

Delays in preparation of Heritage Strategies by Australian Government agencies

**IMPLEMENTATION OF SECTION 341ZA OF THE
*ENVIRONMENT PROTECTION AND BIODIVERSITY
CONSERVATION ACT 1999***

June 2009

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **09|2009**

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EXECUTIVE SUMMARY

In May 2008, the Commonwealth Ombudsman began an own motion investigation into the reasons for delays by Australian Government agencies in complying with section 341ZA of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act).

Section 341ZA of the Act requires all Australian Government agencies that 'own or control' a 'place' to prepare and submit a heritage strategy to the Australian Heritage Council.

The obligation in s 341ZA is not limited to places that have already been identified as having heritage values. Agencies must develop processes to identify whether any of the places they own or control may have any Commonwealth heritage values.

Both 'own and control' and 'place' are very broadly defined (see paragraph 1.2 of this report). For example, buildings leased by an agency are covered by the Act if the terms of the lease give an agency control over what happens to a building. Many Australian Government agencies are therefore potentially subject to the s 341ZA requirement.

When s 341ZA commenced operation on 1 January 2004, agencies were obliged to finalise their heritage strategies for places they owned or controlled by 1 January 2006. However, as of November 2007, only 11 Australian Government agencies had completed a heritage strategy.

This office investigated the apparently low level of compliance with s 341ZA and found that few Australian Government agencies were actually aware of their obligation to prepare a heritage strategy. This lack of awareness appears primarily to be the result of inadequate or unclear advice provided by the Department of the Environment, Water, Heritage and the Arts (DEWHA).

Our investigation found that only a small number of Australian Government agencies had received information from DEWHA about the requirement to prepare a heritage strategy.

Further, agencies that had been contacted by DEWHA did not have sufficient information to understand that all agencies that owned or controlled a place were required to prepare a strategy, or that the first step in preparing that strategy was to assess their places for potential heritage values. Rather, the majority of agencies interpreted the requirement to complete a strategy to apply only to places already included on the Commonwealth Heritage List.

There appeared also to have been a misconception about timeframes. Many agencies did not understand that only the *strategy* for identifying the Commonwealth heritage values (if any) of their places had to be finalised in the two-year timeframe. Instead, they believed that the strategy and the identification process itself had to be completed within that timeframe.

Several Australian Government agencies that were aware of their obligation to prepare a strategy, but which misunderstood what was required within the timeframe, cited a lack of resources as a reason for the delay in completing a strategy.

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Some agencies that owned or had control over places with both State/Territory and Commonwealth heritage values cited the duplication of processes as a reason for the delay in completing a Commonwealth heritage strategy.

Another reason related to a lack of compliance mechanisms under the Act. The investigation found that without compliance mechanisms, an agency was unlikely to allocate resources to the development of a heritage strategy or to make its completion a priority.

In spite of these circumstances, however, 11 agencies met their obligation to produce a heritage strategy within the required timeframe. These agencies were able to do so by assigning responsibility for developing the strategy to specific staff who reported directly to senior managers within the agency and liaised regularly with DEWHA.

This office provided a draft version of the investigation report, including draft recommendations, to DEWHA for comment. DEWHA expressed its appreciation for our interest in the matter and accepted all but one recommendation either in full or in part. Feedback provided by DEWHA helped in the refinement of the report and the recommendations.

The Commonwealth Ombudsman's final recommendations for improving the system are set out in Part 6 of this report.

PART 1—INTRODUCTION

1.1 In May 2008, the Commonwealth Ombudsman commenced an own motion investigation into the reasons for delays by Australian Government agencies in complying with s 341ZA of the Environment Protection and Biodiversity Conservation Act.

1.2 Section 341ZA of the Act requires each Australian Government agency which owns or controls¹ one or more places² to prepare a written heritage strategy for managing the place or places, in order to identify and conserve their heritage values.

1.3 A copy of the strategy must be given to the relevant Minister as soon as practicable, and in any event within two years of the later of the commencement of s 314ZA, or the date that the agency first owns or controls such a place. Section 341ZA commenced on 1 January 2004. Agencies were therefore obliged to finalise their heritage strategies, in relation to places they owned or controlled on that date, by 1 January 2006.

1.4 Agencies are obliged to consult with the Australian Heritage Council (the Council) in preparing their strategies. However, the Council's Periodic Report March 2004–February 2007 reported that, as at 16 February 2007, it had only reviewed strategies from nine agencies, eight of which had been completed within the statutory timeframe. The Council commented that the number of completed strategies was disappointing.

1.5 The Council subsequently advised this office that, as at November 2007, only 11 Australian Government agencies had completed a heritage strategy, three of which were finalised outside the statutory deadline; six Australian Government agencies were in the initial stages of drafting a heritage strategy; and 13 Australian Government agencies, believed by the Council to own or control places with Commonwealth Heritage values, had not yet commenced preparing a heritage strategy.

1.6 In April 2008, DEWHA provided this office with a list of twenty agencies that were believed to own or control places likely to have Commonwealth Heritage values, but which, as of November 2007, had not completed a heritage strategy.

1.7 Under s 5(1)(b) of the *Ombudsman Act 1976*, the Ombudsman may conduct an 'own motion' investigation into action taken by a department or prescribed authority. On the basis of the Council's Periodic Report, and these contacts with the

¹ Section 528 of the Act defines 'control' in the following terms:
A Commonwealth agency controls a place only if the agency has rights (whether arising under a law, lease, licence or otherwise) to:
(a) occupy or use the place; and
(b) take actions in relation to the place that could potentially have an impact on heritage values that the place may have.

