

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HERITAGE LEGISLATION AMENDMENT BILL 2013
(GOVERNMENT AMENDMENTS)

Supplementary Explanatory Statement

Circulated by
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Outline

The Heritage Act was passed in 2004 and provides for the recognition, registration, conservation and promotion of places and objects of heritage significance and the protection of all Aboriginal places and objects in the ACT. The Act also provides for its review after five years of operation.

Following a period of review, and a report completed in 2010 by independent consultant, Mr Duncan Marshall, outlining 111 recommendations, the need for a number of amendments to the Act has become apparent.

The Heritage Legislation Amendment Bill 2013 (the Amendment Bill) was prepared in 2013. It addresses two key policy issues and provides for a range of other technical and administrative amendments. The amendments create a more simplified, open and transparent process for registering and protecting the ACT's heritage places and objects.

Government Amendments have been prepared for the Amendment Bill to further clarify a small number of matters drafted in the Bill and relating to important concepts of object, place, Aboriginal object and Aboriginal place and natural heritage significance.

Government Amendments also remove the proposed introduction of Ministerial call-in provisions, as a result of concerns raised through a number of public submissions on the draft Bill.

Government Amendments also reduce duplication in Sections 40-42 of the draft Bill and the *Heritage Act 2004*, in relation to notification requirements following a decision of the Council to register a place or object. This appears to have been an oversight in the original drafting of the legislation.

Human rights analysis

The Justice and Community Services Directorate has previously issued a memorandum of compatibility with the *Human Rights Act 2001* for the Bill. There is no requirement to obtain a statement of compatibility for Government Amendments that are proposed during the passage of a Bill.

Financial implications

The Government Amendments have no direct financial implications.

Revenue/Cost Implications

The Government Amendments have no direct revenue or cost implications and, as such, a Regulatory Impact Statement has not been prepared.

Detailed explanation of formal clauses

Part 2 - Important concepts

1. Clause 6 – Proposed new section 3B (1) (b) – Registration of urban tree

Government Amendment 1 omits reference to the Minister in the context of a decision to register an urban tree. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

2. Clause 6 – proposed new section 3B (2)

Government Amendment 2 omits reference to the Minister in the context of a decision to register an urban tree. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

3. Clause 7 – Section 8 – meaning of ‘object’ and ‘place’

Government Amendment 3 amends definitions for ‘object’ and ‘place’. It ensures that the definitions provide clarity and certainty.

The definition for ‘object’ has been clarified to exclude buildings and other man-made structures which are otherwise defined as ‘place’. The definition for object removes specific reference to an Aboriginal object. A separate definition continues to provide the meaning of ‘Aboriginal object’.

The wording which describes the features which a ‘place’ includes has been amended from ‘an item at the place’ to ‘an object or feature historically associated with, and located at, the place’. This clarifies that an item at the place must have an historical association with, and must also be located at the place, in order for it to form part of the registration of a place.

The definition for place has been clarified to ensure that a setting or curtilage of a building or structure (or part thereof), may be included as part of the place. This has always been the intent of the legislation in its definition of ‘place’, and the Act has been applied in this way. However, there is nothing within the *Heritage Act 2004* which clearly stipulates that this is the case.

Inclusion of the curtilage or setting of a building or structure (or part thereof) enables views to or from that building or structure (or part thereof) to form part of the place, providing the registered boundary for the place includes the parcel of land which provides the views.

Government Amendment 3 does not have any substantial effect or change to the intent of what is meant by ‘object’ or ‘place’. The amendment merely clarifies these definitions for purposes of ease of reference and interpretation.

4. Clause 7 – Proposed new Section 9 – meaning of ‘Aboriginal object’ and ‘Aboriginal place’

Government Amendment 4 amends the definitions for Aboriginal object and Aboriginal place. It ensures that the definitions provide clarity and certainty, noting that the heritage legislation provides protection for all Aboriginal places and objects.

