not a place formed part of the national estate was to be determined by the Commission.⁹ These are, in summary,.

- * the fact that the identification of a place as part of the national estate involves making value judgements;
- * the inconvenience of allowing such difficult value judgements to be reviewed in the Courts;
- * the requirement that at least half the Commissioners have "qualifications relevant to, or special experience or interest in, a field related to the work of the Commission" (s 12(4));
- * the existence of the objection process (s 23) which gives the opportunity for the making and consideration of objections which may be on the ground that a place does not meet the statutory requirements to be characterised as national estate.

Plainly the words of the Act are consistent with Black CJ's conclusion and the factors outlined above compel the conclusion that parliament's intent was to make the Commission's decision determinative. Furthermore there is nothing in the case law that compels any other conclusion. In *Parisienne Basket Shoes Pty Ltd v Whyte*¹⁰ Dixon J said that, at least in relation to the jurisdiction of courts, making jurisdiction depend upon the actual existence of a state of facts as opposed to the court's opinion or determination of them "produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed"¹¹ Plainly the Commission is not a court, and this might lead courts to be more willing to intervene. However the same consideration of the inconvenience of depriving a specialist body of power to determine questions of fact is relevant to the interpretation of the Act.¹² Furthermore, each of the cases in which the jurisdiction of non-court bodies has been held to depend upon the actual existence of a jurisdictional fact can easily be distinguished from the situation under the Act. In *Minister for Immigration and Ethnic Affairs v Naumovska*¹³ the court was there dealing with an easily determinable fact - the falsity of a statement on a passenger card - and there were compelling reasons of fairness and the protection of the liberty of the individual that weighed in favour of concluding that the Court could review the existence of that fact. Those considerations are not present in relation to the Act which involves value judgements by a specialist body and involves no questions of the protection of individual liberty. In *Queensland v Wyvil*¹⁴ it was held that the erroneous finding that a deceased person was an "Aboriginal" was a jurisdictional fact for the purposes of an inquiry by the Royal Commission into Black Deaths in Custody. The court referred to the deference given to a body whose knowledge "specially equips it to provide an answer"¹⁵ The Commissioner had no such special knowledge in relation to determining whether or not a person was an "Aboriginal" because once the facts were known it was "simply a matter of ordinary usage".¹⁶ This contrasts markedly to the position under the Australian Heritage Commission Act where the Commission clearly is a specialist body making a decision about a term which has no ordinary usage but which involves a value judgment based on specialist knowledge and experience.

In summary, the language of the Act and the obvious legislative intention is that although places exist, regardless of any

6 Drummond J appeared to concede that because of the deference given to the decision of the Commission that the decision in relation to the jurisdictional fact could only be reviewed for "something approaching" Wednesbury unreasonableness ((1995) 56 FCR 219 at 234).

7 see also Brennan "The concept of the National Estate: Federal Court interpretation" 13 EPLJ 316 at 319.

8 *Parisienne Basket Shoes Pty Ltd v Whyte* (1937) 59 CLR 369 at 391; see also *Architects Registration Board of Victoria v Hutchison* (1925) 35 CLR 404 at 412.

9 See (1995) 60 FCR 450 at 466-467.

10 (1938) 59 CLR 369.

11 (1938) 59 CLR 369 at 391.

12 *Tasmanian Conservation Trust v Minister for Resources* (1995) 55 FCR 516 at 538-539.

13 (1983) 88 ALR 589.

14 (1989) 25 FCR 512.

15 *R v Williams; Ex parte Australian Building and Construction Employee's and Builders Labourers' Federation* (1982) 153 CLR 402 at 411.

16 (1989) 25 FCR 512 at 520.

action by the Commission, that might have national estate qualities, it is for the Commission to determine whether, for the purposes of the Act, such places form part of the national estate.

