

**Australian Centre for Environmental Law**

**Best practice heritage identification and protection,  
Australia's national heritage regime and the Tarkine**

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## 1. Introduction

The Australian National Heritage List (NHL) was established in January 2004 to record, protect and conserve the natural, cultural and Indigenous heritage values associated with places of national significance. As originally envisaged, its role was to fill the gap in the heritage hierarchy between the world and state heritage regimes. The universal values of world heritage properties are listed and protected under the federal *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). State and local government heritage laws provide for the recording, protection and conservation of places of state, regional and local importance. They also protect places of national significance but do so through the lens of state and local interests. The NHL was supposed to provide a single, comprehensive list of places of national significance, which fall between those of world and state importance, and ensure the values of those places are adequately protected and conserved.

While there was a coherent logic behind the role of the NHL, its creation was controversial. Previously, the principal federal heritage legislation was the *Australian Heritage Commission Act*, which was created by the Whitlam Labor Government in 1975. This Act established the Australian Heritage Commission, an independent statutory authority that was responsible for the maintenance of the Register of the National Estate (RNE). The object of the RNE was to provide a comprehensive record of natural and cultural sites ‘that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community’.<sup>1</sup> The statutory protection provided to places on the RNE was limited and only applied to federal government agencies. However, the Australian Heritage Commission was solely responsible for the inclusion and removal of places on the RNE and, partly due to this, the register quickly became an important source of heritage information in land management, planning and environmental assessment and approval processes.

The package of bills that established the NHL abolished the Australian Heritage Commission and replaced it with the Australian Heritage Council (Council).<sup>2</sup> After a protracted dispute with the minor parties and independents in the Senate, the RNE was retained but downgraded to an information source – RNE places are no longer explicitly protected by federal laws. Further, unlike the Commission’s powers in relation to the RNE, the Council’s functions in the NHL listing process are merely advisory. The federal heritage minister is responsible for the inclusion and removal of places on the NHL, and the Council is supposed to provide expert heritage advice to the minister to assist in the performance of this role. This aspect of the reforms was opposed by heritage and environment non-government organisations (NGOs) and the Australian Labor Party, and was initially resisted by a minor party, the Australian Democrats, who held the balance of power in the Senate. Their fear was that the vesting of the listing powers in the hands of the minister would lead to a creation of a politically compromised NHL, where the recorded places and values would unduly

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<sup>1</sup> *Australian Heritage Commission Act 1975*, s 4.

<sup>2</sup> The *Australian Heritage Commission Act 1975* was repealed by the *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003*. The Australian Heritage Council was established by the *Australian Heritage Council Act 2003* and the NHL and associated regulatory provisions were inserted in the EPBC Act via the *Environment and Heritage Legislation Amendment Act (No.1) 2003*.

reflect the interests and ideology of the government of the day. As David Yencken, the first chair of the Australian Heritage Commission, wrote in August 2003, vesting listing powers in the hands of the minister 'is not best heritage practice'.<sup>3</sup>

The purpose of this article is to describe the NHL listing process and compare it to a 'best practice' model. A case study on the Tarkine, a wilderness area characterised by temperate rainforest and extensive magnesite karst systems in north-west Tasmania, is provided to demonstrate how the NHL has been managed and the influence that political factors have had on its administration.

The article is set out as follows. Section 2 provides an overview of the national heritage protection and management regime. Section 3 describes the NHL listing process. Section 4 outlines a best practice heritage listing process and compares it to the NHL process. Section 5 contains the case study on the Tarkine. Section 6 concludes that the concerns about the politicisation of the NHL were well-founded and that changes ought to be made to the governance of the NHL to ensure it fulfils its purpose of providing a comprehensive record of the places of national heritage significance.

## **2. The structure of the national heritage protection and management regime**

The national heritage protection and management regime forms part of the omnibus piece of federal environmental legislation, the EPBC Act. This legislation contains four main mechanisms for the protection and conservation of the national heritage values of national heritage places.<sup>4</sup> Protection for these values is primarily provided through the EPBC Act's environmental impact assessment and approval (EIAA) regime. Under the EIAA regime, projects and other activities that are likely to have a significant impact on the national heritage values of a national heritage place are prohibited unless they are approved by the federal heritage minister or covered by an exemption. Taking an action that adversely affects these heritage values without an approval or exemption is a crime carrying a maximum penalty of 7 years imprisonment. Civil penalties of up to AU\$5.5 million can also be applied.

In addition to the EIAA regime, the EPBC Act imposes two statutory obligations on the Commonwealth that are designed to protect national heritage values. Commonwealth agencies are prohibited from taking actions that are likely to have an adverse impact on the national heritage values of a national heritage place unless 'there is no feasible and prudent alternative to taking the action' and all reasonable measures are taken to mitigate the impacts of the action on those values.<sup>5</sup> There are also rules governing the process by which Commonwealth agencies can sell or lease areas that include all or part of a national heritage place.<sup>6</sup> Under these rules, Commonwealth agencies must ensure that the contract of sale or lease includes a

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<sup>3</sup> D Yencken, 'Preserving our shared heritage' (2003) *The Canberra Times*, 21 August.

<sup>4</sup> The legislation contains a number of other protection and conservation mechanisms that are not discussed here, including powers to make conservation agreements with owners of national heritage places (Part 14) and to provide financial assistance to help identify, protect and conserve national heritage places (s 324ZB). The heritage minister is also required to ensure that a report is prepared and published on the condition of national heritage places every five years (s 324ZC).

<sup>5</sup> EPBC Act, s 341ZC.

<sup>6</sup> EPBC Act, s 324ZA.

covenant to protect the national heritage values unless it is deemed unreasonable or impracticable. Where an appropriate covenant is not put on the area, the heritage minister is required to take all reasonable measures to enter into a conservation agreement with the buyer or lessee or to simply advise the Commonwealth agency of measures that could be used to protect the values.

The EPBC Act provides for the conservation and management of national heritage places through a management planning process.<sup>7</sup> For places that are located entirely within a Commonwealth area, there is a statutory obligation for the heritage minister to prepare a management plan that is not inconsistent with prescribed national heritage management principles. Commonwealth agencies are required to abide by these plans and are not permitted to authorise other people to contravene the plans. Where a national heritage place is located within a state or territory, the federal government is required to ‘use its best endeavours’ to ensure a management plan is prepared and implemented in co-operation within the state/territory government.<sup>8</sup> Commonwealth agencies are required to take all reasonable steps to ensure they exercise their powers and perform their functions in a way that is not inconsistent with these plans or the national heritage management principles.

There are positive and negative aspects of the national heritage protection and management regime. For example, unlike the protection provided for RNE places under the *Australian Heritage Commission Act*, the application of the EPBC Act’s EIAA regime is not confined to Commonwealth agencies. The prohibitions, assessment and approval requirements apply to all proponents that fall within the reach of Commonwealth powers under the *Australian Constitution*.<sup>9</sup> On the negative side, contrary to best practice, the EIAA regime separates heritage values from place, and only provides protection for the former.<sup>10</sup> Notwithstanding the pros and cons of the regime, the inclusion of a place on the NHL has important implications. The property related privileges of owners, lessees and those who otherwise use an area can be significantly curtailed or extinguished entirely as a result of the listing of the place and the operation of the protection and management provisions. Those who suffer loss as a result of these processes have no right to compensation unless it can be established that the operation of the legislation would effect an ‘acquisition of property’ other than on just terms under section 51(xxxi) of the Constitution.<sup>11</sup> This constitutional guarantee is only likely to apply where the operation of the regime deprives the interest holder of the ‘reality of proprietorship’ and it can be established that the Commonwealth or a third party acquired a ‘benefit or advantage’ relating to property.<sup>12</sup> In all but the most extreme cases, these requirements are unlikely to be met, meaning interest holders can potentially suffer significant financial losses that can go uncompensated.

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<sup>7</sup> EPBC Act, ss 324S-324Y.

<sup>8</sup> EPBC Act, s 324X(2).