² Section 528 defines 'place' to include:
(a) a location, area or region or a number of locations, areas or regions; and
(b) a building or other structure, or group of buildings or other structures (which may include equipment, furniture, fittings and articles associated or connected with the building or structure, or group of buildings or structures); and
(c) in relation to the protection, maintenance, preservation or improvement of a place—the immediate surroundings of a thing in paragraph (a) or (b).

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Council and DEWHA, the Ombudsman decided that it was in the public interest to conduct an own motion investigation to establish:

- the reasons for the delays in agencies preparing heritage strategies
- any barriers to agencies complying with their statutory obligations, and
- any possible strategies for overcoming these barriers.

PART 2—THE COMMONWEALTH HERITAGE PROTECTION SYSTEM

2.1 On 1 January 2004, amendments to the Act and the Environment Protection and Biodiversity Conservation Regulations 2000 (the Regulations) came into effect. These amendments established a new system for identifying and conserving the Commonwealth Heritage values of places under Australian Government ownership or control.

2.2 Central to this new system is the ‘Commonwealth Heritage List’. A place may be included in the Commonwealth Heritage List, if:

- the place is entirely within a ‘Commonwealth area’,³ or owned or controlled by the Commonwealth or a Commonwealth agency overseas, and
- the Minister is satisfied that the place has one or more Commonwealth Heritage values.⁴

2.3 A place has one or more ‘Commonwealth Heritage values’ if it meets one or more of the ‘Commonwealth Heritage Criteria’ prescribed in regulation 10.03 (see Appendix 2).

2.4 The Act sets out a detailed procedure for the Council to assess whether a place should be included in the Commonwealth Heritage List and make recommendations to the Minister.⁵

2.5 A place that has been included in the Commonwealth Heritage List is a ‘Commonwealth Heritage place’.⁶ Currently there are 339 Commonwealth Heritage places on the Commonwealth Heritage List, including places such as:

- The National Library of Australia and Surrounds
- Cape Byron Light House
- Kirribilli House
- Ashmore Reef National Nature Reserve.

³ Section 525 of the Act defines ‘Commonwealth area’ to mean each, and any part of, the following:

- (a) land owned by the Commonwealth or a Commonwealth agency (including land owned in Norfolk Island) and airspace over the land;
- (b) an area of land held under lease by the Commonwealth or a Commonwealth agency (including an area held under lease in Norfolk Island) and airspace over the land;
- (c) land in:
 - (i) an external Territory (except Norfolk Island); or
 - (ii) the Jervis Bay Territory; and airspace over the land;
- (d) the coastal sea of Australia or an external Territory;
- (e) the continental shelf, and the waters and airspace over the continental shelf;
- (f) the waters of the exclusive economic zone, the seabed under those waters and the airspace above those waters;
- (g) any other area of land, sea or seabed that is included in a Commonwealth reserve.

⁴ Section 341C(2).

⁵ It also provides for the Minister to make an emergency listing, prior to the assessment being undertaken: Part 15, Division 3A, subdivision BB.

⁶ Section 341C(3).

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2.6 The Act imposes a number of obligations on Commonwealth agencies in relation to Commonwealth Heritage places (that is, places already identified as having Commonwealth Heritage values).

2.7 For example, agencies that own or control Commonwealth Heritage places must make written management plans to protect and manage the places' Commonwealth Heritage values.⁷ These management plans must be consistent with the Commonwealth heritage management principles prescribed by the Regulations (see Appendix 3).

2.8 Agencies also must not take action that will adversely affect the Commonwealth Heritage values of a Commonwealth Heritage place unless there is no feasible and prudent alternative, and the agency takes all reasonable mitigation measures.⁸

2.9 However, not all places that may have Commonwealth Heritage values will necessarily have been assessed for the purpose of deciding whether they should be included in the Commonwealth Heritage List. Indeed, an agency may not even be aware of the heritage values of the places it owns or controls.

2.10 Sections 341ZA and 341ZB of the Act therefore also establish a process through which, over time, all Commonwealth places will be assessed to determine whether each place may have Commonwealth Heritage values, and for this to be reported to the Minister and the Council. This identification and reporting process enables the Council and Minister to more effectively prioritise and undertake formal assessments, and decide whether to include a place in the Commonwealth Heritage List.

2.11 Therefore, s 341ZA requires all Commonwealth agencies that own or control one or more places to develop a heritage strategy, in consultation with the Council.⁹

2.12 A heritage strategy is a written document integrating heritage management into the agency's overall property management framework. Its purpose is to help the agency to identify whether any property that it owns or controls has Commonwealth Heritage values, and if so, to conserve those values.

2.13 A key element of a heritage strategy is for the agency to institute a program for identifying the Commonwealth Heritage values of each place that it owns or controls, within the time frame specified in the strategy.¹⁰ The strategy must also include the matters prescribed by the Regulations¹¹ (see Appendix 4).

2.14 As mentioned earlier, s 341ZA requires a heritage strategy to be completed either by 1 January 2006, or within two years of the agency coming to own or control a place, whichever is the later.

2.15 However, the Act does not require the agency to have actually finalised the program for identifying whether any places it owns or controls have Commonwealth Heritage values within that two year timeframe. Rather, the strategy must simply

⁷ Section 341S; regulation 10.03B, schedule 7A.

⁸ Section 341ZC.

⁹ Section 341ZA(1A).

¹⁰ Section 341ZB(1)(a).

¹¹ Regulation 10.03E, schedule 7C.

