Heritage of Humankind A Call for Reform of World Heritage Protection and Management in Australia[1]

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Australia is a nation rich in natural heritage, from the Great Barrier Reef and tropical rainforests of the north, to Ayers Rock and the Olgas in the centre, and south to the forest wilderness of Tasmania. Many of our areas of natural heritage are not only of national significance, but are also considered to be of outstanding universal value, and have been listed as "world heritage"[2] pursuant to the Convention for the Protection of the World Cultural and Natural Heritage 1972 ("the Convention")[3].

Given the onerous obligations cast by the Convention upon its State parties to protect and conserve properties with the status of the heritage of humankind, one might expect that our natural world heritage areas would be subject to a sophisticated management regime, incorporating best practice management techniques and

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1 This paper examines only the natural heritage aspects of the Convention and the implementing Commonwealth legislation. Both the Convention and the legislative regime also make provision for the protection of cultural heritage, but in Australia this has not given rise to the same degree of controversy as has attended the nomination and listing of natural heritage areas.

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2 There are currently 10 properties in Australia included on the World Heritage List for their natural heritage values; the Central Eastern Rainforest Reserves in Queensland and NSW, Fraser Island, the Great Barrier Reef, Kakadu National Park, the Lord Howe Island Group, Shark Bay in Western Australia, the Western Tasmanian Wilderness, Uluru National Park, the Wet Tropics of Queensland and the Willandra Lakes Region of NSW (Department of the Environment, Sport and Territories World Heritage Unit, *World Heritage Listing: What does it really mean?*, 1996,Commonwealth of Australia).

3 The Convention is included as a Schedule to the *World Heritage (Properties Conservation) Act* 1983 (Cth).

principles recognised at the international level. As has been highlighted by the recent *Hinchinbrook cases*[4], however, the regime for world heritage protection and management in Australia has fallen far short of these lofty goals.

The legislation implementing the Convention at the Commonwealth level in Australia, the *World Heritage (Properties Conservation) Act* 1983 ("the World Heritage Act"), has been characterised by political wrangling between Commonwealth and State for jurisdiction over valuable natural resources, leaving little room for a considered approach to the protection and management of world heritage areas. The result is the definition of properties by way of political compromise rather than scientific criteria; uncoordinated, inconsistent management; and a largely ad hoc administrative regime that affords inadequate protection for our most sensitive and precious areas of natural heritage.

The Current Regime for World Heritage Protection and Management in Australia

The Convention, ratified by Australia in August 1974, places broad obligations on State Parties to ensure the protection and conservation of world heritage areas, not only for the benefit of the current generation, but also for the enjoyment of future generations of humankind[5]. The Convention casts a duty upon a State Party to "do all it can ... to the utmost of its own resources" to identify, protect, conserve, present and transmit to future generations, areas of natural heritage on its respective territory[6]. The duty cast upon State Parties by the Convention encompasses the obligation to take *active and effective legal and administrative* measures for the protection, conservation and presentation of areas of identified world natural heritage situated within States' territories[7]. Despite the qualified language used by the Convention in placing these duties upon State Parties, the obligations have been construed as real and not merely hortatory[8].

Strict criteria for the listing of properties on the World Heritage List maintained pursuant to the Convention have been promulgated by an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value ("the World Heritage Committee")[9]. To be accepted by the Committee as part of the world's natural heritage properties must:

- Be outstanding examples representing the major stages of the earth's evolutionary history; or

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4 *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (1997) 93 LGERA 249 (Federal Court - Sackville J); (1997) 95 LGERA 229 (Full Court Federal Court - Northrop, Burchett and Hill JJ) – "the *Hinchinbrook cases*".

5 See Preamble to the Convention.

6 Article 4, Convention.

7 Article 5(d), Convention.

8 *Commonwealth v Tasmania* ("the *Tasmanian Dam case*") (1983) 158 CLR 1 at 133 per Mason J.

9 Article 11(1), Convention.

- Be outstanding examples representing significant ongoing geological processes, biological evolution and man's interaction with his natural environment; or
- Contain superlative natural phenomena, formations or features; or
- Contain the most important and significant natural habitats where threatened species of animals or plants of outstanding universal value from the point of view of science or conservation still survive[10].

Qualities of universal significance and uniqueness are thus the primary characteristics of any property given the status of world heritage pursuant to the Convention.

The World Heritage Act, enacted by the Commonwealth of Australia in 1983, represents only a limited response to the directives of the Convention. The structure of the legislation was driven by the political imperatives of the Labor government of the day, elected on the back of a promise to prevent the damming of the Franklin River in the world heritage listed Southwest Tasmanian Wilderness. The hurried drafting of the World Heritage Act, combined with the prevailing constitutional uncertainty over the extent of the Commonwealth's external affairs power[11], meant that the Act was designed as a limited stop-gap, intended only to be a "means of last resort"[12] in the event of threatened damage to, or destruction of, areas of world heritage in Australia.

Since its enactment there have been only minor amendments made to the World Heritage Act[13]. A relatively simple regulatory regime remains, providing only a limited basis for Commonwealth intervention to control development affecting world heritage properties.

Not all world heritage properties, referred to as "identified properties"[14], are

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10 Extracted in Lane, M., Corbett, T. & McDonald, G., "Not All World Heritage Areas are Created Equal: World Heritage Area Management in Australia: (1996) 13 *E.P.L.J.* 461 at 462.

11 At the time of enactment of the World Heritage Act, the scope of the external affairs power to allow the implementation of international conventions in Australian domestic law had yet to be fully explored. The scope of the power was addressed by the High Court in its consideration of the World Heritage Act in the *Tasmanian Dam case*.

12 Australia, House of Representatives, 21 April 1983, second reading speech, *Parliamentary Debates*, p.52.

13 The World Heritage Act was amended by the *Conservation Legislation Amendment Act* 1988 to include a new definition of "identified property" and to amend s9 following the High Court's decision in the *Tasmanian Dam case*.

14 An "identified property" is defined in s3A as:
"*(a) any property in respect of which one or more of the following conditions is satisfied:*
(i) the property is subject to an inquiry established by a law of the Commonwealth whose purposes, or one of whose purposes, is to consider whether the property forms part of the cultural or natural heritage;
(ii) the property is subject to a World Heritage List nomination;
(iii) the property is included in the World Heritage List provided for in paragraph 2 of Article 11 of the Convention;
(iv) the property forms part of the cultural heritage or natural heritage and is declared by the regulations to form part of the cultural heritage or natural heritage; or
(b) any part of property referred to in paragraph (a)".

given protection by the World Heritage Act. The protective provisions of the Act, ss 9 and 10, are reactive in nature, invoked only by the mechanism of proclamations by the Governor-General[15], once satisfied that a property is being, or is likely to be damaged or destroyed.

Section 9 of the World Heritage Act prohibits actions, which have been prescribed for the purposes of the section, from being undertaken in a property to which the section applies, except with the written consent of the Minister[16]. The prescription of unlawful acts, subject to an exemptive mechanism of Ministerial consent, envisages the Minister granting consent to "damage" a world heritage property in appropriate circumstances[17].

The Ministerial discretion to consent to damage to a property under s9 is circumscribed by s13(1) of the World Heritage Act. The section directs the Minister, in granting consent under s9, to "have regard only to the protection, conservation and presentation, within the meaning of the Convention, of the property".

Section 10 serves a similar purpose to s9, except that it is directed to the actions of companies within the ambit of the Commonwealth's corporations power[18]. Various acts are prescribed by the section, such as excavation, mineral exploration, building or tree-felling. Like s9, s10 contemplates the Minister consenting to an act that may damage a world heritage property, however, no express limitations are placed on the Minister's discretion to grant consent.