<sup>9</sup> EPBC Act, ss 15B and 15C.

<sup>10</sup> International Council on Monuments and Sites (ICOMOS), *Burra Charter* (Australia ICOMOS, Burwood, 2000); S McIntyre-Tamwoy, *Australian ICOMOS: Submission to the Review of the EPBC Act* (Commonwealth of Australia, Canberra, 2008); D Marshall, *Submission to the EPBC Act Review* (Commonwealth of Australia, Canberra, 2008); and M Pearson, *Submission to the EPBC Act Review by Heritage Management Consultants Pty Ltd* (Commonwealth of Australia, Canberra, 2008).

<sup>11</sup> EPBC Act, s 519.

<sup>12</sup> *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; *Commonwealth v WMC Resources Ltd* [1998] HCA 8; *Newcrest Mining (WA) Ltd v Commonwealth* [1997] HCA 38; and *Mutual Pools and Staff Pty Ltd v Commonwealth* [1994] HCA 9.

On top of the direct regulatory implications, the inclusion of a place on the NHL can effect community expectations surrounding management and use. The recognition and status that comes with listing will typically create greater community resistance to activities that could threaten the place and its values. The status gained by the inclusion of a place on the NHL can also make it easier for conservation, heritage and community groups to campaign against projects that could jeopardise its integrity. In addition, listing can increase the pressures to maintain and conserve a place, thereby potentially increasing management costs for owners.

The consequences of listing are not necessarily all negative for interest holders. Listing can create tourism opportunities and increase access to government grants for conservation and management. Owners and other interest holders can also receive intangible benefits that flow from the recognition of the importance of the place and its values to the nation. Notwithstanding these potential benefits, the inclusion of a place on the NHL can threaten the financial interests of certain stakeholders. Commercial opportunities associated with a place – residential and commercial development, mining, fishing, forestry, agriculture etc. – can be curtailed, leading to losses for direct interest holders and opportunity costs for the broader community. For this reason, proposals to include places on the NHL are often opposed by some groups, particularly those who stand to lose financially if the place and its values are stringently protected. This, in turn, leads to pressure being applied to governments to exclude places from the NHL, redefine the boundaries of nominated and listed areas, and to delay listing decisions.

Ideology is the other driver of political interference in the NHL. Political parties and individual members of Parliament have different perspectives on heritage and can seek to manipulate the list to advance their ideological cause. The Australian ‘history wars’, which are generally viewed as an extension of America’s ‘culture wars’, has heightened this risk as the interpretation of history has assumed a greater prominence in political debates and been used to differentiate the major political parties.<sup>13</sup> Due to this, the integrity of the NHL can be damaged if it is subject to the wishes of the government of the day as politicians may seek to express their views on history through the list.

### **3. The NHL listing process**

When the new federal heritage regime was first introduced in January 2004, the NHL listing process was relatively straight forward. There were two avenues by which a place and its values could be listed: the standard process and the emergency listing process (Figure 1). Under the standard process, listings could be initiated by a public nomination or by the Council on its own initiative. If the minister received a public nomination, it was required to be forward to the Council unless there was insufficient information to support the nomination or it was deemed to be ‘vexatious, frivolous or not made in good faith’.<sup>14</sup> Having received a public nomination, the Council was required to assess whether the place met any of the NHL listing criteria (called the national heritage criteria) and submit this assessment within a prescribed period (12 months, which could be extended by up to four years). After receiving the assessment, the minister had to decide, within a defined period, whether to include the place and

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<sup>13</sup> S Macintyre and A Clark, *The History Wars* (Melbourne University Press, Melbourne, 2003).

<sup>14</sup> EPBC Act, s 324E.

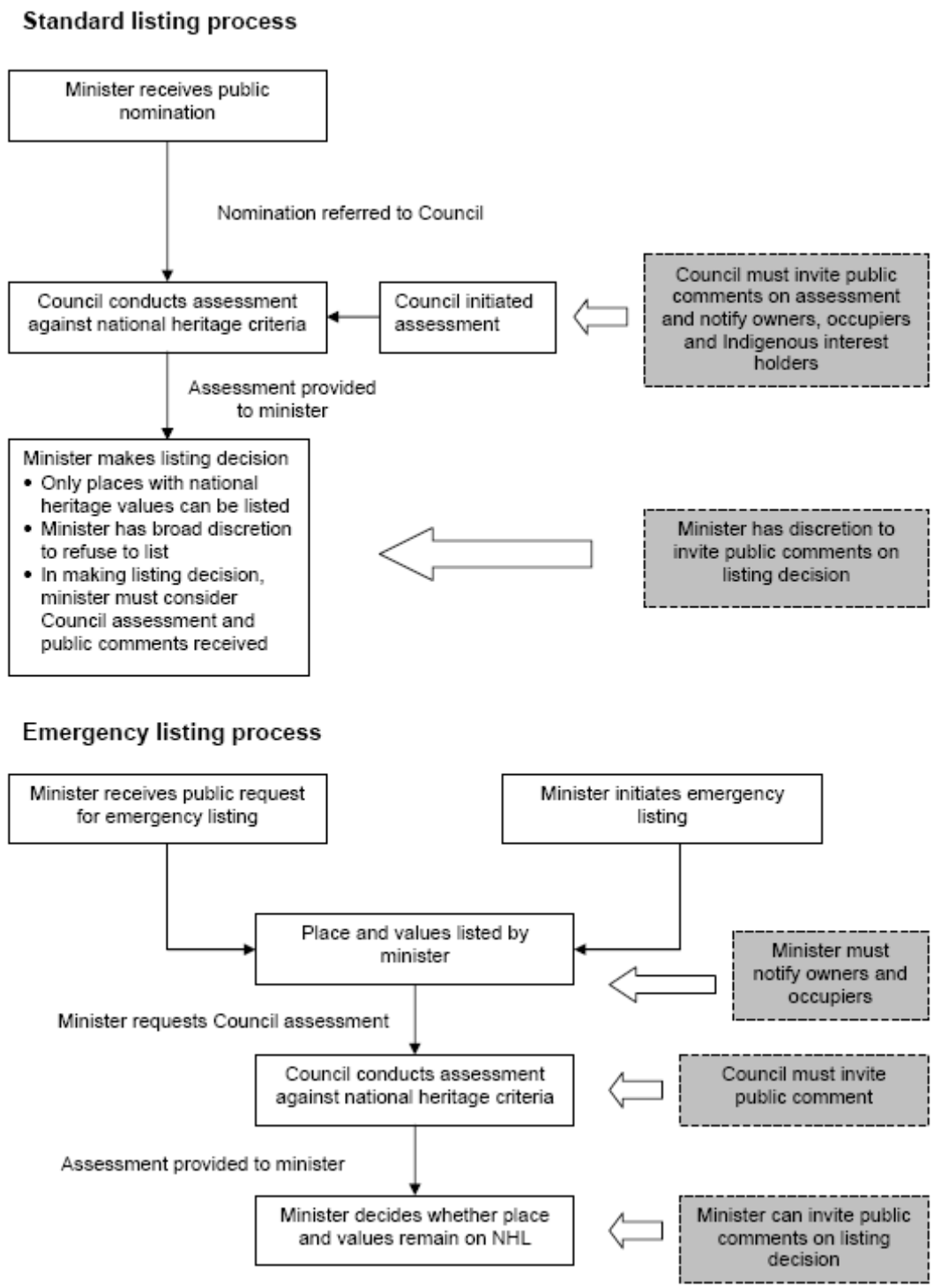
its national heritage values on the NHL. The minister could only include a place on the NHL if they were satisfied it had one or more national heritage value but a place could be refused listing on any grounds; economic, social, political or otherwise.<sup>15</sup>

The emergency listing process was similar to the standard listing process, only it allowed the minister to immediately include places on the NHL if he/she believed a place had national heritage values and those values were under threat. After being emergency listed, the minister was required to seek advice from the Council on whether the place met any of the national heritage criteria, and that assessment was required to be provided within 40 business days (which could be extended). Upon receiving the Council's assessment, the minister was required to decide whether to keep the place and its values on the NHL.