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specify the timeframe within which this program will be completed.¹² Consequently, the Regulations provide:

A strategy must include ... an outline of the process for identifying and assessing the Commonwealth Heritage values of all agency property; [and] a statement of the time-frames for the completion of the agency's heritage identification and assessment program.¹³

2.16 The program for identifying and assessing the Commonwealth Heritage values of the agency's properties must comply with the requirements in the Regulations about this.¹⁴

2.17 Once the heritage identification and assessment program is complete, agencies must produce a register that sets out, for each place it owns or controls, the Commonwealth Heritage values, if any, for that place.¹⁵ Agencies must also provide a report on the identification and assessment program, and a copy of the Register, to the Minister.¹⁶

2.18 As noted above, agencies must prepare their heritage strategies in consultation with the Australian Heritage Council. The Council is an independent body of heritage experts established by the *Australian Heritage Council Act 2003*.

2.19 In relation to Commonwealth heritage, the Council's functions include:¹⁷

- nominating places for inclusion in the Commonwealth Heritage List
- assessing places for inclusion in the Commonwealth Heritage List
- advising the Minister on conserving and protecting places included, or being considered for inclusion, in the Commonwealth Heritage List
- advising the Minister on the monitoring of the condition of places included in the Commonwealth Heritage List
- providing advice to other bodies and agencies in relation to heritage matters.

2.20 Where an agency's report to the Minister mentioned in paragraph 2.17 indicates that a place may have one or more Commonwealth Heritage values, information from the report may be used or referred to in a nomination of the place for inclusion in the Commonwealth Heritage List.¹⁸

2.21 The Minister considers the places nominated by individuals and the Council for assessment, and determines which places will be assessed each year. The Minister then considers the Council's assessment and recommendations, and determines which places are to be included in the Commonwealth Heritage List. Assessments are conducted on an annual basis.¹⁹

2.22 DEWHA is responsible for administering the Act generally, and for maintaining the Commonwealth Heritage List.

¹² Subsections 341ZA(3)(b); 341ZB(1).

¹³ Item 2 of schedule 7C.

¹⁴ Section 341ZB(2)a); regulation 10.03G(1).

¹⁵ Section 341ZB(1)(b). The Register must contain the information specified in regulation 10.03G(2).

¹⁶ Section 341ZB(1)(c).

¹⁷ *Australian Heritage Council Act 2003* s 5.

¹⁸ Section 341ZB(5).

¹⁹ Section 341G.

PART 3—OUR INVESTIGATION

3.1 In early 2008, this office was concerned to read in the Council's Periodic Report 2004–2007 that a number of Australian Government agencies had not yet submitted a heritage strategy as required by the Act.

3.2 On the basis of the Council's Periodic Report and contact with the Council and DEWHA, in May 2008, the Ombudsman decided that it was in the public interest to conduct an own motion investigation to establish:

- the reasons for the delays in agencies preparing heritage strategies
- any barriers to agencies complying with their statutory obligations
- any possible strategies for overcoming these barriers.

3.3 On 26 June 2008, this office wrote to 16 agencies (see Appendix 1) identified by DEWHA as owning or controlling places likely to have Commonwealth Heritage values, but which, as of November 2007, had not completed a heritage strategy. We sought responses to the following questions:

1. Which Commonwealth Heritage places does your agency own or control, and the time at which your agency first owned or controlled each place?
2. Whether your agency has commenced work on a heritage strategy? If so, when did it commence and when is it expected to be completed? If not, when does your agency intend to commence work on a heritage strategy?
3. Whether your agency has commenced consultations with the Australian Heritage Council as required by s 341ZA(1A)? If so, when? If not, when will such consultation commence?
4. Which officer in your agency is responsible for preparing the heritage strategy?
5. What resources have been provided towards preparing a heritage strategy?
6. Has monitoring of progress towards completing a heritage strategy had been undertaken? If so, how?
7. Has your agency had any contact with the Heritage Division of DEWHA in relation to preparing its heritage strategy? If so, what was the nature of this contact?
8. Are there any specific factors that are operating as obstacles to the completion of a heritage strategy for each relevant site or your agency as a whole?

3.4 In the interest of establishing best practice examples for heritage strategies, the Ombudsman also wrote to the eight agencies that had completed their heritage strategy within the statutory time frame (see Appendix 1), to gain insights into their process for doing so. This office sought responses to the following questions:

1. How long did it take your agency to complete its heritage strategy? On what dates did work commence, and when was the strategy completed?
2. Did your agency encounter any particular problems or obstacles in the process of completing its heritage strategy? What were they, and were they caused by internal or external factors?

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3. What processes were in place to ensure the completion of a heritage strategy? How was the strategy's progress monitored?
4. Who was responsible for preparing the heritage strategy? What reporting and sign off procedures were in place? How frequently did reporting occur?
5. What process did your agency use to consult with the Council as required by s 341ZA?
6. What contact, if any, did your agency have with the Heritage Division of DEWHA in relation to preparing its heritage strategy?

3.5 This office also wrote to the Ministers responsible for each of the above agencies to inform them that we were conducting the investigation.

3.6 On the basis of responses received from the agencies contacted, we had further discussions with DEWHA, and sought copies of the information provided to Australian Government agencies in relation to the requirement to prepare heritage strategies.

3.7 We provided a draft version of this report, including draft recommendations, to DEWHA for comment. The department expressed its appreciation for this office's interest in the matter, and was generally supportive of our draft recommendations, accepting all but one of them either in full or in part. It provided a number of comments and suggestions which we found very helpful in refining our report and recommendations.

