

Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*

Summary

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Date:

(date of your submission) 30 July 2009

Which chapter(s) of the interim report are you commenting on?

Chapters 11, 19, 21, 22

Key points of submission

(please identify up to three main priorities or focal points of your submission):

Action is needed to:

- streamline the listing and assessment processes, make them more transparent to the public,
- engage in a national conversation on our heritage values,
- continue to separate listing from management considerations,
- ensure Commonwealth agencies protect all heritage values on their properties,
- give greater independence to the AHC to list heritage places and to monitor the condition of our heritage values, and
- ensure adequate resourcing for these tasks.

References (if possible, include a bibliography of any documents you may wish to make available)

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Comments on the interim report of the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*

In my submission to the Hawke Review, I concluded that Heritage is the Cinderella of the EPBC Act 1999, a later addition [2003] to the omnibus legislation and one that does not fit in neatly with the considerations of environmental regulation::

- The EPBC Act is too complex [932 pages], too inaccessible.
- Processes for listing heritage places and their management plans are convoluted and not easy to follow.
- There have been very few applications of the EPBC Act provisions to conserve historic heritage places.

I asked that the review consider the role of the legislation in the broader Commonwealth approach to Australia's heritage, in particular the *Australian Heritage Council Act 2003*.

- The heritage provisions should be reworked into a stand-alone piece of legislation.
- Information on the Departmental website and the AHC page dealing with applications and notifications is complicated and not user friendly.
- The Commonwealth has adopted a very narrow and exclusively statutory role regarding Australia's heritage concentrating on listing.
- The integrity of the listing process is based on a clear understanding of heritage values, not on selecting the heritage values that are compatible with some management scenarios.
- The purpose of the National Heritage list is not fully clear to the public nor is the criteria for deciding on those 'of outstanding value to the nation'.
- The broad reaching national conversation has failed and only limited progress has been made on this thematic based exercise - not all eight thematic studies already undertaken have been made public to assist in the nomination process.
- The recent Priority Assessment List process is unreasonably inflexible.
- The greatest failure has been in relation to nominations of Commonwealth Heritage places; there is no formal link between Commonwealth agency strategies and nominations to the CHL.
- Commonwealth heritage strategies have not been completed in the statutory time by many agencies.
- There has been no comprehensive review of the adequacy of agency management plans for NHL and CHL places and their implementation.
- There is a national heritage protocol but no national heritage strategy to guide the application of the COAG principle of subsidiarity.
- Plans to terminate the RNE as a statutory list in 2012 will obliterate the public investment in building up the asset over 30 years
- Heritage values on airports and parts of the national capital in Canberra are not protected.
- Formal reporting process on the overall state of the conservation of the nation's cultural and natural heritage is a major deficiency and the independent AHC should be directed to report under s.24A of its Act.

- AHC's role as an active, public, independent and expert champion for heritage needs to be strengthened –by access to increased and expert resources, by more involvement in public debate about heritage conservation, by making the NHL and CHL listing decisions.
- For Indigenous heritage there is an opportunity to harmonise the various legislative requirements and for joint management to extend involvement of those with traditional ties.

All of these issues have been considered to some extent by the Review team –thanks.

Some issues can be grouped together and I wish to concentrate on the following:

- Listing and assessment
- Commonwealth heritage place protection
- Monitoring and reporting.

1. The Review had as its first key point in Chapter 11 that: There is scope for the assessment and listing processes for National and Commonwealth Heritage to be simplified and made more transparent.

The primary role of the AHC is to advise the Minister on whether nominated places had heritage values 'of outstanding value to the nation' that merited their protection by listing them under the Act and whether Commonwealth owned places have heritage values worthy of protection under the Act. The provisions for National and Commonwealth Heritage Places are nearly parallel yet this appears to weight them in a similar manner and one has to go to the Regulations to see the real detail of listing criteria. The thresholds for listing are quite different –this needs to be made obvious.

At the commencement of the Act, many nominations were from people 'jurisdiction jumping' in an attempt to save a favourite, often local place. Added to this was the Minister's announcement that we would consider all nominations –and many were made without any understanding of what constituted or was likely to constitute 'outstanding heritage value to the nation.'