Those seeking to challenge an exercise of Ministerial discretion under ss 9 or 10 are limited to a remedy of judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("ADJR Act") on the basis of technical administrative law grounds, such as unreasonableness, taking into account irrelevant considerations and failing to take into account relevant considerations. Standing provisions for this purpose are broad, encompassing organisations or associations, with objects or purposes relevant to the decision, which engaged in activities related to the decision[19]. However, where an applicant is of the view that the Minister's decision is factually incorrect, notwithstanding that it may be procedurally valid, there is no capacity to seek a review of the decision on the merits.

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15 A proclamation may be issued by the Governor-General in respect of identified properties of natural heritage value under ss 6(3) or 7 of the World Heritage Act. Section 6(3) may only be invoked in respect of Commonwealth properties (for example, properties owned by the Commonwealth, within a Territory or part of the territorial sea) or State properties that satisfy one or more of the criteria listed in s6(2). The criteria in s6(2) relate to such things as whether the protection or conservation of the property is a matter of international obligation by reason of the Convention or otherwise, is necessary or desirable for the purpose of giving effect to a treaty, or is a matter of international concern. These are not the only circumstances in which the Commonwealth can act to protect an identified property within a State. See s6(2)(a) – (e) of the World Heritage Act.

16 The relevant Minister is the Commonwealth Environment Minister.

17 Sparkes, S., "Legislation protecting the Great Barrier Reef World Heritage Property" undated, paper provided by Chris Jones, consultant, Allen, Allen & Hemsley solicitors.

18 Section 51(xx) Constitution of the Commonwealth of Australia. To be within the ambit of this head of power a corporation must be a "foreign", "trading" or "financial" corporation.

19 Section 13(5) World Heritage Act.

The design of the World Heritage Act limits Commonwealth involvement in world heritage management to a last minute attempt to protect world heritage areas where the integrity of the properties, or the values for which they were listed, are under threat. Not only does this approach invariably invoke potent political controversy, but also it often results in less than optimal management and protective outcomes for the world heritage area involved. The deficiencies of this regime to provide the level of protection envisaged for world heritage areas by the Convention are amply demonstrated by the recent *Hinchinbrook cases*, before the Federal Court.

Exposing Cracks in the Regime – The Hinchinbrook Cases and Proposals for Reform

The *Hinchinbrook cases* concern a proposal by Cardwell Properties Limited ("the developer") to construct a marina-based resort complex at Oyster Point, adjacent to Hinchinbrook Channel and opposite Hinchinbrook Island. Both Hinchinbrook Channel and Hinchinbrook Island are included in the Great Barrier Reef World Heritage Area. Significant populations of seagrass, turtles and dugong inhabit the Channel and the area is one of outstanding scenic beauty and amenity.

Although local government and State approval for the project was secured as early as 1985[20], the Commonwealth did not become involved in the proposal until 1994. In June of 1994 the Commonwealth Department of Environment, Sports and Territories ("DEST") expressed the view that an Environment Review Report[21], prepared by the Queensland Department of Environment and Heritage, was inadequate for consideration of the Commonwealth's responsibilities for environmental protection and world heritage. The Commonwealth subsequently commissioned a report by Dr Peter Valentine of the Department of Tropical Environmental Studies and Geography at James Cook University. Dr Valentine identified four areas of "grave reservation" with respect to the development, namely:

- the impact of dredging on seagrass beds in the Hinchinbrook Channel;
- the direct impacts on dugong and turtles from increased boating activity in the Channel;
- the consequential effects from increased numbers of tourists accessing the Hinchinbrook Channel and Hinchinbrook Island and the adjacent areas of the Great Barrier Reef; and

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20 Approvals for a marina-based resort complex at Oyster Point were obtained by a subsidiary of Tekin Australia Pty Ltd in 1985. Tekin later abandoned the project and Cardwell Properties Pty Ltd acquired the benefit of the approvals when it purchased the site in 1993.

21 Office of the Co-ordinator General of Queensland, *An Assessment of the Possible Environmental Impacts of the Proposed Port Hinchinbrook Development on the Values Associated with World Heritage Area, the National Estate, and Migratory and Endangered Species Under the Responsibility of Federal Authorities*, 1994, Department of Environment and Heritage.

- the impact of such a major resort upon the character of the area in the longer term[22].

The Valentine Report concluded that there was an "inadequate level of baseline environmental data on which to properly consider the matter" and recommended a much smaller scale project, lacking a marina[23].

In October 1994, the developer, Cardwell Shire Council and the Queensland Government entered into a Deed allowing the development to proceed, subject to certain protective measures being taken. Pursuant to the Deed, the developer began to clear mangroves on the site, ignoring Commonwealth requests for the cessation of clearing. On 15 November 1994, the Governor-General made proclamations under ss6(3) and 7 of the World Heritage Act, identifying areas of the Hinchinbrook Channel. Three days later regulations were promulgated under the World Heritage Act[24], prescribing certain actions for the purposes of s9, including constructing a breakwater or revetment or removing or damaging a native plant, without the consent of the Minister.

The Commonwealth action necessitated application by the developer for consents under ss9 and 10 of the World Heritage Act, which were applied for in 1995. A second report was commissioned by the DEST[25], which reiterated concerns over the impacts of the development on world heritage values and stated that, in respect of the impacts on seagrass beds and dependent dugong populations, there was insufficient data available to establish the likely effects of the proposal[26]. The Commonwealth Minister granted consents pursuant to the World Heritage Act to allow the removal and coppicing of mangroves, but refused consent for the dredging of an access channel for the marina.

In April 1996, following a change of government at the Commonwealth level, the developer made a fresh application for Commonwealth consent under the World Heritage Act. Six independent scientists were commissioned, through the Great Barrier Reef Marine Park Authority, to review the developer's application. A summary prepared by the Director of the Australian Institute of Marine Science concluded that the activities for which consent was sought could go ahead without significant impact on the *immediate* environment around Oyster Point[27], provided best practice engineering approaches were used.

In light of these findings, on 20 August 1996, the Commonwealth became party

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22 Trinder, C. & Sparkes, S., "Port Hinchinbrook & Beyond – Background to the Controversy and the Great Barrier Reef Marine Park Authority's Role in Protection of World Heritage" *Proceedings of Defending the Environment, 2nd Public Interest Environmental Law Conference*, University of Adelaide, 21-22 May 1995.

23 Valentine, P., *Hinchinbrook Area – World Heritage Values and the Oyster Point Proposal*, Report to the World Heritage Unit, 1994, DEST.

24 See reg 3F and Schedule 2D to the *World Heritage Properties Conservation Regulations*.

25 The NECS Report.

26 Ibid, referred to by Sackville J at (1997) 93 LGERA 249 at 260.

27 That is, within a few hundred metres of the site.

to the Deed between the developer, Cardwell Shire Council and the Queensland government, which was amended to require the implementation of best practice engineering approaches in the development. On the same day the Commonwealth entered into a Memorandum of Understanding ("MOU") with the State of Queensland, establishing processes for the preparation and implementation of a Cardwell/Hinchinbrook Regional Coastal Management Plan, designed to identify and protect the world heritage values of the region. Under the MOU, interim management arrangements for the Hinchinbrook region were to be put in place as soon as possible if there was a "demonstrated need", with a final management plan to be in place no later than 30 June 1998. Two days after finalising arrangements with respect to the Deed and the MOU, the Minister granted consents under ss9 and 10 of the World Heritage Act to allow the development to proceed.