PART 4—ISSUES ARISING FROM THE INVESTIGATION

4.1 This office anticipated finding that agencies had a range of reasons why they had not been able to prepare a heritage strategy as required under s 341ZA. Instead, the main factor identified in our investigation was a lack of awareness of the existence of the obligation in the first place. This lack of awareness appears to be primarily the result of inadequate or unclear advice provided by DEWHA.

4.2 The other issues that we identified as contributing to the low level of compliance with the requirement on agencies to prepare heritage strategies under s 341ZA were:

- lack of understanding of the scope of the obligation
- overlapping responsibilities for heritage management
- resource constraints
- lack of reporting and compliance mechanisms.

4.3 Our investigation also identified three key factors common to those agencies that did achieve compliance with s 341ZA. These include: staff dedicated to the project, senior level reporting and close contact with DEWHA.

Lack of awareness of the obligation

4.4 Section 341ZA obliges all Australian Government agencies that own or control *any* places to develop a heritage strategy—that is, not just those agencies that own or control places already identified as having, or likely to have, Commonwealth Heritage values.

4.5 The obligation is therefore very wide, and potentially applies to all agencies. However, it appears that many agencies are unaware of their potential obligation under the Act.

4.6 This lack of awareness by most agencies is perhaps not surprising. Heritage management and protection is not part of their core business, and there is no reason why most agencies would necessarily be aware of the 2004 amendments to the Act.

4.7 As noted above, DEWHA is responsible for administering the Act generally. In this capacity, it conducted a limited awareness-raising campaign amongst Australian Government agencies, involving:

- February 2004—mail out to 12 agencies
- March 2004—a presentation by DEWHA to 16 agencies on their obligations under the new legislation
- May 2004—discussions with nine agencies
- November 2005—follow up letters to 15 agencies
- January and April 2007—mail out to another 12 agencies.

4.8 As DEWHA explained to this office, it concentrated on agencies that were most likely to own or control a place with Commonwealth heritage values. It based this assessment on the existing Commonwealth Heritage List:

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[T]he Department identified and prioritised contact with agencies it knew already had places on the Commonwealth Heritage List, and would therefore most likely be required to develop a strategy. The Department then broadened the scope of its contact to include other agencies which may or may not need to develop a strategy. It was up to individual agencies to advise this Department whether or not they had properties with any heritage values and whether or not they would need to prepare a heritage strategy. The contact by the Department by no means covered all Australian Government agencies, which numbered in their hundreds.

4.9 Whilst DEWHA's priorities are understandable, the fact remains that most Australian Government agencies are likely to remain unaware of the obligation to prepare a heritage strategy if they own or control any places.

4.10 In our draft report, we recommended that the department write to all agencies that own or control properties according to Department of Finance and Deregulation records (as we understood they had responsibility for whole of government asset management), explaining their obligation to prepare a heritage strategy.

4.11 In response, DEWHA pointed out that the Department of Finance and Deregulation does not maintain a central registry of which agencies own or control which places. However, it undertook instead to write to all portfolio departments. This would appear to be a useful step towards alerting agencies within those portfolios of the heritage strategy obligation.

Lack of understanding of the scope of the obligation

4.12 Most of the agencies contacted in the course of our investigation were aware of the general requirements of s 341ZA, but many were unsure or mistaken about the extent to which it applied to them. There were several reasons for this situation, including:

- lack of understanding that the obligation applies to all agencies that own or control any place
- lack of clarity of the meaning of 'own or control' (as outlined in the Act)
- lack of understanding of definition of 'agency'.

4.13 In this context, many agencies appear to have concluded that, as they did not own or control any Commonwealth Heritage places (ie properties already included on the Commonwealth Heritage List), they were not required to develop a heritage strategy.

4.14 To some extent, this misapprehension may have been encouraged by the fact that many elements required to be included in a heritage strategy (see Appendix 4) effectively assume that the agency's places do indeed have Commonwealth Heritage values. Indeed, on the face of it, some elements of the strategy, such as 'a plan and budget for the maintenance and long-term conservation of Commonwealth Heritage values', cannot effectively be developed prior to the identification process having been completed.

4.15 In our view, the elements required by the Regulations to be included in a heritage strategy should be revised to clarify that those elements that assume the existence of Commonwealth heritage values are only required to be included once places with such values have been identified.

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4.16 In its correspondence with those agencies it did contact, DEWHA does not appear to have made it sufficiently clear that all Australian Government agencies that own or control any places were required to prepare strategies, and that the first step in any such strategy was to assess all these places for any potential heritage values.

4.17 In response to DEWHA's awareness program, some agencies contacted the department and explained that as they did not own any Commonwealth Heritage places, they were not going to complete a strategy. It appears that these agencies received no further correspondence or advice from DEWHA to clarify the scope of the obligation.

4.18 As a result of this office's investigation, a number of other agencies informed this office that they have now contacted DEWHA explaining that they do not believe that they own or control any Commonwealth Heritage places, and therefore do not require a heritage strategy. Again, this demonstrates an incorrect understanding of the scope of the obligation.

4.19 Conversely, as a result of this office's investigation, some agencies have advised this office that they contacted DEWHA to clarify their obligations, and now understand their requirement to prepare a heritage strategy.

4.20 A lack of clarity around the meaning of 'own or control' also appears to have created confusion among those agencies contacted by DEWHA and this office, in particular those who lease property. As noted above, s 528 of the Act defines 'control' for the purposes of s 341ZA in the following terms:

A Commonwealth agency controls a place only if the agency has rights (whether arising under a law, lease, licence or otherwise) to:

- (a) occupy or use the place; and
- (b) take actions in relation to the place that could potentially have an impact on heritage values that the place may have.