'National heritage defines the critical moments in our development as a nation and reflects achievements, joys and sorrows in the lives of Australians. It also encompasses those places that reveal the richness of Australia's extraordinarily diverse natural heritage' (AHC Periodic report, 2007, p.14). Given this definition, the public needs to be aware of this combination of outstanding values and their expression in a place via a broad reaching national conversation. This requires information for story telling about the place, views on those stories or themes in that place and their associations with other places such as in museum collections, art galleries or archives, and protection of those values in those places.

The primary purpose at the time of public discussions on the new system was not seen to be the need for another layer of protection, as most of the anticipated listings were likely to already be protected under State or Territory heritage legislation. This is in deed the fact in most cases, but the national conversation has been silenced for want of commitment and resources and appropriate resources in all types of media in favour of a very bureaucratic and narrow role of listing places.

In an ideal world of informed nominees, the thematic approach would prevail so that the whole nation could participate in a theme development and see where their local place fitted in and be part of the celebration when only one or two places reached the national threshold for listing as occurred with the theme of 'Charting the Coastline' in 2006, the 400th anniversary of the Dutch exploration and landings on the Australian coast and which resulted in publication of a thorough theme report in 2005 (*The Great South Land: the maritime exploration of Terra Australis*) and nominations to the NHL – Recherche Bay, Batavia Shipwreck Site and Survivor Camps Area 1629-Houtman Abrolhos and Dirk Hartog Landing Site 1616-Cape Inscription Area, Point Nepean and North Head Sydney.

Only limited progress has been made on our thematic journey and eight thematic studies already undertaken have not all been made public to assist in the nomination process. Publishing these would add to both popular and scholarly debate. The thematic approach has not had a fair trial with only one theme –how else do you organise a national conversation if not by theme as the topic for debate ? [e.g. convict role in building Australia]. Yet this also has to be balanced with public nominations which may deserve priority attention but not merit emergency listing –hence the priority assessment of some of Australia's iconic places like Eureka, Myall Creek, Broken Hill, Ediacra. The use of a national theme allows the Minister to seek nominations that may address gaps in the NH List.

The AHC recommended to the Hawke Review that the Act should preserve a role for the Council in this respect, specifically, that the Act be amended to limit the Minister's ability to set a theme to those instances where the AHC has provided advice and that there should be a rolling program of these three years ahead (19.58). This is to ensure a worthwhile time for the national conversation on this theme.

11.19. As the Minister's expert body, the AHC considers only the heritage significance of places in its assessment of places for both the National and Commonwealth Heritage Lists. The Minister receives the AHC assessment and decides whether or not to list a place.

The Minister should only consider the heritage significance of places when deciding to accept the advice of AHC for listing a nominated place. The EPBC Act currently allows the Minister to consider a range of factors in listing decisions, not just heritage significance.

This key issue has a long history and there is a 30 year record of failures to appreciate and separate decisions on heritage significance from those on managing that significance in a place, dramatically as first with the listing of Fraser Island on the RNE. The integrity of the listing process is based on a clear understanding of heritage values, not on selecting the heritage values that are compatible with some management scenarios. This principle has been long recognised and is supported through the nationally and internationally acknowledged Australia ICOMOS *Burra Charter* (available at <http://www.icomos.org/australia/>). The AHC in December 2004 endorsed the 2004 version of *The Illustrated Burra Charter* in accordance with section 5(e) and (h) of the AHC Act.

Listing problems under the EPBC Act provisions because of management issues have been apparent in a number of cases including the Belconnen Naval Transmission

Station and Cameron Offices both in the ACT, and the listing of sites on Norfolk Island or twentieth century modern architecture in the Sydney CBD.

Listing decisions following the best practice process in the Burra Charter are the objective results of deliberations by an expert group arriving at a statement about the heritage values of significance in that place, and implying a hope that protection and conservation can be achieved –except in cases like the extraordinary cost of salvaging the wreck of the *HMVS Cerberus*. Many factors influence management, and these change over time. The appropriate mechanism to address such factors is the development approval/ environmental impact process, as is the case for example in Victoria.