The Minister, in his reasons for granting the consents, stated:

> Having regard to the protective arrangements which have been put in place and those I expected would be put in place, I found that the risk of damage to world heritage values ... was so low as in all circumstances to be insignificant. ...it would be consistent with the protection, conservation and presentation (within the meaning of the Convention) to give the consents sought[28].

Throughout its long history the proposal had attracted vociferous opposition from local community groups and environmental organisations. These opponents echoed concerns raised by the various consultants' reports commissioned by the DEST over the possible impacts of the development on seagrass beds and dependent dugong and turtle populations in Hinchinbrook Channel, and the scenic values of the region and nearby world heritage areas[29]. Following the grant of consents by the Commonwealth Environment Minister, a number of these objectors formed an incorporated association, known as the Friends of Hinchinbrook ("FOH"), which initiated an action in the Federal Court, challenging the consents on a variety of administrative law grounds under the ADJR Act.

The *Hinchinbrook cases*, litigated at first instance before Justice Sackville in the Federal Court, and then before the Full Court on appeal, highlight several deficiencies in the present Australian world heritage regime, which may be summarised under six headings:

1. The extreme technicality of, and inconsistency between, the administrative tests that have developed around the regime for the grant of consents to carry out development in world heritage areas under the World Heritage Act;
2. The failure of the World Heritage Act to provide adequate protection against

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28 Minister's "Statement of Reasons", para 38 and 41, referred to by Sackville J at (1997) 93 LGERA 249 at 270.

29 Nearby World Heritage Areas include Hinchinbrook Island, the Great Barrier Reef and the Wet Tropics Region.

impacts upon the scenic values of a property;
3. The inflexibility of administrative tools provided by the World Heritage Act;
4. The failure of the World Heritage Act to incorporate contemporary principles of environmental management;
5. The lack of provision made by the World Heritage Act for a co-ordinated and comprehensive management system for world heritage areas; and
6. The difficulty faced by members of the public or environmental organisations seeking to ensure accountability in the administration of the World Heritage Act.

These deficiencies in Australia's world heritage regime prejudice its ability to provide "active and effective legal and administrative measures" to protect, conserve and present world heritage properties as required by the Convention. Reform of the World Heritage Act to correct the deficiencies brought to light by the *Hinchinbrook cases* is necessary to provide Australia with an effective tool for managing our world heritage properties for the benefit of current and future generations[30].

Tests under s 9 and s 10

Under the World Heritage Act, different tests for the grant of consent apply depending whether consent is sought under s9 of the Act, or under s10. If consent under s9 is sought, s13(1) requires the Minister to "have regard *only* to the *protection*, *conservation* and *presentation*, within the meaning of the Convention, of the property" (emphasis added). In contrast, the Minister, when making a decision under s10, is not constrained to consider any particular factors, but instead is bound to take into account all considerations relevant to the decision.

At first instance in the *Hinchinbrook cases*, Justice Sackville ruled that a consent issued under one section for a particular action (for example, a consent to cut down a tree under s10), does not do away with the need for an authorisation under the other section for the same action (for example, consent to damage a native plant under s9)[31]. The design of these provisions often leaves the Minister in the invidious position of having to grant two consents for the same act, taking into account

30 Environmental law at the Commonwealth level has recently undergone a major process of review, culminating in the release of the Coalition Government's *Environment Protection and Biodiversity Conservation Bill*. This Bill proposes the repeal, *inter alia*,, of the World Heritage Act and the integration of the protection and management of world heritage areas in Australia into an integrated regime for environmental impact assessment and biodiversity conservation. The Bill is currently before a Senate Legislative Committee and, at this stage, it is uncertain whether all or any of its proposed reforms will become law. For critiques of the reforms proposed by the Bill see Münchenburg, S., "Commonwealth Environment Legislation Review – a Small Revolution" (1998) 15(2) *E.P.L.J.* 77 and Mould, H., "The Proposed Environment Protection and Biodiversity Conservation Act" (1998) 15(4) *E.P.L.J.* 275.

31 (1997) 93 LGERA 249 at 275-276.

two different sets of considerations.

The Minister's task is complicated by the formulation of s13(1) of the World Heritage Act. On one view the section may be intended merely to limit the Minister's deliberations to three considerations, each weighed against the other to reach a decision. On an alternative view the section may in fact identify an outcome that must be achieved by the Minister in granting consent under s9, namely the protection, conservation and presentation of the world heritage property. Arguably, the specification of three particular factors to be considered by the Minister, qualified by the use of the adverb "only", comes close to making those three factors the sole objectives to be achieved by the Minister in exercising power under the section[32]. If this view is correct, the test in s13(1) would represent a significant restriction upon the Ministerial power to consent to prohibited acts as the Minister, in making the decision, might be bound to *achieve* the outcomes of protection, conservation and presentation of the property.

Although the correctness of the test under s9 was not in issue at first instance, Justice Sackville raised two possible interpretations of the requirement in s13(1) of the Act.

The first so-called "stringent" test derived from a dictum of Justice Mason (as he was) in the *Tasmanian Dam case*[33] that the terms of s13(1):

> may mean that the Minister is bound to refuse consent when (a) the applicant fails to satisfy the Minister that a proposed activity or development is consistent with the "protection, conservation and presentation" of the property, or (b) the Minister's mind is evenly balanced on that issue.

Justice Mason's stringent test arguably comes close to an outcome oriented test, as it makes a consent possible only where the Minster is positively satisfied that an activity is consistent with the protection, conservation and presentation of a property. This interpretation gains support from the context of Justice Mason's analysis of s13(1), being an examination of the appropriateness of the "regime of control" of the World Heritage Act to achieve the purpose of the Convention[34].

The alternative "less stringent" test referred to by Justice Sackville stemmed from a dictum of Mason CJ and Brennan J in *Richardson v Forestry Commission*[35]. In that case their Honours were considering sections of the *Lemonthyme & Southern Forests (Commission of Inquiry) Act* 1987 (Cth) ("*Lemonthyme Act*"), which prohibited certain actions in relation to the forests the subject of the inquiry, except with Ministerial consent. In considering whether or not to grant consent, the Minister

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32 Fisher, D.E., *Environmental Law: Text and Materials*, 1993, Law Book Company, p. 491.

33 (1983) 158 CLR 1 at 143.

34 Justice Mason concluded that the "regime of control" for which ss.9 and 13(1) provide was not less than appropriate or adapted to the protection, conservation and presentation of the property to which the prohibitions relate (*Tasmanian Dam case* (1983) 158 CLR 1 at 142).

35 (1988) 164 CLR 261 ("*Richardson's case*").

was directed, by s18(1), to "have regard only to Australia's obligations under the Convention". Mason CJ and Brennan J said s18(1)[36]:

> should be understood as disentitling the plaintiff to refuse consent except when refusal is necessary for the protection of the heritage or otherwise for the satisfaction of Australia's obligations under the Convention.

The test in *Richardson's case* creates a *prima facie* entitlement to consent with refusal only justified where necessary to achieve the protection, conservation or presentation of the relevant property. Arguably this test is not readily translatable to the context of s13(1), given the differences between the section of the World Heritage Act and that under consideration in *Richardson's case*[37]. In particular, the test established by s18(1) of the *Lemonthyme Act* is broader than s13(1), allowing the Minister, as it does, to have regard generally to Australia's obligations under the Convention, rather than restricting the Minister to the "protection, conservation and presentation" of the world heritage area.