4.21 Therefore, an agency that leases a property may or may not control it, depending on the terms of the lease. For example, the Attorney General's Department leases the Robert Garran Offices, the North Building of which is heritage listed. The terms of the lease prohibit the department from making any significant changes to the building, including any changes which may affect the building's heritage values, without consulting the landlord. It seems unlikely that an agency in this situation is required to prepare a heritage strategy for a building it leases.

4.22 Whether this is the case for all Australian Government agencies that lease premises depends on the specific terms of each agency's individual lease. Most commercial leases contain a clause that provides that the tenant cannot make substantial changes to the building without the owner's consent. Arguably, therefore, an agency that has such a lease lacks the right to take actions that could potentially have an impact on any heritage values that the place may have, and therefore does not 'control' the property for the purposes of s 341ZA.

4.23 Ultimately, however, the onus is on each agency that leases premises to be familiar with the terms of its lease, because of its relevance to whether the agency is required to prepare a heritage strategy.

4.24 Finally, in some cases, it appears that some statutory authorities were not aware that they are a 'Commonwealth agency' as defined by the Act. The definition

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of ‘Commonwealth agency’ in s 528 includes a body corporate established for a public purpose by a law of the Commonwealth. This clearly includes statutory authorities.

4.25 In response to our investigation, the Chief Executive of the High Court of Australia responded that his agency is neither within the Ombudsman’s jurisdiction, nor a ‘Commonwealth agency’ for the purposes of the Act.

4.26 In our view, the Chief Executive of the High Court is within this office’s jurisdiction in relation to action taken in heritage protection.²⁰ This office cannot investigate action taken by a Justice or Judge of a court created by Parliament, nor the actions of court administrative offices where they are exercising the powers of the court or powers of a judicial nature.²¹ However, the administrative actions of courts and tribunals are otherwise within the Ombudsman’s jurisdiction. As action taken with respect to heritage identification and conservation does not involve the exercise of the powers of the court or powers of a judicial nature, such action is not outside this office’s jurisdiction.

4.27 On the other hand, this office accepts the force in the High Court’s argument that it is not a ‘Commonwealth agency’ as defined by the Act, and is not therefore required by law to have a heritage strategy under s 341ZA, nor a heritage management plan under s 341S, even though the High Court building is included in the Commonwealth Heritage List. This would appear to be an oversight in the drafting of s 528.

4.28 In November 2007, the High Court–National Gallery precinct was also listed in the National Heritage List; as a consequence under s 324S the Environment Minister (rather than the Court) is now required to prepare a management plan for the precinct.

4.29 However, in our view, as a general principle where DEWHA becomes aware that an agency that owns or controls a place on the Commonwealth Heritage List is excluded from the definition of ‘Commonwealth agency’ for the purposes of the Act, then DEWHA should seek an amendment to the Act to bring the agency within the Act’s coverage.

Overlapping responsibilities for heritage management

4.30 In a number of cases, the agency which DEWHA had contacted in relation to a particular building on the Commonwealth Heritage Register was not, in fact, responsible for managing that building. For example, a number of Canberra buildings are managed by the National Capital Authority (NCA), or the Department of Finance and Deregulation, even though they are leased or occupied by other agencies.

4.31 It is unclear, for example, whether the NCA’s completion of a heritage strategy, in relation to a place occupied by another agency, satisfies the occupying agency’s obligation under s 341ZA, or whether that agency is still required to have its own strategy. Some requirements of the strategy, such as providing heritage training for its staff, arguably remain the responsibility of the occupying agency.

²⁰ See paragraph (bb) of the definition of *prescribed authority* and the definition of *chief executive officer of a court or tribunal* in s 3 of the Ombudsman Act.

²¹ Paragraphs 5(2)(b) and (ba) of the Ombudsman Act.

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4.32 Further confusion around the responsibility for some places may have arisen following the November 2007 change of government, which resulted in the restructure of a number of portfolios and physical movement of agencies.

4.33 The Commonwealth Heritage List does not currently identify which agency has responsibility for each of the listings. DEWHA considers that the Act places the onus on each Australian Government agency to identify which of the properties that it owns or controls have heritage values. DEWHA has explained that it considers this to be an internal process and that DEWHA has no way of independently establishing which properties with heritage values are owned or controlled by which agencies. This has contributed to confusion around which agencies are responsible for which places on the List, and which agencies were contacted about their obligations to prepare a heritage plan.

4.34 In the view of this office, establishing the agency responsible for each of the places on the Commonwealth Heritage List, and maintaining this information, would be valuable in administering ss 341ZA and 341S of the Act. This information would facilitate effective communication between DEWHA and the agencies responsible for particular sites, encouraging compliance.

4.35 In our draft report, we therefore recommended that DEWHA should establish the agencies responsible for places currently on the Commonwealth Heritage List and maintain this information as part of the List.

4.36 DEWHA did not accept this recommendation, citing the practical difficulties involved given that ‘the ownership and control of Commonwealth properties is dynamic and changing, with properties being disposed of, leased or acquire constantly’, and also that (as discussed above) there is no central registry of Commonwealth properties.

4.37 We acknowledge the force of DEWHA’s response. We note, too, that not all places eligible for inclusion on the Commonwealth Heritage List are owned or controlled by any Commonwealth agency. These places qualify for inclusion because they are located in an external Territory, the coastal sea of Australia, or Australia’s ‘exclusive economic zone’. Such places may either be privately owned, or have no ‘owner’ at all.