The amended definitions do not alter the intent or meaning of the important concepts of Aboriginal object or Aboriginal place from the current heritage legislation. They simply seek to clarify the definition and provide greater certainty around what is meant by the concepts.

The amended definitions also remove current wording whereby an Aboriginal object or place must have ‘particular significance to Aboriginal people’, thereby implying threshold tests. The removal of this wording makes it clear that *all* Aboriginal places and objects are protected by the legislation, regardless of levels or tests of significance.

The definitions have been amended to clarify that Aboriginal places and objects are those associated with the custom, rituals, institutions, beliefs or general way of life of Aboriginal people.

It is intended that types of Aboriginal places and objects included within this definition and afforded protection by the heritage legislation include (but are not limited to) artefact scatters, scarred trees, burial sites, campsites and known meeting places, rock shelters, rock art and objects fashioned by Aboriginal people as a way of life (eg. digging sticks).

There are a wide range of other types of places and objects associated with the history of Aboriginal people, particularly after European settlement, for which the Act does not provide protection through these definitions. Such places and objects might include places of built (historic) heritage where events or activities important to Aboriginal people might have occurred, such as the Legislative Assembly or Magistrates Court, objects fashioned by Aboriginal people for purposes of demonstration at cultural workshops or training and education seminars, and artwork on a canvas for sale in a commercial gallery.

5. Clause 7 – Proposed new Section 10A – meaning of ‘natural heritage significance’

Government Amendment 5 amends the definition for natural heritage significance. Such definition is not provided in the *Heritage Act 2004*. While the Act has always made provision for both natural and cultural heritage through the heritage significance criteria, it is necessary to further define these concepts for the purposes of other clauses in the Bill, such as that which seeks to reduce duplication of natural heritage registrations with other protection mechanisms under the *Nature Conservation Act 1980*.

The definition for these concepts clarifies that places and objects of natural heritage significance are those which form part of the natural environment and have heritage significance for scientific reasons relating to biodiversity, geological formations, landform or other naturally occurring elements.

Government Amendment at this section also clarifies that the natural environment means *native* flora or fauna.

This amendment does not alter the intent or meaning of the operation or function of the heritage legislation. It simply clarifies what it is meant by the concept of ‘natural heritage significance’.

Part 3 – Heritage Council

6. Clause 14 – New Section 19A – Council must consult Flora and Fauna Committee on matters affecting natural heritage significance

Government Amendment 6 removes concepts proposed through Section 19A-19C of the draft Bill which have effect for Ministerial call-in powers. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

However, Government Amendment 6 retains a provision established through the Amendment Bill which requires the Council to consult with the Flora and Fauna Committee before making any decision which affects a place or object that has natural heritage significance.

Part 6 – Registration of places and objects

7. Clause 23 – Proposed new Section 30 (4) to (6)

Section 30 (4) to (6) in the Amendment Bill makes provision for matters relating to Ministerial call-in powers. Government Amendment 7 omits these sections in accordance with other Government Amendments which remove Ministerial call-in powers.

However, Government Amendment 7 retains a provision established through the Amendment Bill which establishes timeframes under which the Council must use its best endeavours to make a decision about provisional registration where an application for an urgent decision has been made. The provision ensures a greater length of time for places which are precincts, in recognition of the greater number of individual sites often involved.

8. Clause 23 – proposed new Section 31

Government Amendment 8 substitutes reference to a ‘heritage finding’ with reference to a ‘decision’. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 8 removes reference to associated administrative matters.

9. Clause 23 – proposed new Section 31A

Government Amendment 9 substitutes reference to a ‘heritage finding’ with reference to a ‘decision’. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 9 removes reference to associated administrative matters.

10. Clause 23 – proposed new Section 32(1), note

Government Amendment 10 omits reference to the Minister in relating to giving a direction under Section 50A of the Amendment Bill. Section 50A introduces call-in provisions for the Minister. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 10 removes an associated note.

11. Clause 23 – proposed new Section 32(2)

Government Amendment 11 omits reference to administrative matters pertaining to proposed Ministerial call-in provisions, commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill.

