

**SUBMISSION**  
**to the**  
**INDEPENDENT REVIEW**  
**of the**  
***ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT, 1999***  
**by**  
**Dr Herbert Stock**

**Executive Summary**

In addition to providing the Commonwealth's legislative framework for protection and conservation of the environment and biodiversity, the *Environment Protection and Biodiversity Conservation Act, 1999* (as amended) provides the framework for the National protection of natural and built heritage. In particular, Part 15 of the Act establishes the processes for inclusion of sites on the World Heritage List, the National Heritage List and the Commonwealth Heritage List and for the management and conservation of listed sites.

In September 2006 Adelaide Meeting of the Religious Society of Friends (Quakers) applied to have the Meeting House (church) owned by Adelaide Meeting included on the National Heritage List. This submission describes the legislative and administrative impediments encountered by Adelaide Meeting and the consequences of these difficulties for the integrity and value of the National Heritage List. The submission concludes with suggestions for restoring this integrity and value.

**Declaration of Interest**

The author of this submission is a Member in good standing of Adelaide Meeting, the Religious Society of Friends (Quakers). At most relevant times he was an office holder in the Meeting, initially as Clerk (Administrator) and subsequently as Treasurer.

**Background**

Adelaide Meeting is a Local Meeting (self-governing church) within the international Religious Society of Friends (Quakers). Adelaide Meeting is one of two Local Meetings within South Australia Regional Meeting (SARM). In turn SARM, which also includes five Recognised (not self-governing) Meetings, is part of Australia Yearly Meeting, the national body for Quakers in Australia.

Adelaide Meeting, which has some 60 Members and some 60 Attenders (worshippers not in Membership), is incorporated under the *South Australian Associations Incorporations Act, 1985*. Adelaide Meeting is the owner, in fee simple, of the Adelaide Friends' Meeting House in Pennington Terrace, North Adelaide.

Adelaide Friends' Meeting House is an internationally recognised and valued building. Initially prefabricated by builder/architect Henry Manning at the West India Docks in London in 1839, the timber building was disassembled, shipped to Adelaide (arriving at Port Adelaide in February 1840), transported to its present site in North Adelaide, and re-erected and painted by the end of June 1840. The first Meeting for Worship occurred in early July 1840 and there has been a Meeting for Worship each Sunday since then.

The furniture in the Meeting House was also prefabricated by Henry Manning.

With the aid of a grant from the South Australian Government the building was restored to close to original condition as part of the South Australian sesquicentenary celebrations in 1987.

Adelaide Friends' Meeting House is recognised and valued by the following stakeholders.

- Members of the Religious Society of Friends internationally as the oldest surviving Meeting House in Australia and as a place of special value in the history of the Society in Australia.
- Participants in the Peace and Non-violence movements nationally as a place where peace activities have been conducted for more than 100 years. In particular, the Meeting House was a primary site for the Anti-conscription movement of 1916-17, the Peace Pledge Movement (1932-1946), the Campaign for Nuclear Disarmament (1950s) and the Vietnam Moratorium and anti-conscription movements (1963-1972).
- Architects, engineers and furniture makers internationally as the exemplar of the work of Henry Manning. Manning is now recognised internationally as the first systematic pre-fabricator of buildings. Innovations traceable to his work include:
  - kit home structures,
  - pre-fabricated, demountable and moveable buildings,
  - flat packs for transporting/shipping disassembled buildings and furniture,
  - interchangeable parts,
  - standardisation and pre-glazing of windows for assembly into the final building,
  - cantilever roofs, and
  - light 'A'-frame furniture

While each of these innovations is important, that of designing, manufacturing and tolerancing interchangeable parts underlies nearly all of modern manufacturing industry.

Each of these innovations is included, and visible, in Adelaide Friends' Meeting House.

The importance of Manning and, in particular, the Adelaide Meeting House, has been discussed regularly in the published literature, starting with JC Loudon's *Encyclopaedia of Cottage, Farm and Villa Architecture* in 1846.

Adelaide Friends' Meeting House is on the Heritage Register of the City of Adelaide, is recognised by the National Trust, is included on the South Australian Heritage Register, and is included on the Register of the National Estate.

### **The Application for inclusion on National Heritage List**

In late May or early June 2006 Adelaide Meeting received a verbal suggestion from the Historic Heritage Branch of the then Commonwealth Department of the Environment and Heritage that the Adelaide Meeting House be nominated for inclusion on the National Heritage List. Included with this suggestion, which was relayed through the Heritage Branch of the South Australian Department for Environment and Heritage, was Web access to the forms and explanation sheets needed for such an application.

Initially there was some concern within Adelaide Meeting about the costs, in time and money, that preparing such an application would require. However, approval was given and, after expenditure of some hundreds of hours and thousands of dollars,<sup>1</sup> an application was lodged in late September 2006. This application was acknowledged by the Historic Heritage Branch, initially by inclusion on the Branch's web site on 28 September 2009 and, subsequently, in writing on 9 October 2006.