4.38 In light of these considerations, we have not proceeded with this recommendation.

Resource constraints

4.39 A number of agencies that have a large number of properties considered that the timeframes for completing a heritage strategy were unreasonable. Similarly, a number of agencies cited a lack of sufficient resources—staffing and budget—to complete a heritage management strategy in the required time. DEWHA also suggested the potential cost of completing a strategy as a reason for delays in compliance. Nonetheless, it is notable that a number of agencies, both large and small, did meet the statutory deadline.

4.40 Few agencies appear to have understood that the strategy needed only to set out a process for assessing the Commonwealth heritage values of their places within a specified timeframe, rather than them having to complete that process within two years. The Department of Defence, for example, has identified a longer term strategy to assess all of its places, region by region. Once a strategy of this nature is in place,

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the cost of meeting an agency's commitments under the Act can be included in the agency's forward planning, and budgeted for over several years if necessary.

4.41 Several agencies that have completed heritage management strategies stated that they could have completed the strategy within a shorter timeframe had they had further information from DEWHA about what was required, over and above the requirements stated in the Regulations. In particular, they identified a need for a template and/or best practice examples.

4.42 The draft report we provided to DEWHA for comment included a recommendation that they make available a guide to assist agencies in complying with the Act, including clear guidelines, templates, and best practice examples.

4.43 DEWHA accepted this recommendation in part. It advised that in 2004 it published a guide, 'Heritage Strategies—A guide for Commonwealth agencies' in hard copy and on its website, which 'provides a clear and comprehensive explanation of the requirements for a heritage strategy'.

4.44 DEWHA further explained that this guide did not currently include templates or best practice examples 'as the Department had not wanted to restrict agencies in determining the structure and format of strategies' and 'the format and structure employed by one agency in completing its strategy was not necessarily the best or only format'.

4.45 However, DEWHA agreed that, at this point in time, a broad template and best practice examples would be useful. It undertook to prepare a template to be included in the guide, and to 'seek permission from exemplar agencies to make their completed heritage strategy available to other agencies'.

4.46 In addition, the guide should be reviewed to ensure that it makes it clear that, as discussed above, the obligation to prepare a strategy rests on all agencies that own or control any places, not only those that own or control places with heritage values.²²

4.47 In their responses to our investigation, a number of agencies cited issues of duplicated or parallel heritage requirements at State/Territory and Commonwealth level that contributed to a delay in completing a heritage strategy.

4.48 The Australian Rail Track Corporation (ARTC), for example, was mid-way through completing a heritage plan to comply with NSW heritage obligations when it commenced its Commonwealth heritage strategy in compliance with the Act. The ARTC found a number of inefficiencies and duplication of processes in dealing with legislative obligations at both the Commonwealth and State level, which led to a delay in producing a strategy. Eventually, the ARTC reached an ad hoc agreement with State and Commonwealth heritage agencies to streamline a number of processes.

4.49 This office considers that duplication of heritage requirements at State/Territory and Commonwealth levels is undesirable. It is inefficient and costly, both for the agencies affected by dual obligations, and those agencies responsible for administering them. The 2004 amendments to the Commonwealth heritage

²² For example, DEWHA's guide to writing a heritage strategy at www.environment.gov.au/heritage/management/commonwealth/strategies/writing.html opens with a statement that suggests that only agencies that own or control places with heritage values must prepare a heritage strategy.

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system were, in part, intended to reduce duplications of this nature. It may be that further amendments need to be made to current legislation to streamline heritage management processes for Commonwealth agencies.

Lack of reporting and compliance mechanisms

4.50 No practical mechanism currently exists for ensuring that Australian Government agencies comply with their obligations under s 341ZA.

4.51 Agencies that are obliged to prepare a heritage strategy are obliged to consult with the Council, and to provide a copy of their strategy to the Minister within the time specified in s 341ZA(1). DEWHA and the Council are therefore aware of which agencies are preparing or have completed a strategy, and in order to encourage agencies to comply, the Council has adopted the practice of publishing the names of those agencies that have completed a heritage strategy on its website.

4.52 Of the many other agencies, however, neither DEWHA nor the Council have any way of knowing whether a particular agency is obliged to prepare a strategy. Even where an agency is known to occupy a Commonwealth Heritage place, for example, it may not 'control' that place for the purposes of the Act, as the example of the Robert Garran building given earlier demonstrates (see paragraph 4.18).

4.53 In our view, where agencies consider that they are not obliged to prepare a heritage strategy, it would be beneficial if the Act nevertheless obliged them to report this conclusion to the Minister. This would provide a mechanism by which DEWHA could identify both agencies that were mistaken in this regard, and those agencies that appeared (through their silence) to be unaware of the requirements of s 341ZA.

Keys to success

4.54 Our investigation identified three key factors that contributed to the successful completion of a heritage strategy within the statutory timeframe:

- assigning dedicated staff member(s) to complete the project
- reporting at a very senior level within the agency
- working closely with DEWHA.

4.55 Assigning dedicated staff members to completing the strategy ensures that individuals are assigned responsibility for the project and are not forced to juggle competing priorities. Reporting at a sufficiently senior level ensures executive management awareness of relevant issues, and authority for completing the project. The combination of dedicated officers and senior executive reporting also demonstrates a high level of priority and commitment to completing the strategy to all staff.

4.56 A third factor that contributed to the successful completion of the strategy by agencies was close consultation with DEWHA. This communication ensured agencies had a thorough understanding of what was required. It is unfortunate that it appears to have been largely up to the agencies completing strategies to initiate communication with DEWHA.

4.57 The Bureau of Meteorology for example, completed its strategy within eight months. An SES Band 1 officer was responsible for the strategy, assisted by a project officer. The team reported to the Bureau executive on a monthly basis, and the final draft document was signed off by the agency head. The Bureau also

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consulted DEWHA on a regular basis and sought comments on the final draft of its strategy prior to submitting it formally.