At first instance in the *Hinchinbrook cases* the parties agreed that the Minister had applied the "stringent test" in granting consents under s9 and that this was the correct test to apply. However, on appeal, the FOH contended that the Minister had in fact erred in applying the test as he had merely considered whether the acts in question were *consistent* with the "protection, conservation and presentation" of the World Heritage property. Underlying the submission was the view that consent under s9 could only be granted if the acts had a positive benefit, especially to the protection and conservation of the natural heritage[38]. This formulation of s13(1) by the FOH advocated an outcome-oriented test.

The Full Court did not adopt either the "stringent" or "less stringent" test for the application of s13(1), nor did it endorse the outcome-oriented test advocated by the FOH. Instead, the Court construed the test as requiring a balancing exercise by the Minister, giving equal weight to each of the considerations of "protection", "conservation" and "presentation". In this balancing process the Minister was limited to considering only matters affecting the "protection, conservation and presentation"

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36 Ibid at 293.

37 Fleming, A., "Friends of Hinchinbrook Society Inc v Minister for Environment and Management of World Heritage" (1997) 14 *E.P.L.J.* 295.

38 The Society considered that the objective of "presentation" in s13(1) was subordinate to the Convention's alternative objects of "protection" and "conservation". This submission relied heavily upon a dictum of Brennan J in the *Tasmanian Dam case* (1983) 158 CLR 1 at 224 to the effect that: "The duty of 'presentation' may thus require the provision of lighting or access or other amenities so that the outstanding universal value of the property can be perceived; nevertheless, *conservation of the property is an element of its presentation and is not to be sacrificed by presentation.* The duty thus requires the protection and conservation of the features that give the property its outstanding universal value. It is the 'object and purpose' of the Convention to ensure that those features are protected and conserved" (emphasis added).

of a property, excluding other matters such as those of an economic or social nature[39].

"Presentation", in the context of the Convention was considered to denote an obligation on the part of State Parties to the Convention to render items of heritage accessible to the general public, subject to the obligations to protect and conserve[40]. Whilst Justice Hill, delivering the leading judgment, acknowledged that the Convention is for the protection of heritage, in his opinion it did not envisage that heritage would be "locked away from sight and made inaccessible to the public in all circumstances or indeed in most circumstances"[41].

Justice Hill recognised the perhaps inevitable tension between presentation of a world heritage property through provision of public access facilities on the one hand, and its protection and conservation on the other[42]. However, His Honour considered that the task for the Minister set by s13(1) was "to weigh the damage on the one hand which presentation may bring with it, against the need to protect and conserve the world heritage on the other"[43]. In His Honour's view, if the Minister decided, after balancing these competing considerations, that the risk of damage to world heritage values was insignificant, then there was "*only one conclusion* to which he could come,... namely to give his consent" (emphasis added)[44].

This interpretation of s13(1) by the Full Court falls somewhere between the "stringent" test of Justice Mason in the *Tasmanian Dam case* and the "less stringent" test put forward by Mason CJ and Brennan J in *Richardson's case*. What is required of the Minister, in determining an application for consent under s9, is a balancing of competing matters affecting the protection, conservation and presentation of the property, excluding all others matters from consideration. If the end result of this process is a determination that the impact on world heritage values is insignificant then the Minister is bound to give his consent. This formulation of the test represents the current state of the law in respect of s13(1) as an application by the

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39 *Friends of Hinchinbrook Society Inc v Minister for Environment and Ors* (1997) 95 LGERA 229 at 262 and 263 per Hill J (with whom Northrop J agreed).

40 Ibid at 262 per Hill J; also see Burchett J at 250.

41 Ibid at 262.

42 Justice Burchett, who delivered a separate concurring judgment, also stressed the possible tension that might arise between the objects of the Convention.

His Honour considered that: (p.252)"To the extent that presentation has an impact on preservation or that protection may require limits on presentation, questions of "judgment and discretion" arise involving "a broad spectrum" of possible views, the decision on which has been committed by Parliament to the Minister".

43 (1997) 95 LGERA 229 at 263.

44 Ibid. Justice Burchett appeared to reach a slightly different conclusion in relation to the nature of the test under s13(1).

His Honour commented: "This conclusion [of the Minister's] – that giving of the consents would be consistent with the protection, conservation and presentation of the property – meant that it was open to him to give the consents. It may or may not, as a matter of law, have required him to do so in the circumstances. But nothing in his careful and detailed reasons suggest he considered himself other than free to exercise a judgement upon the statutory question, subject only to the constraint expressed in s13(1)".

His Honour left open the question of the circumstances in which the Minister may have been required to grant consent.

FOH for special leave to appeal the decision further was refused by the High Court[45].

Although the test for application of s13(1) now appears to have been finally determined, the inconsistency between the administrative tests under ss 9 and 10 of the Act remains. Whereas under s9 the Minister may only consider the protection, conservation and presentation of the property, excluding all other considerations from the deliberative process, under s10 the Minister must consider all relevant factors, which may include employment gains, economic or other social benefits stemming from a particular proposal affecting a world heritage property. The practical outcome of inconsistency between the tests may be that the Minister is prejudiced in the exercise of power under one section in determining whether or not to grant consent under the other. If the Minister reaches the conclusion that the benefits of presentation of a property are outweighed by concerns over its protection and conservation, but that, when wider social and economic considerations are taken into account, the overall balance favours consent, the Minister might be left in the difficult administrative and political position of granting consent to an action under s10, while at the same time refusing consent to the same action under s9. The inherent difficulties of this position are likely to lead the Minister, whether consciously or unconsciously, either to apply a more stringent test than is necessary in deciding whether to grant a consent under s10, or alternatively, to take into account economic and social factors when issuing a consent under s9. In either situation, the administrative technicalities and inconsistencies of the decision-making process go no way toward providing a transparent and effective protective regime for world heritage properties.

A preferable system to that established by ss 9 and 10 of the World Heritage Act would be one based upon a series of management plans as the primary regulatory tools, rather than an all or nothing consent system. The highly successful regime for the Great Barrier Reef under the *Great Barrier Reef Marine Park Act* 1975 provides a model for a flexible administrative regime for the management of world heritage properties. Rather than last-minute intervention through the mechanism of Ministerial consents, the latter system utilises a number of tailored management plans which specify activities permitted or prohibited in the world heritage property and sets up a permit system to authorise permitted activities. The employment of such a system to manage world heritage properties generally would do away with the need for executive proclamations and regulations to determine when and if actions are prescribed, while allowing appropriate actions to be determined on a case-by-case basis for different world heritage properties or different areas within a property.

Basing the regulation of development affecting world heritage properties upon management plans for each world heritage area would allow world heritage issues to be considered and addressed at the outset of a development proposal, rather than at the eleventh hour when all other relevant State and local government approvals

45 *Friends of Hinchinbrook Society Inc v Minister for Environment* [1998] 6 LegRep SL8a (Gaudron & McHugh JJ).

are in place.

In order to reflect the obligations of the Convention, decisions whether or not to grant a permit for an activity under a management plan could be required to be assessed in light of the objectives of protection, conservation, presentation, rehabilitation and transmission to future generations of world heritage properties. This could be achieved by giving the objectives of the Convention primacy as objects of the Act or by specifying these factors as relevant considerations in the deliberative process. In recognition of their status as international obligations assumed by Australia, the legislation should make the objectives of the Convention outcomes which decision-makers are bound to achieve, rather than merely factors to be weighed against each other in the exercise of executive discretion. Compared to the current regime that tends to obscure the objectives of the Convention with administrative intricacies, such an approach enhances the effectiveness of legal and administrative measures to advance the purpose of the Convention.