Discretion in the Listing Process

An issue raised in the Mount Isa Mines cases and relevant to an overall understanding of the operation of the Act is the role of the discretion of the Commission in entering a place that it has identified on the *Register of the National Estate*. The conclusion reached by both Drummond J and all members of the Full Court was that the Commission, in deciding whether to enter a place on the Register of the National Estate, was bound to consider matters other than matters relating to the national estate value of a place, such as economic interests that might be affected by listing. That arose directly as a result of its obligation to consider matters raised in objections to its proposed listing (see s 23(2)(c)). It is obviously the correct conclusion. However in reaching that conclusion there was some indication that at least Drummond J was not clear about the obligations of the Commission in the listing process. His Honour gives conflicting indications of whether or not all places identified by the Commission as forming part of the national estate must then proceed through the public notice provisions of s 23 or whether the Commission has a discretion to single out a subset of the places it identifies to go through that process.¹⁷ This is of significance because it determines whether or not the Commission has a discretion to not proceed with the listing process, that is the giving of public notice of its intention to list a place on the Register, after it has identified a place as being part of the national estate. It also determines whether those identified places are entered on the Interim List for the Register of the National Estate (see s 26(2)).

In my view, the operation of the listing process is as follows. The decision in s 23(1) is a decision which flows from the identification of a place as part of the national estate. The only discretion involved at the s 23(1) stage is that which involves the Commission making the value judgement as to whether or not the place forms part of the national estate, a decision which, as outlined above, is the Commission's to make. The use of the word "should" is consistent with this view because it recognises that it is the Commission's identification of a place as part of the national estate that is relevant. A place "should" be listed because the Commission has identified it as part of the national estate. The presumption of the Act is that, subject to s 23(3), all those places identified as part of the national estate will be entered on the Register. Therefore, at the s 23(1) stage the only issues that are before the Commission are those relating to its status as part of the national estate. In particular, the Commission does not at this stage take into account economic or other arguments against entry of the place on the Register.

Following the giving of notice to the public under s 23(2), any person can make written objections to the entry of the place on the Register. Such objections may be on any ground (s 23(2)(a)(v)) and the Commission must give due consideration to objections (s 23(2)(c)). Obviously this contemplates objections on grounds other than that the place should not have been identified as part of the national estate. Section 23(3) indicates that if the Commission "becomes of the opinion, whether by reason of its consideration of objections or otherwise" that the whole or part of the identified place should not be listed then it must give public notice of that decision and, once again, objections may be lodged to that decision (s 23(3)(b)). It is at the s 23(3) stage that economic matters may be considered by the Commission. Precisely what weight should be given to such matters is not specified although s 24A states that when dealing with objections "the Commission must give upmost consideration to the significance, as part of the national estate, of the place to which the decision relates".

Critical to this explanation of the operation of the Act is the link between the identification by the Commission of a place as being part of the national estate and the decision that it should be entered on the Register. Subject to the possibility of the Commission changing its mind under s 23(3), its decision under s 23(1) is both the identification of a place as part of the national estate and the decision to proceed with the listing process. There is no separation between the decision to identify a place as part of the national estate and the decision to commence the listing process. Obviously the Commission might choose not to list a place but, once it has identified a place as part of the national estate, it can only choose not to enter it on the Register after it has given public notice in accordance with s 23(2), that is, pursuant to s 23(3). Once the Commission has identified a place it has no choice but to proceed to give public notice of its intention to list the place on the Register. There are a number of reasons that this is the case.

17 At (1995) 56 FCR 219 at 224 his Honour says that the only places in the national estate not listed on the Register will be those that have been through the public notice process and that the Commission has then decided not to enter on the Register. However on the same page his Honour accepted both parties' submission that the national estate exists independently of any action of the Commission to identify it. This appears to be inconsistent with his earlier remarks. Similarly, his Honour refers to the decision of the Commission to proceed with giving public notice of its intention to list a place as indicating that the Commission has chosen to "single it out for ... special attention" (at 226). The confusion probably arose from MIM's argument as to the operation of s 24A that requires the Commission, when dealing with objections to give "upmost consideration to the significance, as part of the national estate, of a place to which the decision relates". MIM argued that this required the Commission to compare the place with other national estate places to determine its significance and, so the argument went, to determine whether it was significant enough to enter on the Register. That argument seems to be based on a view that only the most significant places identified as part of the national estate are to be entered on the Register. That is not correct. The intention is that, if not all (s 7(c), s 23(1)), then the vast majority (s 23(3)) of places will be so entered. What s 24A requires is giving upmost consideration to the national estate value of a place rather than, for example, its significance as a mine or as a new residential subdivision.