11.20 Under the EPBC Act heritage listing brings with it significant potential impacts on property rights and serious penalties for non-compliance. The current listing system is grounded on the concept that if such statutory protections are to be extended then these decisions should be made by the Minister. The alternative view point is that the existence or not of heritage value is best treated as a matter of expert analysis and judgment and therefore listing should be undertaken by an independent body at arms length from government and politics.

From my experience I am in favour of the expert body undertaking the listing in a more transparent process. The Minister can then use the EPBC Act provisions for management and protection of the heritage values. In this way assessment of heritage values is not influenced by management implications and we are more likely to build an understanding in the Australian public of what values are expressed in our heritage places.

In the Review's chapter 19 –*Governance and Decision Making*, at 19.56 the AHC argued that the current approach under the EPBC Act, which separates listing decisions and management responses for World, National and Commonwealth Heritage, represents an important heritage conservation principle. And while they supported a continuation of this approach, they wanted the Minister to continue making the listing decision while they had sole responsibility for calling for nominations and determining the priority assessments lists for National and Commonwealth Heritage. However, the Australian Council of National Trusts (ACNT) and numerous other submitters recommended [19.57] that the AHC be made solely responsible for decisions about listing National and Commonwealth Heritage places. The ACNT also recommended that the AHC be given greater capacity to initiate activities, and lead or contribute to public debate about heritage issues, and that any such expansion of responsibilities be adequately supported by dedicated funding and increased heritage-trained staff resources.

11.22... While the 2006 amendments to the Act attempted to provide a more open and consultative approach, more may need to be done to include greater public participation and transparency [in the assessment and listing of nationally significant places]. The current system is also quite complex; more may need to be done to simplify the process. However, the price of simplification may be increased flexibility that in some quarters will be perceived negatively.

The general public, applicants, students etc are confused by the flow chart of spaghetti-like processes for listing and protection, and hence there is little detailed

understanding of actual or potential operations. Potential listings are advertised at great cost in the national newspaper, *The Australian*, but except for the high profile ones for Burrup Peninsula or Recherche Bay, there were often no comments –unlike endangered species notifications where there is also a well organized and resourced NGO examining the ongoing processes. The AHC website does not publish the initial assessments of potential NHL or Commonwealth Heritage List (CHL) places for comment. Simply doing this would at least allow for a broad range of comments over a longer period possibly soliciting new historical or aesthetic information, and in the process educating the public about what are likely ‘heritage values of outstanding significance to the nation.’

As a way of providing greater transparency, the AHC proposed that the Act be amended to require the Council to maintain a publicly available list of all of its recommendations made to the Minister about nominations for heritage listings under the Act (at 19.61). This list could serve as a concise public record of the Council’s recommendations, which the AHC noted are based purely on an assessment of the heritage values of the nominated place. The Hawke Review acknowledged that there is a need for greater public access to heritage information, but the issue of whether all listing advices provided to the Minister by the AHC should be published on the Internet is a matter which requires further deliberation (19.68).

The Review also noted at 11.113, that the ‘theory’ behind the EPBC Act which resulted in a single piece of environmental legislation has a powerful logic. ‘On the other hand, if complexity is significantly reducing the effectiveness of the Act then this may justify a range of changes and challenge the current format of the Act. There seems little doubt that having the heritage provisions located in numerous parts of an otherwise large Act makes it much harder to understand.’

2. Commonwealth heritage place protection

The Commonwealth Heritage List differs from its National counterpart in that it is the only level of heritage protection available to places within the Commonwealth’s control. It thus has a very different purpose to the NHL, despite the similarity in the listing process. Commonwealth legislation needs to be able to address all levels of heritage under its jurisdiction from local through to World Heritage level.

The greatest failure has been in relation to nominations of Commonwealth Heritage places to the CHL. The initial list comprised 332 places and a further eight were added by 2007 –mostly from the jurisdictional mix up with Queensland located places not being eligible for the Queensland Heritage Register and being renominated for the CHL. However, this is far cry from the recommendations of the Schofield Review of 1996 into Commonwealth Owned Heritage Properties which led to these provisions so that the Commonwealth would for the first time be responsible and accountable for managing its own heritage places.