Scenic Impacts

An issue raised by, though not explicitly addressed in, the *Hinchinbrook cases* was the impact of the proposal upon the values of scenic amenity and beauty of the Hinchinbrook region[46].

If it proceeds, the resort will include buildings and structures directly adjacent to, and highly visible from, Hinchinbrook Channel and Hinchinbrook Island. Although not themselves located within the world heritage area, the buildings and structures will inevitably have an impact on the scenic amenity and beauty of Hinchinbrook Channel and Hinchinbrook Island, values that formed part of the basis for the inclusion of the properties on the World Heritage List.

Other than the exhortation in s13(1) of the World Heritage Act for the Minister to have regard to the "presentation" of a property when determining whether to grant consent under s9, the concepts of damage and destruction to world heritage properties used by the Act do not readily extend to protection of the scenic qualities of a world heritage property. Even the obligation to ensure "presentation" of a property would not seem to afford protection to scenic values of a property, as on the Full Federal Court's view, "presentation" within the meaning of the Convention relates to making the property accessible to the general public[47].

By failing to take account of impacts upon the scenic amenity and beauty of natural places protected as world heritage, the World Heritage Act neglects an important aspect of the protection and conservation of properties possessing those values.

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46 Justice Sackville did not find it necessary to decide whether, or in what circumstances, the appearance of a place outside a World Heritage Area affects its "presentation" for the purposes of s13(1) of the World Heritage Act, as His Honour considered that the Minister took into account the impact of the Port Hinchinbrook development on the aesthetic features of the world heritage area and formed the view that the impact would be "insignificant". See (1997) 93 LGERA 249 at 289.

47 Op cit n 40.

The impact of a development upon the world heritage values for which a property was listed, including values related to a property's aesthetic significance, should be a primary consideration for a decision-maker. The use of management plans for world heritage areas would allow the identification of the particular world heritage values of a property to be protected and conserved. In deciding whether to permit activities, the impact upon a property's world heritage values would need to be considered in light of the directives of the Convention to ensure that an activity did not prejudice the protection, conservation, presentation, rehabilitation or transmission to future generations of the world heritage area.

Conditional Consents

The elaborate contractual arrangements governing the development of the Port Hinchinbrook resort, were apparently entered into by the Commonwealth, after the Minister received advice from departmental advisers that protective measures in relation to the development could not be implemented by means of conditional consents under the World Heritage Act.

The FOH argued that the Minister was in fact empowered to issue conditional consents under ss9 and 10 of the Act and that, in failing to recognise this power, he failed to take account of a relevant consideration. The result alleged by FOH was the acceptance of a weaker regime than might otherwise have been put in place, limiting the Commonwealth to difficult contractual remedies against the developer in the event of default[48].

Justice Sackville rejected the FOH argument that there was an implied power to attach conditions to consents issued under ss 9 and 10 of the World Heritage Act. His Honour pointed to a number of factors that he considered established the lack of a conditions power. These factors were[49]:

- the lack of an express power to impose conditions in either ss 9 or 10;
- the lack of an explicit mechanism for the enforcement of conditions attached to a consent[50];
- the lack of a reference to conditional consents in s13; and
- the framing of other provisions in the World Heritage Act on the apparent basis that the Minister's power was one either to give or refuse consent. Justice

48 If conditional consents had been issued the FOH argued that an injunction could have been obtained under s14 of the World Heritage Act to prevent contravention of the conditions. Time seems to have vindicated the FOH's fears, as enforcing obligations under the complex contractual arrangements against the developer has proved very difficult in the absence of a power to seek injunctive relief.

49 (1997) 93 LGERA 249 at 287.

50 His Honour considered that the power to grant an injunction under s14 of the World Heritage Act against the doing of an act unlawful by virtue of ss 9 or 10 was not apt to deal with the infringement of a condition attached to the grant of consent.

> Sackville pointed to the language of ss13(3) and (4) of the Act, which makes reference only to the grant or refusal of a consent.

Justice Sackville considered that the lack of a conditions power was not surprising given the uncertainty over the constitutional basis of the Act at the time of its enactment and the express intention of the Parliament that the powers conferred by the Act be used as a "means of last resort"[51].

The Full Court upheld Justice Sackville's finding, Justice Hill[52] adding that the text of s13(4), dealing with the publication of consents in the Gazette, provided a further reason against an inference of conditional consents. His Honour considered that the difficulty of determining the point of time at which a consent was given, if given conditionally, in order to know the correct time for publication of the gazette notice indicated that consents under ss 9 and 10 of the Act were not intended to have conditions attached[53].

The technical arguments raised against the inference of conditional powers by the Federal Court in both instances fail to take account of the purpose served by ss 9 and 10 of the World Heritage Act. Arguably ss 9 and 10 of the Act contemplate the Minister consenting to actions with the potential to damage a world heritage property, provided certain protective measures are taken to minimise or prevent any adverse impacts. Construing ss 9 and 10 as bare powers to grant or refuse consent renders useless the conferral of a consent power on the Minister, as the Minister is left with no legislative means by which to require minimisation of the impacts of the damage authorised.

Notwithstanding any debate over the correctness of the Federal Court's rulings, their result is that the Commonwealth, in administering world heritage areas, is given only unsophisticated and inflexible administrative tools. Lacking the power to grant a consent incorporating a range of environmental conditions, which may then be enforced via the injunctive provisions of the World Heritage Act, the Minister is limited to a bare power to grant or refuse consent to a particular proposal impacting on a world heritage area. If the Commonwealth wishes to exercise control over the manner in which development is carried out in an area it is forced to enter into contractual arrangements with the developer that are unlikely to offer the same level of security to the Commonwealth in the event of default. The lack of power to grant conditional consents under the World Heritage Act undermines the Commonwealth's ability to take an effective role in the management of world heritage properties, making it overly dependent upon the compliance of the developer with contractual arrangements or State-based mechanisms to secure protection and conservation of the property.

To ensure the Commonwealth is given a more sophisticated and flexible mechanism by which to control development affecting a world heritage property, a power

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51 Op cit n 12.

52 Northrop and Burchett JJ concurred with Justice Hill on this point.

53 (1997) 95 LGERA 229 at 266.

to grant permits should include an express provision allowing the attachment of conditions to a consent. Permissible conditions could include those requiring environmental management plans, financial assurances, the ongoing monitoring of impacts and requirements for remediation of damage caused in the course of the activity. Conditions of a permit could be enforced via the injunctive mechanism under s14. The range of remedies available to a management authority in the event of non-compliance with a permit could be broadened beyond injunctions to encompass powers to require the mitigation and remediation of damage caused and to allow the authority to recover the costs of clean-up action directly from the offender involved[54].

Contemporary Principles of Environmental Management

The World Heritage Act is now over 15 years old. At the time of its enactment the tenets of ecologically sustainable development ("ESD"), which characterise contemporary environmental management, had yet to emerge[55]. Not surprisingly, the World Heritage Act does not make any reference to ESD principles as relevant considerations for the grant of Ministerial consent, nor are these principles enshrined as part of any objects clause so characteristic of modern environmental legislation.

Notwithstanding the lack of reference in the World Heritage Act to ESD principles, arguably the *Hinchinbrook cases* were an appropriate setting for the application of one of these principles – the precautionary principle.