- * The only reference to the role of the Commission in identifying the national estate is in s 7 of the Act which is entitled "Functions of the Commission". That section provides

"7. The functions of the Commission are:

...

(c) to identify places included in the national estate and to prepare a register of those places in accordance with Part IV;"

Part IV provides for the creation of the Register of the National Estate and the process for listing places on that Register. The important point to note about s 7(c) is that it indicates that those places that are identified by the Commission should be included on the Register. That results from the reference to "those places", that is the identified places, when describing which places should be entered on the Register. It contrasts to a situation where it was intended that the Commission enter a subset of the places that it has identified on the Register. In such circumstances the drafter might have used the words "national estate", as in "to identify places included in the national estate and to prepare a register of national estate places in accordance with Part IV".¹⁸ Therefore this section suggests that when the Commission identifies a place as part of the national estate the intention of the Act is that, subject to Part IV, the place be entered on the Register. Whilst recognising that the general statement of functions in s 7 of the Act should not detract from the specific provisions of the Act, if there is a choice between a construction consistent with the legislative statement of functions and one inconsistent with that statement then the former should be adopted.

- * The scheme set out in s 23 is remarkably detailed in its specification of the obligations of the Commission in relation to public notice of, and public involvement in, the listing process. The decision to list a place and, if the Commission changes its mind pursuant to s 23(3), the decision not to list are both subject to public notice requirements and to public input. Both require the Commission to supply reasons for its decision as well as to deal with objections. It is plainly the intention of the Act that decisions relating to the identification and listing of places as part of the national estate be subject to public scrutiny and participation by way of objection. These provisions do not show merely an intention to protect economic interests that might be affected by the entry of a place on the Register because they also apply to a decision of the Commission, having given public notice, not to enter a place on the Register. It is inconsistent with such a complex scheme of public notice and involvement to imply a discretion on the part of the Commission not to proceed with the listing of a place identified as part of the national estate which is not subject to public notice and public input. Such an implication is inconsistent with the obvious legislative intent that decisions relating to entry of places on the Register of the National Estate be made openly, subject to public scrutiny and objection.
- * The final reason why the Commission has no discretion about whether or not to proceed with the listing of an identified place is the existence of s 24A. That section provides that "[w]hen dealing with an objection to any of its decisions under section 23 or 24, the Commission must give upmost consideration to the significance, as part of the national estate, of the place to which the decision relates". This section is designed to ensure that although economic related arguments against entering a place on the Register may be considered, the predominant consideration will be the value of the place as part of the national estate. However the section only has any application when dealing with objections to its decisions, that is, after public notice has been given of, relevantly, the Commission's intention to list a place on the Register. Prior to that there is no requirement that the national estate value of the place be the predominant consideration. If there was a discretion as to whether or not to commence the listing process for an identified place then this would circumvent the requirement that national estate values be the dominant consideration. It would render s 24A of limited value and would create a highly unusual scheme where, although there was no legislative direction as to the weight to be given to non-national estate matters at one stage in the process (the decision to commence the listing process) there was a clear legislative direction at a later stage (when considering objections). The unusual nature of such a scheme and the lack of any policy justification for such a scheme indicate that it is not what the legislature intended.

The implication of this is that all places identified by the Commission as part of the national estate must proceed through the process of public notice and comment. It means that even those places which the Commission might choose ultimately not to list because of compelling economic reasons, or because they are destined at some time in the future to be destroyed or lose their national estate values, must go through the public notice process. This ensures that even if they are not ultimately listed, the public is made aware of their existence and, through the requirement that the Commission gives public notice of its decision not to list them, their fate.

¹⁸ The use of the word "such" would have achieved the same result: "to identify places included in the national estate and to prepare a register of such places in accordance with Part IV".