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<sup>15</sup> Subject to abuse of power and other applicable administrative law restrictions on the exercise of a statutory discretion.

**Figure 1 Original NHL listing process**



The original NHL listing process had several positives. Consistent with the literature on the virtues of public participation, the listing process included a mandatory requirement for the Council to seek public input during the assessment process.<sup>16</sup> The

<sup>16</sup> D Fox, *Public Participation in the Administrative Process* (Law Reform Commission of Canada, Ottawa, 1979); L Susskind and J Cruikshank, *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (Basic Books, New York, 1987); J Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, New York, 1997); A Shepherd and C Bowler, 'Beyond the Requirements: Improving Public Participation in EIA' (1997) 40(6) *J Environ Planning*

minister also had a discretionary power to invite public comments on the final decision. Not only was the public given opportunities to participate in the process, they could potentially initiate it by making nominations and emergency listing requests. In addition, the process was reasonably transparent, with the minister and Council being subject to requirements to publish notices on assessments and assessment decisions, to provide reasons for decisions and to ensure the list was publicly available. Further, there were statutory timelines for decisions, which diminished (albeit only slightly) the scope for the government to manipulate the process.

While the process had positive elements, it suffered from a number of deficiencies. Most importantly, the responsibility for making listing decision was vested in the minister, who was given a broad discretion to refuse to include places on the NHL, even if they satisfied the national heritage criteria. This allowed for non-heritage considerations to be given priority over heritage issues, thereby exposing the regime to politicisation and reducing the likelihood that it would constitute a comprehensive, representative and balanced list of Australia's pre-eminent heritage sites.

The government justified the governance arrangements for the NHL on the grounds that heritage considerations should not be given priority over other issues. To do so could lead to unnecessary welfare losses as important economic and social considerations could be sacrificed to conserve heritage values, even if the social costs outweighed the benefits. While the utilitarian ethic underlying this position is reasonable, its application to the NHL listing process is misguided. The national heritage protection and management regime does not provide absolute protection for national heritage places and their values. Under the EIAA regime, the heritage minister has a broad discretion to approve actions that degrade or even eliminate the values associated with a listed place. The only substantial restriction on the minister's approval power is that, when making the approval decision, he/she 'must not act inconsistently' with a management plan for a national heritage place, an agreement between the Commonwealth and another party concerning such a place, or the national heritage management principles.<sup>17</sup> While the precise meaning of 'inconsistently' in this provision is unclear, theoretically it could mean that the minister is unable to approve actions that harm a national heritage place if it involves a clash with the management principles, plan or another agreement. In practice, this issue has never arisen because the principles, plans and agreements are drafted so as to avoid the possibility of inconsistency.

In addition to the minister's broad approval power, the EIAA regime contains a number of provisions that are designed to protect the rights and privileges of pre-existing interest holders. There are prior approval and existing use exemptions, which apply to actions that were approved under other federal or state laws before the commencement of the Act (July 2000) and actions that involve the lawful continuation of a use that was occurring immediately prior to the commencement of the Act.<sup>18</sup> There is an exemption for forestry operations undertaken in accordance

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Manage 725; E Kirk and K Blackstock, 'Enhanced Decision Making: Balancing Public Participation against 'Better Regulation' in British Environmental Permitting Regimes' (2011) 23(1) JEL 97.

<sup>17</sup> EPBC Act, s 137A.

<sup>18</sup> EPBC Act, ss 43A and 43B.

with a regional forest agreement (RFA)<sup>19</sup> or in prescribed RFA regions, the effect of which is to exclude the vast majority of commercial forestry operations in native forests from the EIAA regime.<sup>20</sup> In the same vein, the inclusion of a place on the NHL has no effect in relation to actions that were approved before the listing and any action in respect of which the minister has made a ‘controlled action decision’ (i.e. a decision on whether the action requires formal assessment and approval under the Act).<sup>21</sup>

The EPBC Act’s heritage conservation and management process is no more prescriptive than the EIAA regime. Management plans only bind Commonwealth agencies, not third parties. They are also generally drafted in non-prescriptive terms, leaving broad scope for the exercise of discretion and for trade-offs to be made in resource use and management decisions. Conservation agreements can be made that impose restrictions on the use of national heritage places but they are voluntary. People who hold an interest in a national heritage place cannot ordinarily be compelled to enter into such an agreement. Due to the scope that the EPBC Act provides for national heritage places and their values to be sacrificed to protect or advance other interests, there is no coherent public interest justification for non-heritage issues to be considered in the NHL listing process.

Although the NHL listing process initially had deficiencies, these were magnified by amendments made in 2006. On the pretext of improving the efficiency of the system, the standard listing process was changed to enable the minister to determine themes for listings and to introduce a ‘priority assessment list’. Under this process, there is a 12-monthly assessment cycle. At the beginning of each cycle, the minister can set listing theme(s) for the coming assessment period and invite public nominations (Figure 2). These nominations are passed to the Council, who is charged with the responsibility of drafting a priority assessment list having regard to the nominations, the minister’s theme(s) and its views on what should be assessed. After the draft list is completed, it is passed to the minister for finalisation. The minister can make any changes to the list that he/she considers appropriate, including inserting and removing places from the list and changing the proposed assessment time for each place. Importantly, the priority assessment list that is determined by the minister is not a legislative instrument, which means Parliament cannot disallow it. After the priority assessment list is finalised, the Council must assess whether the places meet the national heritage criteria and submit this assessment to the minister within the time specified in the priority assessment list (although this period can be extended by the minister by up to 5 years). After receiving the assessment, the Minister is required to decide whether to include the place and its national heritage values on the NHL. As with the original NHL listing process, the minister can only include a place on the NHL if he/she is satisfied it has one or more national heritage value but a place can be refused listing on any grounds. Further, the statutory timeline on listing decisions was removed. The minister has 90 days to make the listing decisions but this can be extended indefinitely by the minister.

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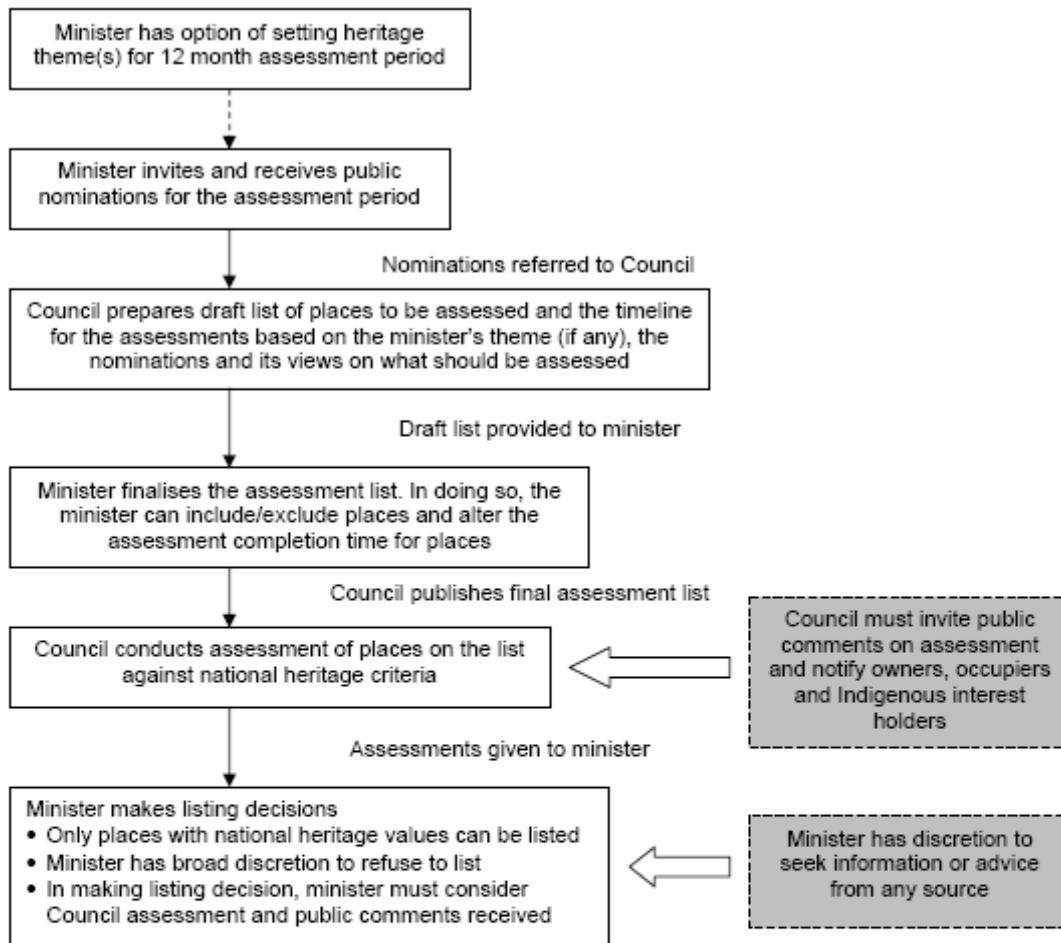
<sup>19</sup> RFAs are agreements between the Australian Government and state governments over the management of forestry resources. See Section 4 for further details.