The precautionary principle, as endorsed at international environmental law, states:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation[56]

In the circumstances of the *Hinchinbrook cases* the precautionary principle was *prima facie* applicable. The proposal under consideration was to take place in, and adjacent to, areas of World Heritage significance, considerable scientific uncertainty existed in predicting the impacts of the development on World Heritage values and there was also uncertainty over ensuring compliance with conditions and planning measures put in place to alleviate any adverse impacts of the development. In addition to these factual circumstances, since the time of enactment of the World Heritage

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54 See for example ss 61A and 61B of the *Great Barrier Reef Marine Park Act* 1975.

55 ESD came to the fore in environmental circles in 1992 with the United Nations Conference on Environment and Development in Rio de Janeiro.

56 Principle 15, *Rio Declaration on the Environment and Development* (1992) 31 ILM 874. The principle may now have acquired the status of a customary norm of international law, see Fullem, G.D., "The Precautionary Principle: Environmental Protection in the Face of Scientific Uncertainty" (1995) 31 *Willamette Law Review* 495 at 500.

Act, ESD principles, including the precautionary principle have gained recognitior in important policy documents of the Commonwealth, such as the *National Strategy for Ecologically Sustainable Development* 1992, which adopts the principle as one o its Guiding Principles, and the *Intergovernmental Agreement on the Environmen* 1992 ("IGAE").

The FOH argued that, taking into account the level of scientific uncertainty surrounding the impacts of the proposal on the world heritage area and the integral role of the precautionary principle in the national policy framework for environmental management, the Minister ought to have considered and applied the precautionary principle in deciding whether to issue consents under ss 9 and 10 of the World Heritage Act.

Justice Sackville referred to the statement of Justice Stein in *Leatch v. National Parks & Wildlife Service*[57] that:

> the precautionary principle is a statement of common-sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious[58].

Justice Sackville then continued:

> I do not think that the precautionary principle in the form adopted by the 1992 Intergovernmental Agreement (nine years after the enactment of the World Heritage Act), is a relevant consideration that the Minister is bound to take into account in exercising powers conferred by the World Heritage Act. There is nothing to suggest that in 1983 any particular formulation of the precautionary principle commanded international approval, let alone endorsement by the Parliament. It may be that the "commonsense principle" identified by Stein J is one to which the Minister must have regard. But this would flow from the proper construction of the relevant legislation and of its scope and purpose, rather than the adoption by representatives of Australian governments of policies and objectives relevant to a national strategy on the environment[59].

The decision of the Court has been criticised for taking a narrow view of the

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57 (1993) 81 LGERA 270 at 282.

58 In *Leatch*, Stein J was called upon to consider the relevance of the precautionary principle to a decision made to grant a licence to take or kill fauna under the *National Parks and Wildlife Act* 1974 (NSW), which makes no reference to the principle as a relevant consideration. While not directly applying the principle, in practice Justice Stein considered that scientific uncertainty over the impact of the development involved on the endangered Giant Burrowing Frog necessitated a refusal of the licence sought.

59 (1997) 93 LGERA 249 at 296. His Honour determined that, in any event, to the extent that the Minister was required to take account of the need to exercise caution on the fact of scientific uncertainty, he did so. This determination was not challenged on appeal.

scope and purpose of the World Heritage Act and of the relevance to the decision-making process of policy documents enunciating the precautionary principle[60]. The scope of the World Heritage Act necessarily encompasses the obligations placed upon Australia by the Convention it seeks to implement, including the duty to *ensure* that *effective and active* measures are taken for the protection, conservation and presentation of natural heritage. Although s13(1) of the World Heritage Act seeks to confine the exercise of Ministerial discretion in respect of consents granted under s9, the precautionary principle, dictating precaution in the face of serious or irreversible harm to the environment, is arguably a consideration relevant to the protection, conservation and protection of a world heritage property[61].

Justice Sackville's rejection of the precautionary principle on the basis that no particular formulation of the principle commanded international or national endorsement at the time of enactment of the World Heritage Act has also been criticised as flying in the face of the administrative law maxim that statutory discretions must not be fettered[62]. By stating that new developments in the national and international environmental legal system would not be relevant to decision-making under the Act, Justice Sackville suggests that policy and other considerations influencing the decision-making process remain stagnant from the time of enactment of the relevant legislation. This finding is particularly hard to justify given that the IGAE, of which the precautionary principle is an intrinsic part, contains a schedule that relates specifically to the management of world heritage sites.

Putting to one side the question of the correctness or otherwise of Justice Sackville's reasoning, the *Hinchinbrook cases* demonstrate the difficulty of translating contemporary environmental management principles to legislation now well out of date. In the absence of an express legislative mandate for a decision-maker to take into account ESD principles, uncertainty will continue to exist as to whether these principles are relevant considerations in the deliberative process.

In a reformed management regime based upon management plans regulating permitted and prohibited activities within world heritage areas, ESD principles could be incorporated as guiding principles for decision-makers. As with the objectives of the Convention, ESD principles could be given primacy amongst the purposes of the world heritage legislation or specified as relevant considerations in the deliberative process.

Rather than simply employing caution in their deliberations, decision-makers could be required by the World Heritage Act to take a precautionary approach through the restriction or refusal of a proposal where scientific uncertainty exists over the

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60 Cf *Leatch v National Parks and Wildlife Service*, op cit n 56 and *Yamauchi v Jondaryn Shire Council*, unreported, Queensland Planning and Environment Court, Skoein J, 22 April 1998.

61 Lyster, R., "The Relevance of the Precautionary Principle: Friends of Hinchinbrook Inc v Minister for Environment" (1997) 14 *E.P.L.J.* 390. Note that the same limitations on the exercise of discretion do not apply to a decision to grant consent under s10 of the World Heritage Act. In the latter case, all relevant considerations must be taken into account, which arguably includes the precautionary principle.

62 Ibid.

impact of the development upon the world heritage values of an area.

The principles of ESD, reflecting, as they do, contemporary consensus on the proper principles for environmental management, should form an express and integral part of the regime purporting to control the protection and management of natural areas that are of world heritage status.

Management Regime

Perhaps the most critical deficiency of the World Heritage Act highlighted by the *Hinchinbrook cases* is its failure to provide a flexible regime of co-ordinated management for world heritage properties. Instead, the World Heritage Act relies on a command and control approach involving the ad hoc grant or refusal of Commonwealth consent for particular activities affecting a world heritage area.

The approach taken by the World Heritage Act reflects a traditional reticence on the part of the Commonwealth to "interfere" in issues of land use management, which are seen as the responsibility of States, unless some real and distinct threat to a property is identified[63]. This approach relies heavily upon effective management being carried out by the States, with the Commonwealth precluded from taking any significant role in the ongoing management of a property until action is precipitated by an application for Commonwealth consent[64].

In the *Hinchinbrook cases*, the FOH challenged the Commonwealth's reliance on State arrangements for the protection of the affected world heritage area on the basis that the Minister, in relying on the Queensland regional planning process, had improperly deferred relevant questions, taken into account irrelevant considerations and acted unreasonably.

Justice Sackville considered that the Minister, in taking account of the process set in train by the MOU for the preparation and implementation of a regional management plan, had not left critical issues unresolved by "vacuous conditions"[65]. Rather, the Minister had specifically found that, as a result of the regional planning process, environmental impacts flowing from the consents would be insignificant. The Court considered that the Minister, acting on behalf of the Commonwealth, was entitled to rely upon State arrangements, whether legislative or administrative, in implementing the obligations under the Convention[66]. Justice Sackville stated that neither the World Heritage Act, nor the obligations under the Convention, was sufficient to impose an obligation on the Commonwealth itself to take all the appropriate legal and administrative measures required pursuant to obligations of the Convention. Instead, his Honour concluded that it was:

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63 Sparkes, op cit n 17.