12. Clause 27 – Proposed new Section 35(6), definition of *termination event*

Government Amendment 12 omits reference to the Minister in the context of a termination event for a registration matter. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

13. Clause 27 – Proposed new Section 36

Government Amendment 13 omits reference to the Minister in the context of the end of the provisional registration period where no decision has yet been made on final registration. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

14. Clause 27 – Proposed new Section 36, note

Government Amendment 14 omits reference to the Minister in an explanatory note in the context of the end of the provisional registration period where no decision has yet been made on final registration. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

15. Clause 28 – Proposed new section 37(2), note

Proposed new Section 37(2) note relates to administrative matters associated with the proposed provisions enabling Ministerial call-in powers. Government Amendment 15 removes reference to those administrative matters, as they are redundant in accordance with other Government Amendments which remove Ministerial call-in powers.

16. Clause 29 – heading

The heading at Clause 29 refers to Sections 38 to 41. Government Amendment 16 substitutes the heading to refer to Sections 39-41, in accordance with section changes resulting from other Government Amendments.

17. Clause 29 – Proposed new Section 39

Government Amendment 17 substitutes reference to a ‘heritage finding’ with reference to a ‘report’ of the Heritage Council. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 17 removes reference to associated administrative matters.

18. Clause 29 – Proposed new section 40(3)

Government Amendment 18 reduces duplication which was created in the original drafting of the Amendment Bill in Sections 40-42. These sections of the legislation pertain to a decision about registration, the entry of registration details in the Heritage Register and requirements for notification.

The Government Amendment does not alter or change these requirements in any way. They simply reduce duplication in the drafting, which would otherwise have resulted in confusion.

The Government Amendment ensures that the requirements relating to a decision about registration, the entry of registration details in the Heritage Register and requirements for notification are streamlined and clear.

19. Clause 29 – Proposed new section 40(5)

Government Amendment 19 substitutes reference to a ‘heritage finding’ with reference to a decision of the Heritage Council. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 19 removes reference to associated administrative matters.

20. Proposed new clause 29A – Section 42 – Notice of decision about registration

Government Amendment 20 omits Section 42 of the *Heritage Act 2004* as this information is now included in Government Amendment 18. The omission of this section ensures there is no duplication in provisions of the Amendment Bill.

21. Clause 30 – Section 42 – Notice of decision about registration

Government Amendment 21 removes Clause 30 from the draft Bill as this information is now included in Government Amendment 18. The removal of Clause 30 ensures there is no duplication in provisions of the Amendment Bill.

22. Clause 31 – Section 42 – Notice of decision about registration

Government Amendment 22 removes Clause 31 from the draft Bill as this information is now included in Government Amendment 18. The removal of Clause 31 ensures there is no duplication in provisions of the Amendment Bill.

23. Clause 32 – New Section 42A – Registration of place or object under this Act limited if declaration under Nature Conservation Act in force

Government Amendment 23 reduces duplication between registrations under the heritage legislation and declarations under the nature conservation legislation.

The amendment prevents the Council from registering a place or object that has native flora, native fauna or a process that is, or is likely to be, the subject of a declaration in force under the *Nature Conservation Act 1980*.

However, the provision ensures that the Council may continue to register the place or object if it also has cultural heritage significance or aspects of natural heritage significance which cannot be protected under the nature conservation legislation.

This amendment ensures effective and efficient operation of both pieces of legislation.

24. Clause 36 – Proposed new Section 45(2)

Government Amendment 24 removes reference to a ‘heritage finding’. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 24 removes reference to associated administrative matters.

25. Clause 37 – Proposed new Section 45A(2)

Government Amendment 25 removes reference to a ‘heritage finding’ in relation to consulting with the Flora and Fauna Committee about a cancellation proposal. The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 25 removes reference to associated administrative matters.