<sup>20</sup> EPBC Act, ss 38-42.

<sup>21</sup> EPBC Act, s 158A.

**Figure 2 Current NHL listing process**

**Standard listing process**



**Emergency listing process**



The emergency listing process was also changed (Figure 2). The formal public request process was removed, leaving the minister as the sole initiator of emergency listings. As with the old process, after a place is emergency listed it is required to be assessed by the Council against the national heritage criteria. Within 12 months, the minister is required to decide whether the place should remain on the NHL having regard to the assessment provided by the Council and any other matter the minister considers appropriate. Previously, there was a set timeline within which the minister had to

make the final listing decision and, after the decision was made or the end of the decision period, the Council's assessment had to be released to the public. The new process creates a loophole for the minister to prevent the release of the Council's assessment. Now if the minister fails to make the final emergency listing decision within 12 months, the listing lapses and is automatically deemed to be removed from the list. Where this occurs, the Council's assessment remains confidential unless the minister authorises its disclosure.

There are three crucial elements of the 2006 amendments. First, due to the introduction of the priority assessment listing process and changes to the emergency listing process, the minister now has complete control over what does and does not get assessed. Second, by virtue of the changes to the statutory timeline provisions, the minister now has complete control over the timing of listing decisions. Third, the minister has been given complete control over the release of the Council's assessments of whether places meet the national heritage criteria, thereby diminishing the transparency of the process. The concentration of power over the NHL listing process in the hands of the minister has left it open to abuse.

#### **4. Best practice listing process**

There is no objective basis on which to define a best practice heritage listing process. What constitutes best practice is a subjective matter and depends on peoples' views on a range of issues, including the role of government and utility derived by the community through heritage conservation and economic growth.<sup>22</sup> Notwithstanding this, the notion of best practice is often used to describe a set of principles and practices that are widely viewed amongst interested parties as being the most appropriate and cost-effective way of achieving a given objective. In the current context, best practice should reflect the views of heritage practitioners, academics, and other parties with substantial experience in heritage regulation and conservation on how the listing process should be designed so as to ensure that the NHL contains a comprehensive, representative and balanced collection of places of outstanding national significance.

It has long been the view of a large proportion of the Australian heritage community, including leading practitioners and the major heritage and environment NGOs, that the NHL listing process should be 'independent'. This independence has four components:

- the power to include and remove places and values from the NHL should reside in the Council;
- the Council should be a statutory agency at arms length from the government;
- the Council should be an expert heritage body, with all members having recognised expertise in heritage identification, protection and/or conservation; and

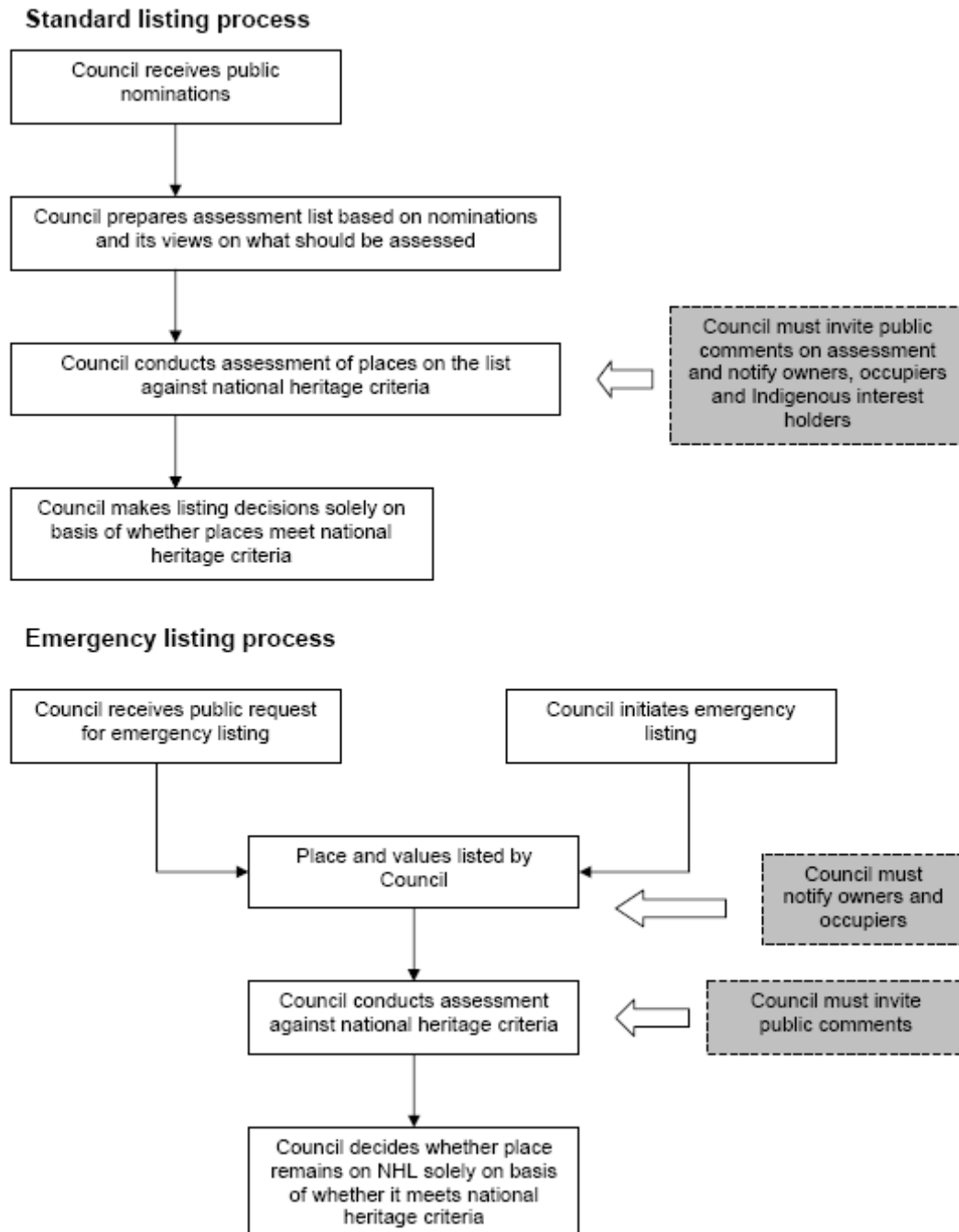
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<sup>22</sup> A Macintosh, 'Best Practice Environmental Impact Assessment: A Model Framework for Australia', (2010) 69(4) Aust J Publ Admin 401.

- in making listing decisions, the Council should be allowed only to have regard to whether the place meets prescribed heritage criteria.

Figure 3 provides an illustration of how the best practice NHL listing process would function.