4.58 This office is of the view that a similar approach should be taken by all remaining Australian Government agencies and that these factors could be included in the best-practice information which DEHWA provides to agencies.

PART 5—CONCLUSIONS

5.1 This office's investigation established that few Australian Government agencies are aware of their obligation to prepare a heritage strategy. This lack of awareness appears to be primarily the result of inadequate or unclear advice provided by DEWHA.

5.2 Only a small number of Australian Government agencies received information about the requirement to prepare a heritage strategy. Those Australian Government agencies that were contacted did not receive sufficient information to understand that all agencies that own or control a place are required to prepare a strategy, and the first step in preparing that strategy is to assess its places for potential heritage values. Rather, the majority of agencies interpreted the requirement to complete a strategy to refer only to places already on the Commonwealth Heritage List.

5.3 There appears to have been a further misconception that the process of identifying which places had Commonwealth heritage values itself had to be completed within two years, rather than simply adopting a strategy including a timeframe for this process to occur. A number of Australian Government agencies that were aware of their obligation to prepare a strategy, but who misunderstood what was required within the timeframe, cited a lack of resources as a reason for the delay in completing a strategy.

5.4 Agencies with places with both State/Territory and Commonwealth heritage values cited the duplication of processes as a reason for the delay in completing a Commonwealth Heritage Strategy.

5.5 This office's investigation also identified a lack of compliance mechanisms under the Act as a further reason for the delays in complying with the requirement to prepare a heritage strategy.

5.6 That 11 agencies were able to complete heritage strategies in these circumstances, however, is commendable and indicates that the above impediments are not insurmountable. Key factors for the success of these agency's strategies appear to be a dedicated staff member(s) responsible for the project, reporting at a high level within the agency, and regular liaison with DEWHA.

PART 6—RECOMMENDATIONS

6.1 On the basis of this investigation, I make the following recommendations:

Recommendation 1

The Department of the Environment, Water, Heritage and the Arts should revise its guide for Australian Government agencies on preparing heritage strategies to make it clear that the obligation rests on all agencies that own or control any places, and to include templates and best practice examples.

Recommendation 2

The Department of the Environment, Water, Heritage and the Arts should write to all Australian Government departments, alerting them to the obligation under s 341ZA resting on all agencies within their portfolio that own or control properties, to prepare a heritage strategy. The explanation should clarify the scope of the obligation; the meaning of ‘control’, particularly in relation to leased property, and the circumstances in which an agency that only leases property may nevertheless be required to complete a heritage strategy; and the meaning of ‘Commonwealth agency’ for the purposes of the Act.

Recommendation 3

The Department of the Environment, Water, Heritage and the Arts should review the required elements of a heritage strategy (set out in schedule 7C of the Regulations), to clarify that the elements which assume the existence of Commonwealth heritage values only need to be addressed if and when a place has been identified as having heritage value.

Recommendation 4

The Department of the Environment, Water, Heritage and the Arts should consider whether the following amendments to the Act are required:

- the definition of ‘Commonwealth agency’ in s 528, as necessary to ensure that the definition includes all agencies that own or control places included in the Commonwealth Heritage List
- provisions to ensure that Commonwealth agencies are not subject to overlapping Commonwealth and State/Territory heritage obligations
- a provision that where agencies conclude that they are not obliged to prepare a heritage strategy, they must report this conclusion to the Minister.

Recommendation 5

Either the Australian Heritage Council or the Department of the Environment, Water, Heritage and the Arts should publish on its website up-to-date lists of those agencies that have reported that they are not required to prepare a strategy, as well as of those agencies that have finalised their heritage strategies.

Recommendation 6

The Department of the Environment, Water, Heritage and the Arts should undertake a review of the progress of Australian Government agencies in completing heritage strategies within 18 months of the publication of this report, and provide a report of the review to the Minister and the Commonwealth Ombudsman.

APPENDIX 1—AGENCIES CONTACTED AS PART OF INVESTIGATION

Agencies with heritage strategies outstanding

Ombudsman letter to the following agencies on 26 June 2008	Response to Ombudsman's letter dated
Attorney General's Department	9 July 2008
Australian Federal Police	24 July 2008
Australian Government Solicitor	7 July 2008
Australian Heritage Council	22 July 2008
Australian National Maritime Museum	19 August 2008
Australian Rail Track Corporation	11 July 2008
Australian Sports Commission	23 July 2008
Civil Aviation Safety Authority	23 July 2008
Department of Education, Employment and Workplace Relations	29 September 2008
Department of Families, Housing, Community Services and Indigenous Affairs	6 August 2008
Department of Immigration and Citizenship	12 August 2008
The Treasury	23 July 2008
Department of Veterans Affairs (Office of Australian War Graves)	10 July 2008
Family Court of Australia	12 July 2008
High Court of Australia	7 August 2008
National Museum of Australia	18 July 2008
National Portrait Gallery	No Response

Agencies with heritage strategies completed within the statutory timeframe

Ombudsman letter to the following agencies on 26 June 2008	Response to Ombudsman's letter dated
Air Services Australia	29 July 2008
Bureau of Meteorology	28 July 2008
Department of Defence	9 July 2008
Department of the Environment, Water, Heritage and the Arts	27 August 2008
Department of Infrastructure, Transport, Regional Development and Local Government	No Response
Great Barrier Reef Marine Park Authority	27 July 2008
National Capital Authority	14 August 2008
Sydney Harbour Federation Trust	24 July 2008