64 The approach of co-operative federalism evident in the World Heritage Act is further entrenched by the IGAE.

65 Cf *Parramatta City Council v Hale* (1982) 47 LGRA 319.

66 (1997) 93 LGERA 249 at 285.

> open under the Convention, for Australia to discharge its obligations by ensuring that appropriate legal and administrative measures are taken to protect and conserve the natural heritage, whether those measures are implemented under Commonwealth or State laws or administrative arrangements or a combination of both[67].

Despite the recognition in the *Hinchinbrook cases* that joint Commonwealth/State legislative and administrative arrangements are an acceptable way of discharging obligations with respect to world heritage properties under the Convention, the World Heritage Act makes no formal provision for initiating this process. The World Heritage Act does not put in place a system for joint development and implementation of management plan for world heritage areas, nor does it specify foundation management principles to guide the management of properties in accordance with the objectives of the Convention. As a result, there is no uniformity in the management arrangements pertaining to different world heritage properties, and legislative support, administrative structures and levels of funding for properties vary considerably and without any apparent reference to their particular management needs[68].

Resource conflicts between the Commonwealth and States and Territories have characterised the nomination and listing of many Australian world heritage properties and continue to be influential in their management[69]. Management arrangements and funding allocations were generally adopted hastily following listing as a belated reaction to the highs and lows of the political conflicts generated in the process[70]. The consequence is a diversity of management structures, including single agency management, special purpose legislation, co-operative management arrangements and integration with pre-existing management structures[71]. Funding allocations for different properties also diverge widely, with the level of Commonwealth support dependent upon the management arrangements in place, the amount of State support for management and residual agreements concerning funding resulting from the listing process. Those properties that attracted heated political controversy during the nomination and listing process often have secured large funding allocations from the Commonwealth and have comprehensive management regimes, sophisticated planning processes and the capacity for strategic planning. In comparison, other properties, which did not attract the same degree of political furore, receive significantly less funding and rely largely upon ad hoc use of existing State legislative arrangements to provide for their management[72].

Just as the allocation of funding and the devising of management arrangements

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67 Ibid; on appeal the Full Court of the Federal Court upheld this conclusion.
68 Lane *et al* (1996) op cit n 10.
69 Ibid.
70 Davis, B., "Federal-State Tensions in Australian Environmental Management: The World Heritage Issue" (1989) 6 *E.P.L.J.* 66.
71 Lane *et al* (1996), op cit n 10.
72 Ibid.

for world heritage properties in Australia has often been linked to political controversy, so too the boundaries of world heritage areas have generally had more to do with rancorous conflicts between government agencies, conservation and resource interests than any scientific evaluation of their appropriate limits[73]. The result may be that significant areas are not included within the protective mantle of a world heritage area, even though activities in this area may have a significant impact on the adjacent world heritage property[74].

These deficiencies of the current world heritage regime could be rectified by the adoption of a management system based upon a series of management plans for different world heritage areas. Using the Great Barrier Reef Marine Park system as a model, a management authority for each world heritage area could be established with the primary responsibility for preparation of management plans, oversight of development and strategic planning. The authority should be a Commonwealth agency, staffed by well-qualified scientific and other experts, functioning as an independent body capable of taking decisions and resolving disputes between stakeholders with respect to the world heritage area concerned. A lead role for the Commonwealth[75], paralleling its international responsibilities under the Convention, is necessary to ensure that world heritage management does not become entrapped in conflicts over resource use and States' rights.

To aid a management authority in its strategic planning function and to provide a sounding-board for issues concerning the management of a world heritage area, a consultative committee should be established for each area, with Commonwealth and State or Territory representatives, as well as representation from other stakeholders, such as traditional Aboriginal owners.

To ensure consistency across the different world heritage areas, in preparing management plans the authorities could be required to have regard to the world heritage values of the area and the management objectives of the Convention[76]. Promoting multiple use of world heritage areas should be a goal of effective management, but this should not dominate over the primary concerns nominated by the Convention of protection, conservation, presentation, rehabilitation and transmission to future generations of the world heritage area[77].

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73 Ibid.

74 The Kakadu World Heritage Area provides a good example, resource conflicts over uranium deposits in the vicinity of the area having led to the Ranger Uranium mine site being excised from the World Heritage Area. The boundaries of the Tasmanian Wilderness, Fraser Island and Wet Tropics Region World Heritage areas also were primarily the result of acrimonious conflicts between State and Commonwealth governments over resource use.

75 A 1996 report by the House of Representatives Standing Committee on the Environment concludes that world heritage requires a strong Commonwealth role. See HORSCERA, *Managing Australia's World Heritage*, 1996, Parliament of the Commonwealth of Australia, AGPS, Canberra.

76 Any duty cast upon world heritage authorities or their officers to have regard to certain matters in preparing management plans should be framed in language creative of private rights as well as public duties to ensure the obligations may be enforced by members of the public.

77 Dr Peter Valentine of James Cook University considers that the ecosystems of the Great Barrier Reef World Heritage Area are being placed under pressure from multiple use activities and warns

Although overall management planning and decision-making would rest with each world heritage authority, on-the-ground management of world heritage properties should harness the personnel and expertise of the national parks' services of the States or Territories in which the properties are situated. The Act should provide for financial assistance from the Commonwealth to the State or Territory involved to fund the employment of staff to undertake conservation activities, to supervise activities in the area and to monitor impacts from permitted activities.

In addition to a more flexible and co-ordinated regime for management of identified world heritage areas, the World Heritage Act should incorporate comprehensive provisions for the delineation of world heritage areas[78]. Criteria for the delineation of properties to be nominated for world heritage listing should be based upon the provisions of the Convention and the criteria used by the World Heritage Committee in its assessment process to provide a clear and objective basis for nomination. Ideally the process of identifying areas suitable for nomination would be undertaken by an independent expert body[79], such as the Australian Heritage Commission. This process could make provision for public advertising of proposals for the nomination of areas and for submissions to be made by affected landholders and the general public. Compensation could be provided by the Commonwealth to individuals whose interests are injuriously affected by a proposal if listing takes place[80]. A more open nomination process might avoid the political controversy that has characterised the majority of nominations and listings to date in Australia, leading to a delineation of property boundaries guided by objective scientific criteria rather than political compromise.

The outstanding universal significance of world heritage properties, the exacting criteria for listing and the aspirational goals of management advocated by the Convention demand a rigorous approach to management, worthy of areas considered to be the heritage of humankind. In ratifying the Convention, Australia committed itself to providing the highest possible level of protection for our most outstanding

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against a subordination of the primary aims of protection and conservation in world heritage management to a multiple use approach. See Valentine, P., "World Heritage: Values and Management Implications" *Proceedings of the Queensland Environmental Law Association 1997 Conference: Negotiating the Environmental Web*, May 14-17 1997, pp.73-79.

78 A number of other natural areas in Australia, outside those already listed, are considered by some authors to have the necessary characteristics for world heritage listing. See Hall, C.M., *Wasteland to World Heritage: Preserving Australia's Wilderness*, 1992, Melbourne University Press, p.166.

79 The perils of the public inquiry process, demonstrated only too well by the experience of the Helsham Commission of Inquiry investigating the world heritage values of the Tasmanian Lemonthyme and Southern Forests region, favour control of the nomination process by an independent body such as the Australian Heritage Commission rather than ad hoc public inquiries which may be derailed by political hi-jacking. See Tsamenyi, B.M., Bedding, J. & Wall, L., "Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry" (1989) 6 *E.P.L.J.* 79.