**Figure 3 Best practice NHL listing process**



The importance of having an independent listing process is that it would reduce the risk of political interference that could jeopardise the integrity of the NHL. Within the best practice framework, the primary responsibility of the Council is to ensure that the list provides a comprehensive, representative and balanced record of places of

outstanding national significance. Decisions on the use of these places, and conservation and degradation of their values, are separated from the listing process and made within the EIAA and management planning regimes. The Council could advise on these decisions but the power for making them would reside in an elected representative, the heritage minister, who is accountable to the people through Parliament (representative and responsible government).

This best practice framework, involving the separation of listing from management decisions and vesting of the former in an independent and expert heritage body, reflects the principles of the International Council on Monuments and Sites' (ICOMOS) *Burra Charter*.<sup>23</sup> It is also embodied in several state heritage regimes, has been called for by most major heritage and environment NGOs, and has the public support of a long list of past members of the Council and the Australian Heritage Commission. As Jane Lennon, a member of the Commission from 1998 to 2003 and the Council from 2003 to 2008, has written:

Listing decisions following the best practice process in the Burra Charter are the objective results of deliberations by an expert group arriving at a statement about the heritage significance of a place, and implying a hope that protection and conservation can be achieved ... . Many factors influence management, and these change over time. The appropriate mechanism to address such factors is the development approval/environmental impact process ... .<sup>24</sup>

So widespread is the support for this structure that, for most of its time in opposition over the period 1996-2007, the Australian Labor Party supported an independent NHL listing process. During the debates over the creation of the NHL, the demise of the independence of the Commission and the listing process were cited as the primary reasons for the Labor Party's opposition to the new regime.<sup>25</sup> Four years later, in the lead up to the 2007 federal election that Labor won, the then shadow heritage spokesperson, Peter Garrett, decried the loss of the independent listing process.

In 2003, the stand-alone Australian Heritage Commission was abolished under the Howard government and substituted with the Australian Heritage Council – an advisory body specifically and effectively controlled by the Department of the Environment and Water Resources. The absence of an independent body offering arms-length advice on Australian heritage risks the politicisation of listing processes. Additionally, a closed-door approach to Australia's heritage diminishes the scope for genuine community engagement and the national conversations that I referred to earlier, which are central to understanding and recognising heritage values.<sup>26</sup>

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<sup>23</sup> International Council on Monuments and Sites (ICOMOS), *Burra Charter* (Australia ICOMOS, Burwood, 2000).

<sup>24</sup> J Lennon, *Submission to the Review of the EPBC Act* (Commonwealth of Australia, Canberra, 2008), p 5.

<sup>25</sup> K Lundy, *Senate Hansard, Thursday, 13 August 2003* (Commonwealth of Australia, Canberra, 2003); and K Lundy, *Senate Hansard, Thursday, 14 August 2003* (Commonwealth of Australia, Canberra, 2003).

<sup>26</sup> P Garrett, *House of Representatives Hansard, Wednesday, 12 September 2007* (Commonwealth of Australia, Canberra, 2007), at 198.

Echoing Garrett's sentiments, the Labor Party's National Platform and Constitution of 2007 stated categorically that 'the identification and listing of properties of heritage significance should be carried out by an independent expert body'.<sup>27</sup>

During its first term in office (2007-2010), the Labor Party's national platform still expressed support for an independent NHL listing process.<sup>28</sup> In a statutory review of the EPBC Act in 2009 (Hawke Review), heritage groups and practitioners called for the listing process to be overhauled in a manner consistent with Labor policy.<sup>29</sup> The review's final report, while expressing a degree of sympathy with this position, rejected the calls for an independent process. It concluded:

The Minister should remain the primary decision-maker under the Act for several reasons. ... [D]ecision-making involves the challenging task of balancing competing environmental, social and economic considerations. It is appropriate that these decisions continue to be made by an elected representative of the people. ... Retaining the Minister as the primary decision-maker under the Act also means that the Minister can be held publicly accountable for those decisions and it creates a context that motivates experts to ensure their reasoning is careful, well supported and convincing.<sup>30</sup>

Elsewhere it stated:

The Minister should not have regard to social and economic factors when making listing decisions. However ... if the required considerations for listing decisions are broadened to include social and economic considerations, a decision not to list a heritage place on social or economic grounds should be constrained to exceptional situations where the social or economic costs of listing are overwhelming and the heritage benefits are known to be slight.<sup>31</sup>

The arguments advanced by the review to support the status quo are confused. As discussed, under the current regime, the heritage minister is allowed to have regard to social and economic considerations in making listing decisions – there is no need for the considerations to be 'broadened' as suggested by the review. Further, given the nature of the protection and management regime, particularly the scope for the heritage minister to approve actions that would detrimentally affect the values of national heritage places, it is unclear what the review had in mind when it referred to 'exceptional situations' that would warrant non-listing on economic and social grounds. If the protection and conservation of a national heritage place would involve unacceptably high economic and social costs, the minister has the discretion to sacrifice the place and its values under both the EIAA and management planning processes. The only logical reasons to exclude a place that meets the national heritage criteria from the list are political: to shield the government from political pressure and

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<sup>27</sup> Australian Labor Party, *National Platform and Constitution 2007* (Australian Labor Party, Canberra, 2007), p 147.

<sup>28</sup> Australian Labor Party, *National Platform and Constitution 2009* (Australian Labor Party, Canberra, 2009).

<sup>29</sup> Australian Council of National Trusts, *Submission to the Review of the EPBC Act* (Commonwealth, Canberra, 2008); and S McIntyre-Tamwoy, *Australian ICOMOS: Submission to the Review of the EPBC Act* (Commonwealth of Australia, Canberra, 2008).

<sup>30</sup> A Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth of Australia, Canberra, 2009), p 231.

<sup>31</sup> *Ibid.*, at 171-172.

embarrassment and to shield developers from community opposition to projects that could threaten a heritage site.

The current NHL listing process bears no resemblance to the best practice model. As described above, the minister has complete control over what gets assessed by the council and when, what gets listed and when, what is considered in listing decisions, and the transparency of the process. The deficiencies of the process leave it open to abuse and reduce the prospects of the NHL providing a comprehensive, representative and balanced list of places of outstanding national significance. This has been illustrated by the treatment of the Tarkine.

## **5. Trying to list the Tarkine**

### *5.1. Background on the Tarkine*

The Tarkine is a wilderness area covering 447,000 ha in the remote north-west of Tasmania. It is an area of outstanding heritage significance and contains both national and world heritage values relating to wilderness, rare and unusual biodiversity, ecological and evolutionary processes, fossil sites, Indigenous archaeology, magnesite karst systems and aesthetic characteristics. The area is highly valued in Tasmania and the broader Australian community, a fact that is evidenced by the campaigns that have been waged since the 1990s to protect it from forestry and mining activities. While it has long been treasured, the area rose to national prominence in the early 2000s in a dispute between conservationists and foresters over native forest logging in Tasmania.

During the late 1980s and 1990s, there were protracted disputes in a number of Australian states about the logging of native forests. Conservationists sought an end to the logging of high conservation value forests, while the forestry industry was looking for greater resource security.<sup>32</sup> The federal and state governments tried to resolve these issues by preparing 20-year strategic plans, known as Regional Forest Agreements (RFA), which were meant to provide for the creation of a comprehensive, adequate and representative forest reserve system and the delineation of other areas for commercial harvest.

The Tasmanian RFA was signed in 1997 and covered the entire state. Despite the values associated with the Tarkine, the Tasmanian RFA left much of it open to harvesting, including rainforest areas.<sup>33</sup> The failure of the RFA to protect the high conservation forests in the Tarkine and other areas led to ongoing, and at times bitter, conflict between conservationists and the forestry industry in Tasmania. The Tarkine National Coalition and the Wilderness Society waged campaigns throughout the 1990s and early 2000s to stop the logging, and were later joined by other conservation groups like WWF Australia and the Australian Conservation Foundation. In the lead up to the 2004 federal election, the issue grabbed national headlines. Under pressure to respond, the major political parties (the Australian Labor Party and the Liberal-National Coalition) promised to increase the protection for Tasmania's high conservation value forests, including those in the Tarkine.