As noted by the Review at 11.82, these agency heritage strategies formed the basis of the Commonwealth heritage amendments to the Act in 2004. They were intended to provide a sound basis for transparent and enhanced heritage conservation and management outcomes by the Commonwealth on behalf of the Australian community. While there has been some review of the operation of the Commonwealth Heritage

provisions of the Act, submissions argue that more could be done to examine their effectiveness and compliance. The AHC suggested that a number of Commonwealth agencies are not meeting their requirements under the Act or taking a whole-of-government approach to heritage.

There are approximately 130 ‘stranded’ places awaiting transfer from the RNE to the CHL –presumably due to lack of resources and will to tackle fellow government agencies like the feisty Defence Department. Only two places have been announced by the Minister as being assessed this current year –both high profile media attention sites –HMS *Sydney* and HSK *Kormoran* sites. The complex Priority Assessment List process was designed to fix problems with the NHL and there is no evidence it is required for Commonwealth Heritage, which has a lower assessment threshold.

In addition, there is no formal link between Commonwealth agency identification and survey work (mostly undertaken by consultants and representing a considerable expenditure) and nominations to the CHL, the assessment of which is undertaken by Departmental staff who are overloaded by non-listing work on other processes relating to operation of the EPBC Act and not referable to the AHC as with advice under the former Commission. Agencies must give reports to the Minister about potential heritage places but there is no formal link to ensure these reports result in listings. This must be rectified. Nor is there a simple link made to update listing details on the basis of accepted management plans (eg. a conservation management plan approved under the Act by the Minister might develop a superior statement of significance for a listed place but changing the actual listing still involves an unnecessarily complex process).

As mentioned previously there is no publicising of the AHC’s assessments which should be automatically posted whenever the Minister’s statement of reasons are posted (eg. on the EPBC website, and ideally as part of the AHDB citation). If these assessments were transparent there might be greater call for protection of CHL places as these are often held in high esteem by locals who are confused by privatisation or not of these places once their primary function has changed, eg. from barracks to another use or post office to store.

The Review at 11.98 noted that Commonwealth agency heritage registers (required as part of an agency heritage strategy), although in an early phase of development, might be expected to mirror the CHL itself, over time. In this case, there would also appear scope to consider simplification. The AHC recommended that agency strategies be linked to nominations/inclusion in the CHL through a streamlined approach.

Much more action is required –now happening following the Commonwealth Ombudsman’s report on agency heritage strategies as well –to ensure that the objectives of the EPBC Act regarding protection of heritage values in Commonwealth owned places are achieved.

3. Monitoring/reporting

The lack of monitoring for compliance, audit etc under the EPBC Act is obvious from the omission in the Review report at chapter 21 of any mention of heritage issues.

Commonwealth Heritage is obviously a core part of the Commonwealth's role with new accountable reporting arrangements, and the Commonwealth should be an exemplar in the treatment of its heritage, particularly historic and built heritage but current outcomes fall far short of this goal.

National Heritage itself is a shared responsibility given its multi-tenure ownership which is not neatly divisible or accountable and the abstract division agreed by COAG glosses over this reality. The effectiveness of the national heritage protocol (AHC Periodic Report, p. 19) and the cooperative national heritage agenda, is not entirely clear to the public as they report to a Ministerial Council dealing with environmental issues rather than heritage issues.

Theoretically Australia's icon heritage is potentially better off under the EPBC Act, but in practice the range of problems is such that realization of the improvements has not occurred. This is due to:

- the complexity of the Act,
- lack of resources to promote good implementation and a better understanding of the Act,
- lack of commitment to fully embrace good conservation outcomes rather than focusing on facilitating development,
- lack of enough suitable heritage expertise with sufficiently high level expertise to administer the legislation while the protection decisions rest either with the Minister or the Approvals and Wildlife Division.

And there is no formal reporting to gauge the extent of this, other than crude indicators such as number of assessments completed, etc which really indicate resourcing and process management rather than conservation of heritage.

Lack of a formal reporting process is a major deficiency that needs to be remedied.