26. Clause 38 – Proposed new Section 46(2), note

The note contained at Section 46(2) of the Amendment Bill refers to provisions related to proposed Ministerial call-in powers. Government Amendment 26 removes this note in accordance with other Government Amendments which remove Ministerial call-in powers.

27. Clause 39 – Sections 47 to 49

Government Amendment 27 omits Clause 39 from the Amendment Bill, and substitutes it with a new Clause 39, Sections 47 to 49. Provisions contained under Clause 39 relate to a decision of the Council about a cancellation proposal. These provisions within the Amendment Bill make numerous references to Ministerial call-in provisions and associated administrative matters.

New clause 39, as proposed through Government Amendment 27, removes reference to Ministerial call-in powers and associated administrative matters, in accordance with other provisions removing call-in provisions.

28. Clause 40 – New Part 7A

New Part 7A, as proposed in the Amendment Bill, introduces a range of provisions enabling the Minister to have call-in powers in relation to a range of registration decisions.

Government Amendment 28 removes the call-in provisions.

Following the presentation of the draft Bill to the Assembly in May 2013, a four week period of public consultation ensued. 23 submissions were received, many of which raised significant concern with the proposed introduction of Ministerial call-in provisions. Many submissions made strong arguments for retaining the clear independence of the Heritage Council as the sole body with responsibility for all decisions affecting the registration of heritage places and objects in the ACT.

The Government has considered these concerns in detail and has reached the conclusion that the ACT Heritage Council is best placed to make all registration decisions. They are a body of nine appointed community representatives and experts in heritage related fields, as well as two *ex-officio* members.

The most appropriate role for the Minister is to ensure that all matters have been appropriately considered prior to the Heritage Council making a final decision on whether or not the place or object has heritage significance. Existing provisions already contained in the

Heritage Act 2004, requiring the Council to report to the Minister after a period of public consultation and ahead of a decision on final registration, and scope for the Minister to direct Council to further consider matters before proceeding with their final decision, will remain.

Therefore, the preferred option, adopted through Government Amendments to the Amendment Bill, is to retain the current composition and independence of the Heritage Council who will remain the key body with responsibility for administering the provisions of heritage legislation in the ACT.

The Heritage Council has adopted the nationally accepted principle of separating the identification and registration of heritage places from decisions about their conservation and management. The model now proposed will enable the Council to continue to implement this practice, focusing their attention solely on heritage significance at the time of decisions about registration, but will allow scope for a broader perspective – from both the Council and Minister – at the time of any proposed works or development.

29. Clause 70 – Proposed new Section 118A (1) (a)

Government Amendment 29 omits reference to the Minister in the context of requesting information from the Commissioner of Revenue. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

30. Clause 70 – Proposed new Section 118A (2)

Government Amendment 30 omits reference to the Minister in the context of requesting information from the Commissioner of Revenue. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

31. Clause 70 – Proposed new Section 118A (3)

Government Amendment 31 omits reference to the Minister in the context of requesting information from the Commissioner of Revenue. This amendment is in accordance with other Government Amendments which remove Ministerial call-in powers.

32. Clause 77 – Dictionary, proposed new definition of *conservator*

Government Amendment 32 corrects the definition of *conservator* to the ‘conservator of flora and fauna’ rather than the ‘conservator for flora and fauna’.

33. Clause 77 – Dictionary, proposed new definition of *heritage finding*

The concept of a heritage finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 33 removes this term from the dictionary.

34. Clause 83 – Dictionary, new definition of *notice of finding*

The concept of a notice of finding had been established through the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial

call-in powers proposed in the Amendment Bill, Government Amendment 34 removes this term from the dictionary.

35. Clause 86 – Dictionary, new definitions

Government Amendment 35 removes from the dictionary the term ‘referable heritage matter’. This term had been introduced in the Amendment Bill to give effect to administrative processes enabling the Minister to be able to call-in a registration decision. Commensurate with other Government Amendments which remove the Ministerial call-in powers proposed in the Amendment Bill, Government Amendment 35 removes this term from the dictionary.