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<sup>32</sup> J Ajani, *The Forest Wars* (Melbourne University Press, Melbourne, 2007).

<sup>33</sup> Community unease about the threat to rainforest areas in the Tarkine was heightened by the fact that commercial harvesting of rainforests was virtually eliminated in all other states prior to 1990. Department of Climate Change and Energy Efficiency, *Australian National Greenhouse Accounts – National Inventory Report 2008* (Commonwealth of Australia, Canberra, 2010).

The Liberal-National Coalition retained office in the 2004 election and went on to make the Tasmanian Community Forestry Agreement, which, amongst other things, led to the creation of a new 30,946 ha reserve in the Tarkine. This agreement was negotiated under the RFA and led to formal amendments to it. While conservationists acknowledge the benefits of the changes to the RFA, the Tarkine remains under threat. Logging is still permitted in some of the Tarkine's rainforests, old-growth eucalyptus and mixed forests. The other major threat is mining. The Savage River magnetite (iron ore) mine has been in operation in the Tarkine for almost half a century. Rising commodity prices has also sparked increased mining exploration in the area in recent years, with the interest focusing on tin, iron ore and magnesite resources.

Unsatisfied by the 2005 changes and spurred on by the persistent threats, the conservation movement has developed a proposal for the creation of a large Tarkine national park that would take in most of the area. The Tarkine National Coalition has also nominated the area for inclusion on the NHL and called for its inscription on the World Heritage List.

### *5.2. The Tarkine and the NHL*

The Tarkine National Coalition first nominated the Tarkine for inclusion on the NHL in July 2004, in the heated political environment surrounding the 2004 federal election. The Australian Labor Party went to the election on a strong conservation platform, promising to substantially increase forest protection and place a large proportion of the Tarkine in reserves. The Government's policy involved less conservation and greater security for the forestry industry and its workers. Labor's decision to favour conservation proved to be a political mistake, costing it two of Tasmania's five lower house seats as forestry-dependent communities in the north, who were traditionally Labor voters, turned to the Coalition.

In the wake of the election, the Government was keen to continue to appease blue-collar workers in Tasmania's north. In addition to grants and industry assistance provided through the Tasmanian Community Forestry Agreement, the heritage minister extended the Council's assessment of the Tarkine until August 2006. As this revised deadline approached, the minister again extended the assessment deadline until August 2008, citing the need for the Council 'to consider the outcomes of the Tasmanian Community Forest Agreement process'. As with the initial extension, the forestry negotiations and community agreement should have had no bearing on the Council's assessment. By law, the Council was prohibited from considering 'any matter that does not relate to the question whether the place meets the National Heritage criteria'.<sup>34</sup>

Following the legislative changes in 2006, the then heritage minister, Malcolm Turnbull, added the Tarkine to the 2007/08 priority assessment list and set the assessment completion time as 31 August 2009; thereby extending the assessment timeline for the third time. While in Office, Turnbull also asked the Council to

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<sup>34</sup> EPBC Act, s 324G(5). The equivalent provision is now found in s 324JH(4).

examine, identify and advise him of any world heritage values associated with the area.<sup>35</sup>

When the Liberal-National Coalition lost office in November 2007, the delay in the assessment continued. Despite expectations in some quarters that the new Labor Government might accelerate the listing process, the assessment was not brought forward. Then, on 16 June 2009, Labor's heritage minister, Peter Garrett – who before becoming a Member of Parliament had been an outspoken environmental activist and President of the Australian Conservation Foundation – extended the assessment period to 31 December 2010.

Only months after the assessment completion time was extended for the fourth time, the standard NHL listing process was disrupted by a proposal put forward by the Tasmanian Government to construct a 131 km 'tourist road' through the area. The road proposal attracted widespread publicity and was opposed by conservationists, heritage groups and others due to its potential to undermine the wilderness values of the Tarkine, harm biodiversity and hasten the spread of Tasmanian devil facial tumour disease. Many also believed the project was uneconomic.

The road proposal was referred to Minister Garrett under the EPBC Act's EIAA regime on 21 October 2009.<sup>36</sup> With the assessment incomplete and the Tarkine not on the NHL at this time, the Minister would be unable to have regard to the area's potential national heritage values in deciding whether or not the project should be subject to formal approval under the EIAA regime, how it should be assessed or whether it should be approved. The only matters he was likely to be able to consider were the potential impacts of the road on threatened species, particularly the Tasmanian devil, Tasmanian wedge-tailed eagle and the giant freshwater crayfish. Faced with widespread public opposition to the road and concerned about the potential impacts on the area's heritage values, Minister Garrett used the emergency listing process to include the Tarkine on the NHL on 11 December 2009.<sup>37</sup>

The emergency listing stated that the Tarkine may have national heritage values related to its importance to evolutionary history, rare and endangered biodiversity, the extent and quality of the cool temperate rainforest, wilderness, and the area's magnesite karst systems. Eight days after the listing took effect, Minister Garrett determined that the road would require formal approval under the EIAA regime because of its potential to adversely affect these values and several nationally listed threatened species. He also decided to assess the project by way of an environmental impact statement; the second most comprehensive assessment approach available and one that has been used relatively sparingly over the EIAA regime's history.

Shortly before the Council's assessment report was due to be completed, in mid-September 2010, Peter Garrett was replaced by Tony Burke. A few weeks later, the new minister extended the assessment completion time from 30 September to 29 October 2010. Soon after granting the extension, on 18 October 2010, the minister received another referral under the EIAA regime that related to a development in the

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<sup>35</sup> On 13 September 2007, the Australian Senate also passed a motion moved by Senator Andrew Bartlett (Australian Democrats), which stated that the 'Senate acknowledges the World Heritage significance of the Tarkine wilderness in the north-west of Tasmania'.

<sup>36</sup> EPBC Reference No. 2009/5169.

<sup>37</sup> *Commonwealth of Australia Gazette*, No. S212, Friday, 11 December 2009.

Tarkine, within the boundaries of the emergency listed area. Tasmania Magnesite, a subsidiary of British company Beacon Hill Resources Plc., was planning to undertake an exploratory drilling program on a 231 ha mining lease located near the confluence of the Keith and Arthur Rivers in the eastern side of the Tarkine, north of Savage River National Park. The proposed project involved ‘diamond drilling at up to 48 positions’ on the magnesite ore body, which forms part of the area’s magnesite karst. The project also required approval for the construction of up to 1 km of access track, vegetation clearance and earthworks. Accord to the company, the purpose of the drilling is:

[t]o improve the understanding of the [magnesite] ore body and to undertake requisite hydrogeological investigations and collect suitable samples for metallurgical test work. This information is essential to improve the delineation of the ore body and to improve the understanding of mining and environmental constraints and opportunities.

Karst is a terrain with distinctive landforms and drainage, such as fissures, caves, caverns, sinkholes and underground streams, which are formed by the dissolution of soluble bedrock.<sup>38</sup> Considered in isolation, neither magnesite nor karst landforms are particularly remarkable. What makes the karst in the Tarkine special is that it is formed in magnesite.<sup>39</sup> This rarity, combined with the size and relative natural state of the landforms, makes the Tarkine’s magnesite karst of national and global significance. As Household et al. (1999) note:

Magnesite deposits of the size found in northwest Tasmania are uncommon on an international scale, and very few large deposits remain in an essentially natural condition. Karst landforms (i.e. caves and surface features such as sinkholes, pinnacles, sinking streams and springs formed mainly through bedrock solution) and associated ecosystems in magnesite are rare both because of the relative scarcity of large deposits, and lack of suitable conditions to allow ongoing solution. Most of the world’s large magnesite deposits are not found in climates as conducive to solution processes as those in Western Tasmania.<sup>40</sup>

At present, little is known about the Tarkine’s magnesite karst. Because of their remoteness and uniqueness, the species and ecosystems that are supported by these landforms are largely unknown and undescribed. According to Williams, ‘the biota of both the cool and warm groundwater systems could be important for their rarity and consequently merit investigation’.<sup>41</sup> Similarly, very little is known about the groundwater systems and the conservation value of the karst’s hydrology. Writing about the Keith-Arthur area specifically, Houshold et al. (1999) note that ‘[t]he possibility exists that both the filled sinkholes and the large filled and open caverns

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<sup>38</sup> J Jennings, *Karst Geomorphology* (Basil Blackwell, Oxford, 1985).