The independent AHC should be directed to report under s.24A of its Act on the overall state of the conservation of the nation's cultural and natural heritage, recognising that this will probably generate observations and even criticisms of State and Territory government performance and that of the non-government sector. It may be suggested that this is a function of the formal State of the Environment reporting process, a report that is tabled every five years in the Commonwealth Parliament. Unfortunately, the attention that this report has generated for the heritage environment in the past has been sadly deficient and there is a range of systemic problems with Commonwealth State of the Environment reporting. The AHC suggested that its ability to prepare periodic reports under the AHC Act could provide an effective mechanism for more frequent and specific heritage monitoring and reporting than the current SOE arrangements.

The Review noted at 19.63 that a number of submissions also recommended that the Act be amended to require formal reporting by the AHC.

Commonwealth leadership in monitoring the state of heritage conservation across all of Australia is an issue that formal State of the Environment reporting process is meant to address, but there is little evidence of its findings being used in new heritage policies. It used the RNE which was ground-breaking in its comprehensive scope and remains an important national dataset about Australia's heritage, and as such has been important to Commonwealth State of the Environment Reporting since the 1990s.

Plans to terminate the RNE as a statutory list in 2012 will obliterate the public investment in building up the asset.

The Commonwealth should be revaluing the RNE as an asset, and assessing its future as part of a broader strategic review of listing activities and how it links to State and Territory levels of listing and protection. AHC advice on this need has been rejected by the Department due to lack of resources. The RNE has had several roles: it is a list of heritage places across all environments and at all levels of significance. While historic heritage registers have been developed in all jurisdictions, this is not the case for natural or Indigenous heritage places. The demise in the RNE will create a gap in identification.

As the Review Report noted at 19.101, following amendments to the AHC Act, the RNE was frozen on 19 February 2007, which means that no new places can be added or removed. Until 2012, the Minister is required to continue considering the RNE when making decisions under the EPBC Act. The transition period will allow places on the RNE to be transferred to other heritage lists registers if appropriate, and for the legislation to be amended to remove the RNE as a statutory list. But in concert with all the other lists, it could continue to act as a statutory reference when the Minister is considering impacts under the EPBC Act. This would show Commonwealth leadership in considering the state or condition of Australia's heritage.

The Review Committee asked for comment at 11.102 on how a framework for listing could be developed. A single internet portal with all heritage lists accessible on it is technically feasible but the political will is required to make sharing databases the practical exercise that the Australian public deserves. This database would also make monitoring the condition of what is listed a much easier task than the current reinvention of databases every five years for SoE reporting in Parliament.

Resourcing

Australia needs the AHC to be an active, public, independent and expert champion for heritage. This is especially the case when the Minister has a regulatory role for management under the EPBC Act.

It is extraordinary that the Commonwealth has created a new heritage regime linked to the EPBC Act and yet, over each successive year, overall heritage funding has declined and core Departmental heritage funding, including salaries and other running costs, has also declined. As the Review report noted at 11.118, the AHC in its own submission noted that resourcing is an issue in conducting its duties in relation to both the EPBC Act and the AHC Act.

Most of the submitters to the Hawke Review as noted in Chapter 22 on *Administration under the EPBC Act* were of the view DEWHA was hampered in its administration of the EPBC Act by a lack of resources which meant appropriately trained people, information and funds. In addition, the Senate Committee in its report on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) considered that the evidence base for calls for greater resourcing for DEWHA appeared compelling. The Committee 'is strongly supportive of more resources being allocated to ensure compliance with the Act.'

Conclusion

The Hawke Review has addressed many issues in the current operation of the EPBC Act in relation to conservation of Australia's heritage. The discussion points based on the evidence from submissions and meetings lead to quite clear and obvious recommendations (see my suggestions underlined).

Action is needed to:

- streamline the listing and assessment processes, make them more transparent to the public,
- engage in a national conversation on our heritage values,
- continue to separate listing from management considerations,
- ensure Commonwealth agencies protect all heritage values on their properties,
- give greater independence to the AHC to list heritage places and to monitor the condition of our heritage values, and
- ensure adequate resourcing for these tasks.

In the only nation to occupy a whole continent resulting in such a distinctive environment, heritage should not be the Cinderella but one of the main performers – with transparent slippers that fit the task.

Jane Lennon
30 July 2009