APPENDIX 2—COMMONWEALTH HERITAGE CRITERIA

10.03A—Commonwealth Heritage criteria (s 341D)

- (1) For section 341D of the Act, sub-regulation (2) prescribes the Commonwealth Heritage criteria for the following:
- (a) natural heritage values of places
 - (b) indigenous heritage values of places
 - (c) historic heritage values of places.
- (2) The Commonwealth Heritage criteria for a place are any or all of the following:
- (a) the place has significant heritage value because of the place's importance in the course, or pattern, of Australia's natural or cultural history
 - (b) the place has significant heritage value because of the place's possession of uncommon, rare or endangered aspects of Australia's natural or cultural history
 - (c) the place has significant heritage value because of the place's potential to yield information that will contribute to an understanding of Australia's natural or cultural history
 - (d) the place has significant heritage value because of the place's importance in demonstrating the principal characteristics of:
 - (i) a class of Australia's natural or cultural places, or
 - (ii) a class of Australia's natural or cultural environments
 - (e) the place has significant heritage value because of the place's importance in exhibiting particular aesthetic characteristics valued by a community or cultural group
 - (f) the place has significant heritage value because of the place's importance in demonstrating a high degree of creative or technical achievement at a particular period
 - (g) the place has significant heritage value because of the place's strong or special association with a particular community or cultural group for social, cultural or spiritual reasons
 - (h) the place has significant heritage value because of the place's special association with the life or works of a person, or group of persons, of importance in Australia's natural or cultural history
 - (i) the place has significant heritage value because of the place's importance as part of indigenous tradition.
- (3) For sub-regulation (2), the **cultural** aspect of a criterion means the indigenous cultural aspect, the non-indigenous cultural aspect, or both.

APPENDIX 3—COMMONWEALTH HERITAGE MANAGEMENT PRINCIPLES

- 1 The objective in managing Commonwealth Heritage places is to identify, protect, conserve, present and transmit, to all generations, their Commonwealth Heritage values.
- 2 The management of Commonwealth Heritage places should use the best available knowledge, skills and standards for those places, and include ongoing technical and community input to decisions and actions that may have a significant impact on their Commonwealth Heritage values.
- 3 The management of Commonwealth Heritage places should respect all heritage values of the place and seek to integrate, where appropriate, any Commonwealth, State, Territory and local government responsibilities for those places.
- 4 The management of Commonwealth Heritage places should ensure that their use and presentation is consistent with the conservation of their Commonwealth Heritage values.
- 5 The management of Commonwealth Heritage places should make timely and appropriate provision for community involvement, especially by people who:
 - (a) have a particular interest in, or associations with, the place, and
 - (b) may be affected by the management of the place
- 6 Indigenous people are the primary source of information on the value of their heritage and that the active participation of indigenous people in identification, assessment and management is integral to the effective protection of indigenous heritage values.
- 7 The management of Commonwealth Heritage places should provide for regular monitoring, review and reporting on the conservation of Commonwealth Heritage values.

APPENDIX 4—COMMONWEALTH HERITAGE STRATEGIES

- 1 A strategy must include general matters, including the following:
 - (a) a statement of the agency's objective for management of its heritage places
 - (b) a description of how the heritage strategy operates within the agency's corporate planning framework
 - (c) a list of key positions within the agency, the holders of which are responsible for heritage matters
 - (d) an outline of a process for consultation and liaison with other government agencies on heritage matters
 - (e) an outline of a process for consultation and liaison with the community on heritage matters, including, in particular, a process for consultation and liaison with indigenous stakeholders on indigenous heritage matters
 - (f) an outline of a process for resolution of conflict arising from the assessment and management of Commonwealth Heritage values
 - (g) an outline of processes for monitoring, reviewing and reporting on the implementation of an agency's heritage strategy.

- 2 A strategy must include matters relating to the identification and assessment of Commonwealth Heritage values, including the following:
 - (a) an outline of the process for identifying and assessing the Commonwealth Heritage values of all agency property
 - (b) a statement of the time-frames for the completion of:
 - (i) the agency's heritage identification and assessment program, and
 - (ii) the agency's register of places and their Commonwealth Heritage values, and
 - (iii) the agency's report to the Minister, that includes details of the program and a copy of the register.

- 3 A strategy must include matters relating to the management of Commonwealth Heritage values, including the following:
 - (a) a description of how the agency's heritage places register will be maintained, updated and made accessible to the public
 - (b) a statement of the time frame for the preparation of management plans for the agency's Commonwealth Heritage places
 - (c) an outline of the existing use, by the agency, of places with Commonwealth Heritage values
 - (d) an outline of current or expected development, works, disposal or other proposals that may affect Commonwealth Heritage values
 - (e) an outline of the process to ensure that Commonwealth Heritage values are considered in the agency's planning for future development, works, divestment or other proposals

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- (f) a plan and budget for the maintenance and long-term conservation of Commonwealth Heritage values
- (g) an outline of the process by which the success of the agency in conserving Commonwealth Heritage values will be monitored and reviewed.

4 A strategy must include matters relating to Commonwealth Heritage training and promotion, including the following:

- (a) a program for the training of agency staff about Commonwealth heritage obligations and best practice heritage management
- (b) a program for promoting community awareness of Commonwealth Heritage values, as appropriate.

ABBREVIATIONS AND ACRONYMS

ARTC	Australian Rail Track Corporation
DEWHA	Department of the Environment, Water, Heritage and the Arts
s	section
the Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
the Council	Australian Heritage Council
the Regulations	Environment Protection and Biodiversity Conservation Regulations 2000