<sup>39</sup> P Williams, *Report on the geoconservation values of the magnesite karst in northwest Tasmania* (Tasmanian Department of State Development, Hobart, 1998); and I Household, C Calver and C Sharples, *Magnesite karst in northwest Tasmania – geology, geomorphology and hydrology* (Tasmanian Department of State Development, Hobart, 1999).

<sup>40</sup> I Household, C Calver and C Sharples, *Magnesite karst in northwest Tasmania – geology, geomorphology and hydrology* (Tasmanian Department of State Development, Hobart, 1999).

<sup>41</sup> P Williams, *Report on the geoconservation values of the magnesite karst in northwest Tasmania* (Tasmanian Department of State Development, Hobart, 1998).

are a preserved Tertiary relict/palaeokarst'.<sup>42</sup> They suggest that the 'ferricrete associated with a warm spring at Keith-Arthur', 'the large cavities in drillholes at Keith-Arthur' and 'sinkhole fills at Main Rivulet and Keith Arthur' should all be subject to detailed assessment to evaluate their scientific significance.<sup>43</sup> The report also goes on to propose areas of further work, including:

- characterisation, assessment and planning for the management of the physical, chemical and biological aspects of the hydrothermal groundwater systems;
- planning for the management of cave and sinkhole hills, and associated groundwater flows; and
- investigation of the age and palaeoecological information contained in sinkhole and cavity fills and nearby basalt flows, and their potential for reconstructing regional environmental history.

The mining lease on which Tasmania Magnesite is undertaking its drilling operations contain two geoconservation sites, which according to the Tasmanian Geoconservation Database, are of national or 'Australian' significance. They are the Keith/Arthur Rivers Magnesite Karst – which was specifically mentioned in the values statement for the emergency listing – and the Arthur Lineament. Of the two, the Keith/Arthur Rivers Magnesite Karst is the most sensitive to human activity. It has a 'sensitivity' rating of 3, compared with the Arthur Lineament which has a sensitivity rating of 10. A '3' rating means that it has 'values sensitive to damage by scientific or hobby collecting or sampling, or by deliberate vandalism or theft (eg some fossil and mineral sites; speleothems)'. At least two of Tasmania Magnesite's drilling positions are proposed for the Keith/Arthur River Magnesite Karst, with a number of others adjacent to it.

Consultants engaged by Tasmania Magnesite identified two key issues associated with the physical impacts of the drilling on the magnesite karst: an increase in the void volumes of the rock mass and an increase in 'hydraulic connectivity between void systems that might otherwise not be connected'.<sup>44</sup> They considered the drilling would not significantly increase the void volumes of the rock mass but could offer little information on the potential adverse affects of the resulting increase in connectivity. In their words:

The adverse affects of increased connectivity in the Arthur River Magnesite Deposit have not as yet been identified. ... whether there is a significant increase in connectivity through any future resource drilling that would have an adverse impact on the karst system cannot be ascertained as yet with any certainty.<sup>45</sup>

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<sup>42</sup> I Household, C Calver and C Sharples, *Magnesite karst in northwest Tasmania – geology, geomorphology and hydrology* (Tasmanian Department of State Development, Hobart, 1999), p 6.

<sup>43</sup> I Household, C Calver and C Sharples, *Magnesite karst in northwest Tasmania – geology, geomorphology and hydrology* (Tasmanian Department of State Development, Hobart, 1999), p 7.

<sup>44</sup> L Evans, *Memorandum to Pitt and Sherry, Tasmanian Magnesite, Beacon Hill Resources 7 May 2010* (Commonwealth of Australia, Canberra, 2010).

<sup>45</sup> L Evans, *Memorandum to Pitt and Sherry, Tasmanian Magnesite, Beacon Hill Resources 7 May 2010* (Commonwealth of Australia, Canberra, 2010).

The deliberations over the project were complicated by the submission of the Council's final Tarkine assessment on 28 October 2010. At the time of writing, the Council's full assessment report had not been made public. Only parts of the Council's report (the official values, description, history, condition and integrity, and location and land area) were accessible because they were accidentally published on the Australian Heritage Database.<sup>46</sup> The report concludes that the Tarkine meets three of the national heritage criteria:

- the place has outstanding heritage value to the nation because of the place's importance in the course, or pattern, of Australia's natural or cultural history (Criterion A);
- the place has outstanding heritage value to the nation because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history (Criterion B); and
- the place has outstanding heritage value to the nation because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group (Criterion E).<sup>47</sup>

The national heritage values of the area that relate to these criteria cover a wide range of issues, summarised in Table 1. A crucial finding of the Council in the context of the Tasmania Magnesite proposal was that, not only does the Tarkine possess 'extensive high-quality wilderness and natural landscape values', but 'consideration of wilderness in the Tarkine as a National Heritage value must encompass all of these areas as parts of a whole, as a single wilderness region, as is traditionally done for the Tasmanian Wilderness World Heritage Area'. This is significant because it implies that damage to one part of the Tarkine will affect the wilderness value of the whole, not just the parcel of land on which the project is located and its immediate surrounds.

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<sup>46</sup> The authors contacted the Commonwealth Department of Sustainability, Environment, Water, Population and Communities about the entry at 11.30am on 4 March 2011. After directing the Departmental officer to the entry in the Australian Heritage Database, he stated that he would get back to us after consulting with colleagues. By 11.39am on the same day, the relevant parts of the Council's report had been removed from the database. At the time of publication, we had not received a return phone call from the Department.

<sup>47</sup> *Environment Protection and Biodiversity Conservation Regulations 2000*, Reg 10.01A(2)(a), (b) and (e).

**Table 1 National heritage values of the Tarkine**

<b>Criterion A Events, Processes</b>	Cool temperate rainforests within the Tarkine are important to our understanding of evolutionary processes.
	Rainforests of the Tarkine are an important refuge for ancient flora species.
	The fossil flora site at Little Rapid River is one of the most important Tertiary fossil deposits in Australia and is of importance in understanding the Tertiary vegetation history of south-eastern Australia.
	The Tarkine contains a number of sites that are important in Aboriginal history, providing evidence of Aboriginal lifestyles. The Tarkine coast has the greatest number, diversity and density of Aboriginal hut depressions in Australia.
<b>Criterion B Rarity</b>	The Tarkine contains extensive high quality wilderness and natural landscape values and the largest tract of cool temperate rainforest in Australia.
	The Tarkine's forests are globally unique, being the centre of distribution for many rare and unusual species, particularly lichen floras.
	Magnesite karst systems within Tarkine are unique in Australia and globally rare.
<b>Criterion E: Aesthetic characteristics</b>	The Tarkine contains areas of a wild, undisturbed character that are valued by the Tasmanian community and parts of the broader Australian community.
	The Tarkine is an important place of reflection, inspiration and symbol of untouched nature.
	The varied aesthetic characteristics of the Tarkine are widely appreciated and a feature of photography and other imagery.

Source: Australian Heritage Database, 14 February 2011.

Despite the Council's findings, the known heritage values of the area, and the uncertainty surrounding the karst and the impacts of the drilling, on 3 December 2010, Minister Burke's delegate, Michelle Wicks, determined that the project did not require formal assessment and approval under the EPBC Act if it was undertaken in a 'manner specified'. A manner specified decision is essentially a short-cut approval, which is reserved for actions that are deemed to be unlikely to significantly affect the matters protected under the legislation if they are carried out in a particular way. The 'manner specified' are effectively mandatory conditions imposed on the project. In this case, the minister's delegate determined that, provided the proponents abide by certain conditions, the project was not likely to have a significant impact on the area's national heritage values or threatened species. Notably, the conditions imposed on the project are designed to protect threatened species; none of them relate specifically to the Tarkine's national heritage values and there is no mention of the magnesite karst.