80 An example of this type of provision is s54 of the *Wet Tropics World Heritage Protection and Management Act* 1993 (Qld) dealing with compensation for injuriously affection of a landholder's interest by virtue of the promulgation of a management plan.

natural properties. The failure of the World Heritage Act to lay down appropriate criteria for the delineation of world heritage areas, to make adequate provision for Commonwealth grants of funding for properties and to ensure co-ordinated design and implementation of management plans represents a significant deficiency in the current regime for management of world heritage properties in Australia.

Merits Review

In the *Hinchinbrook cases*, the only avenue available to the FOH to challenge the consents issued by the Minister under the World Heritage Act was that of judicial review. Despite queries over the validity of the scientific evidence relied upon by the Minister, subsequently been called into question by a Senate Inquiry[81], the FOH in its judicial review was limited to arguments concerning the decision-making *process*. Nevertheless, one line of argument, pursued by the FOH at first instance, brought the Court very close to an examination of the merits of the decision; that based on the alleged unreasonableness of the Minister's reliance upon the Deed and MOU to address identified potential risks of the proposal.

The difficulties faced by courts adjudicating upon an argument of unreasonableness in the judicial review context arise "because the unreasonableness ground is 'inescapably concerned with the substantive *quality* of the impugned decision'" [82]. To avoid placing their own "legitimacy at risk" [83] by delving into the merits of an administrative decision, courts conducting judicial review advocate a cautious approach to dealing with the issue of the reasonableness of a decision made by a public official. Courts are particularly wary in the environmental field[84], where decisions often involve emotive subject matter and arguments over the substance of the decision made may be clothed in terms of a challenge on the ground of reasonableness.

Justice Sackville was obviously mindful of the tension between judicial review and merits review in the *Hinchinbrook cases*, caveating his reasons in the following terms:

> It should be stressed that the role of the Court in proceedings of this kind is not to determine the desirability or otherwise of the Port Hinchinbrook development. Nor is it to consider afresh the merits of the Minister's decision to grant consents under the World Heritage Act. The essential issue in the proceedings is whether the Minister exceeded the powers conferred on him by the Act. The fact that not all decision-makers in the position of the Minister would necessarily have taken the same view as the Minister does not demonstrate that he committed any legal error. Whether or not he did so

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81 Hogarth, M., "Resort Brings Shame On Us All, Says Expert", *Sydney Morning Herald*, 27 July 1998, p.3.

82 (1997) 93 LGERA 249 at 277.

83 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 38 per Brennan J.

84 See for example the recent decision of the High Court in *Mount Isa Mines Limited v Australian Heritage Commission* (1997) 187 CLR 297.

> turns on the construction of the relevant legislation and the application to the facts of well-established principles of administrative law[85].

In the case before him, Justice Sackville considered that the Minister had not acted in disregard or breach of all of the available evidence or advice or in a manner that was demonstrably irrational. His Honour acknowledged that "[d]ifferent decision-makers may have reached different conclusions about the adequacy of the arrangements embodied in the deed (sic) and the MOU to protect and preserve world heritage values from the threats identified by the Minister"[86], but considered that the decisions of the Minister were not so unreasonable that no reasonable person could have reached them.

The *Hinchinbrook cases* illustrate the difficulties applicants face when judicial review is the only available mechanism for challenging the decision of an environmental decision-maker, given the Court's reluctance to stray into any examination of the merits. The preference for judicial review under the World Heritage Act and in respect Commonwealth environmental legislation generally seems to stem from traditional concerns that allowing merits review would expose courts to a flood of frivolous and vexatious claims. The broadening of standing and the availability of merits review in other jurisdictions has not substantiated this fear. Traditional arguments against greater public involvement in supervising the exercise of public duties also lose credibility when weighted against the prevalence of administrative decision-making in modern legislation and the conferral of broad discretions upon public officials to determine matters of the public interest.

Reform of the World Heritage Act should introduce a greater degree of public accountability for actions taken and decisions made under it. In particular, key decisions made under the Act, such as those concerning development proposals with a "significant impact" [87] upon a world heritage property could be subject to merits review before the Administrative Appeals Tribunal or a specialist tribunal. Open standing provisions for challenging actions taken or decisions made under the Act should apply, leaving the control of vexatious or frivolous litigants to the powers of the court or tribunal to prevent an abuse of process. Members of the public and public interest groups should be able to obtain interim or interlocutory injunctions to restrain alleged unlawful activities in a world heritage area, without being subject to a requirement to provide an undertaking as to damages.

In a statute designed to govern the protection, conservation and presentation of properties that have been recognised as the heritage of humankind as a whole,

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85 (1997) 93 LGERA 249 at 253.

86 (1997) 93 LGERA 249 at 282.

87 Various criteria could be specified to determine when a proposal involved a significant impact on a world heritage property. These criteria might include a consideration of the extent of the property affected, impacts upon endangered or vulnerable flora or fauna, the potential for serious or irreversible environmental harm and the potential for far-reaching or long-term impacts on the property and nearby world heritage areas.

arguably the public has a role to play in supervising the exercise of discretion by public officials affecting these areas. Where our most significant and precious natural heritage is at stake, the availability of merits review of decisions affecting that heritage, open to the public at large, would seem appropriate.

Conclusion

When the World Heritage Act was enacted over a decade ago, it was put forward as a limited implementation of Australia's obligations under the Convention, specifically designed to block the Franklin Dam proposal and intended only to function as a means of last resort.

Some 15 years later, the substantive elements of the original legislative regime remain, but viewed in the light of the outcomes sought by the Convention and contemporary principles of environmental management, they make inadequate provision for the protection and management of natural areas in Australia that have achieved the status of world heritage.

The recent *Hinchinbrook cases* before the Federal Court illustrate the deficiencies of the current regime as an overly technical and inflexible administrative regime that takes no account of contemporary environmental principles endorsed at the international level. The case also highlights the ad hoc nature of management arrangements made under the World Heritage Act and the difficulties faced by members of the public or environmental groups seeking to review decisions taken under the Act.

The deficiencies highlighted by the *Hinchinbrook cases* indicate the need for a comprehensive overhaul of the World Heritage Act to:

- replace the current inflexible and inconsistent administrative regime of all or nothing consents with a more flexible regime using management plans for different world heritage properties, or areas within the properties, as the primary regulatory tools;
- define the world heritage values of properties, including any aesthetic values to be protected and conserved;
- allow conditions dealing with engineering procedures, monitoring and rehabilitation obligations to be attached to decisions to permit activities in world heritage properties;
- establish a management regime with management authorities for each world heritage area with primary responsibility for the preparation and administration of management plans and activities permitted under them; and to
- increase the level of public involvement in world heritage protection, particularly by broadening the availability of merits review in respect of key decisions made and actions taken pursuant to the World Heritage Act.

These reforms should aim to mould the World Heritage Act into an effective protective and management tool for the achievement of the objectives of the

Convention.

In the coming century, international scrutiny will increasingly turn from the listing of properties to the monitoring of conservation efforts in accordance with the Convention[88]. Having committed ourselves to the utmost of our resources, nothing short of the global best might be expected from Australia in its treatment of world heritage areas in the future. The Commonwealth of Australia must take the initiative to put in place a system of international best practice for the protection and management of world heritage properties to ensure that we meet our duty to the international community to preserve areas of the heritage of humankind for the enjoyment of our children and our children's children.

88 Valentine (1997) op cit n 88.