Eight days after the Tasmania Magnesite project was approved, the heritage minister allowed the emergency listing of the Tarkine to lapse, meaning it was automatically removed from the NHL.<sup>48</sup> Two weeks later, on 23 December, the Tasmanian Government withdrew the 'tourist road' proposal. In the wake of the demise of the road proposal, Minister Burke claimed the reason he allowed the emergency listing to lapse was that, because the road proposal had been withdrawn, there was no longer any threat to the area's potential national heritage values.<sup>49</sup> He also indicated that a decision on whether the Tarkine would be permanently added to the NHL would not be made until mid-2012 at the earliest.<sup>50</sup>

Minister Burke's explanation for the lapsing of the Tarkine listing made little sense. By law, he had a statutory duty to either confirm that the Tarkine would remain on the NHL or delist it within 12 months of the original emergency listing decision. The process for lapsing of listings is a default that only operates where the minister's statutory duty has not been fulfilled.<sup>51</sup> The presence of an ongoing threat from the road proposal or elsewhere to the Tarkine's national heritage values was irrelevant to the performance of the minister's duties.

In a response to a Freedom of Information request submitted by the authors, the federal Environment and Heritage Department gave an alternative explanation for why the listing was allowed to lapse.

The Minister allowed the listing to lapse on 10 December 2010 to allow for further consultation. The Australian Heritage Council will do further consultation during 2011 and then provide another recommendation on heritage values to the Minister.<sup>52</sup>

This explanation suggests that the listing was allowed to lapse because the heritage minister claims that more time is required to negotiate with interest holders, including miners and foresters, on whether the place should be listed and, if so, what values should be protected and where the boundaries should lie. An alternative interpretation is that the minister did not like the Council's assessment and has instructed it to rewrite it after consulting with stakeholders. Irrespective of which version is correct, the process falls well short of best practice as it would appear that the heritage minister, Council or both are horse-trading over the inclusion of a place on the NHL. In an ideal system, the listing process is supposed to be insulated from this sort of interest balancing, which is better suited to the EIAA and management planning regimes.

The other important element of Minister Burke's decision to allow the listing to lapse was that it enabled him to prevent the release of the Council's assessment. Had the minister decided to formally remove the Tarkine from the NHL, the Council could be

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<sup>48</sup> The listing lapsed 12 months after the date it was emergency listed (i.e. 11 December 2010).

<sup>49</sup> There is a difficulty with the minister's explanation in that the road proposal was not officially withdrawn from the EIAA regime until 23 December, after the listing lapsed. Presumably the explanation for this is that the Tasmanian Government had given the minister advance notice of its decision to abandon the project.

<sup>50</sup> R Bolger, 'Tarkine listing removal concern', *The Examiner*, 11 December 2010.

<sup>51</sup> EPBC Act, s 324J(1).

<sup>52</sup> P Murphy, *Letter to Ms D. Wilkinson re FOI Reference: 110111* (Department of Sustainability, Environment, Water, Population and Communities, Canberra, 10 February 2011).

compelled to release its assessment.<sup>53</sup> The loophole inserted by the 2006 amendments allowed the minister to get around this disclosure requirement by defaulting on his statutory duty.

The removal of the Tarkine from the NHL exposes its national heritage values to degradation through ongoing developments, particularly mining.<sup>54</sup> This was highlighted when, on 16 February 2011, Shree Minerals made a referral under the EIAA regime 'to develop a magnetite/haematite mine near Nelson Bay River in north western Tasmania'. The proposal involves the development and operation of an open cut mine on Shree Mineral's Nelson Bay River Exploration Licence (EL41/2004).

Throughout 2010, Shree Minerals had sought to alter the Tarkine's NHL boundary so as to excise the two mining tenements it holds in the area (EL41/2004 and EL54/2008). In its quarterly activities report for the period ending 30 June 2010, the company wrote:

Shree Minerals has made two submissions to the Heritage Council and has also met with the Commonwealth Department, presenting its case that the boundaries of the nominated area improperly encompass large areas of land that clearly do not hold the wilderness values for which the listing is being sought. In particular, Shree Minerals has argued that if the listing is to be retained it should be based on appropriately amended boundaries, which would exclude two of its mining tenements – Nelson Bay River (EL41/2004) and Rebecca Creek (EL54/2008). These tenements do not have wilderness values.<sup>55</sup>

The excision of the tenements from the official boundaries of the Tarkine would not exempt Shree Minerals from the operation of the EIAA regime. If the Tarkine remained on the NHL, any significant mining activities within the tenements could still adversely affect the heritage values of the area and, therefore, would have to be referred to the heritage minister. However, with the lapsing of the Tarkine's emergency listing, the national heritage values are no longer relevant. Unless the Tarkine is re-listed before the minister decides whether the project requires formal assessment and approval under the EPBC Act, the area's national heritage values will not be able to be considered in any regulatory decision concerning the EIAA regime. Even if the area is listed after this decision is made, the national heritage values will have no relevance to the regulation of the project under the EPBC Act.

## **6. Conclusion**

The treatment of the Tarkine under the NHL provides a vivid illustration of the importance of an independent heritage listing process. Where heritage listing processes are controlled by government there is a significant risk they will be abused. The inclusion of a place on the NHL can affect the financial interests of stakeholders and place the government in the awkward position of having to choose, in a very

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<sup>53</sup> EPBC Act, s 324R(3).

<sup>54</sup> Forestry is the other major threat but all relevant forestry operations are likely to be exempt from the EPBC Act's EIAA regime because of the RFA exemption.

<sup>55</sup> Shree Minerals Ltd, *Shree – Quarterly Report – Period Ending 30 June 2010* (Shree Minerals Ltd, West Perth, 2010). See also Shree Minerals Ltd, *2010 Annual Report* (Shree Minerals Ltd, West Perth, 2010).

public forum, between protecting and conserving places of national significance and economic development. Politicians often prefer to make these choices behind closed doors. Heritage lists can also be used as a way of expressing and perpetuating ideological preferences about history. If governments control heritage lists, there is a risk they will be skewed toward particular ideological views.

The treatment of the Tarkine under the NHL demonstrates that the party in government has little or no bearing on the robustness of the process. Both parties appear to have delayed the process to protect their own interests. They were no doubt concerned that if they formally refused to include the Tarkine on the NHL they could ostracise voters concerned about environment and heritage issues. On the other hand, listing of the area could spark an adverse reaction from the forestry and mining industries, and the northern Tasmanian communities that depend on these industries for employment. These factors seem to at least partly explain the protracted NHL assessment and listing processes. In the future, the Tarkine may be included on the NHL and possibly even the world heritage list. However, this is only likely to occur after concessions have been granted to placate forestry and mining interests. This is the opposite of a best practice process.

The NHL listing process should be the responsibility of an independent body staffed solely by heritage experts. The primary function of this body should be to determine what is included on the NHL, having regard only to whether places meet prescribed heritage criteria. The body should have its own budget and be housed in separate premises from the Environment and Heritage Department, which is under the direct control of the heritage minister. Interest balancing is necessary to ensure the optimal allocation of resources and is appropriate in a democracy. At times, the weighing up of competing claims will lead to actions being authorised that have significant impacts on heritage places. While interest balancing is important, the right and proper place for it is within the protection and management regime, not the listing process. In the words of Tom Uren, the federal heritage minister responsible for the introduction of the original Australian Heritage Commission:

Australia needs a legislative body that stands above party politics. ... The nation has the Australian Broadcasting Corporation as an independent body in relation to broadcasting and communications. We have the Reserve Bank on monetary matters and the economy. It is imperative that we have an independent authority on heritage and environment issues.<sup>56</sup>

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<sup>56</sup> T Uren, 'Heritage body should be above party politics', *Canberra Times*, 13 August 2003.