The application complied in all details with the requirements of the Section 324J of the *Environment Protection and Biodiversity Conservation Act, 1999* as worded at the time of the application. Further, the application demonstrated, and documented, that Adelaide Friends' Meeting House met four of the National Heritage List Criteria (in particular, criteria a, c, f & g).<sup>2</sup>

Despite regular inquiries no further information was received until a letter, dated 27 May 2008 and signed by Dr Robert Bruce of the Heritage Information Branch, baldly advised that because the Adelaide Meeting House had not been included in the Australian Heritage Council's annual work plan for two successive years the application was deemed to have lapsed. The effective date of this action was 6 May 2008.

Adelaide Meeting's application was one of 98 applications that were deemed to have lapsed.

Dr Bruce's letter also advised that the legal basis of the decision to discard Adelaide Meeting's application was Section 324JB(3) of the *Environment Protection and Biodiversity Conservation Act, 1999*, as currently amended. However, further inquiry established that Section 324JB had been added to the Act by amendments included in the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*, which was assented to on 12 December 2006 (more than 2 months after Adelaide Meeting's application was lodged and acknowledged).

Protests to the Minister over the retrospective application of a legislative provision (contrary to the well-understood principle of administrative law and public administration that legislative changes not be applied retrospectively unless this is specifically provided for in the legislation)<sup>3</sup> have, to date, proved fruitless. The only concession offered to us is that Adelaide Meeting may, if it wishes, make a further application. Adelaide Meeting is reluctant to indulge in a further round of administrative roulette; we believe that our spare resources will be better used elsewhere, particularly given calls on our time and funds consequent to the current financial climate.

As an aside, it is worth noting that the effect of Section 324JB(3) to exclude applications if not acted upon after two years was not disclosed in the Acting Minister's second reading speech during the debate on the *Environment and Heritage Legislation Amendment Act (No. 1), 2006*. Rather, the Acting Minister stated:<sup>4</sup>

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1 Time sheets were not kept so that the exact time was not determined; however, a great deal of time was expended in organising support from neighbours, and from within the national and international heritage, history, architecture and engineering communities. Similarly the exact cost of obtaining documents, surveys and consultants' reports is uncertain because much of this material was also used for other projects; projects which probably would not have been initiated but for the synergy with the National Heritage List project.

2 See <http://www.environment.gov.au/heritage/about/national/criteria.html>

3 A good statement of this principle can be found in the judgement in *Polyukovich v the Commonwealth* (1991) [172 CLR 501] where Dawson J wrote "The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement."

4 Environment and Heritage Legislation Amendment Bill (no. 1) 2006, Second reading speech, p 4. See <http://www.environment.gov.au/epbc/publications/pubs/2006-amendments-second-reading-speech.pdf>

*“The bill also provides for a more strategic approach to the listing of heritage places and threatened species and ecological communities. The roles of the Australian Heritage Council and the Threatened Species Scientific Committee will also be expanded to enable a strategic approach to be taken to listing. In future, roles of the Council and Committee will be restructured to provide advice to the Minister on annual work programmes, which will be based on the strategic importance of nominations and other listing proposals rather than, as now, simply when they happened to be nominated. Both the Council and the Committee will retain their expert independent status as the Minister’s advisers on these matters.”*

Similarly, nowhere in the explanatory memorandum provided by the then Government,<sup>5</sup> nor in the subsequent debate, was the “two-strikes and you’re out” consequence discussed, or even alluded to. It would appear reasonable to conclude that the intention of the then Government either was not made clear, or was merely to provide a mechanism to determine the strategic order in which applications would be considered. In the latter case applications would be reassessed annually until, eventually, all applications that were “not vexatious, frivolous or not in good faith”<sup>6</sup> were subjected to a full assessment for national heritage values.

### **Consequences of the application of the present Part 15, Subdivision B of the Act**

Part 15, Subdivision B includes sections 324C to 324JJ.

#### *Differing outcomes depending on the applicant for listing*

Under the changes introduced by the 2006 amendments to the EPBC Act, the assessment of applications for National Heritage listing is no longer done sequentially and in order of receipt, but in batches associated with twelve-monthly assessment periods. In addition, prior to the commencement of an assessment period, the Minister must publish a notice inviting people to nominate places for inclusion in the National Heritage List.

In each of the 2007-2008 and the 2008-2009 assessment periods this call for nominations attracted about 100 applications. Together with the approximately 50 applications still outstanding from before the change in the Act, there were some 250 valid applications for National Heritage listing awaiting or undergoing assessment by the Heritage Division. Of these about 40 applications were chosen for inclusion on the resultant priority assessment lists.<sup>7</sup> This represents a ‘strike’ rate of less than 20%.

The Heritage Division is aware that the combination of a successful appeal for nominations, and limited resources for assessment, must lead to more applications being excluded. This was demonstrated in a recent letter from [...name...removed, .....], Heritage Division, who wrote to me noting that “Unfortunately though, the reality is that there are always many more nominations received than can be fully assessed by the Council in any year.” The disregard for the efforts of nominators, and the cynicism apparent, in this phrase, is disturbing and indicative of an inappropriate degree of hubris in a senior official.

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5 Environment and Heritage Legislation Amendment Bill (No. 1) 2006 Explanatory Memorandum, p63; See [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/A2BC41227BD57BD0CA25720600227136/\\$file/06149em.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/A2BC41227BD57BD0CA25720600227136/$file/06149em.pdf)

6 National Heritage List, Nomination Notes, provided by the Department of the Environment and Heritage, June 2006.

7 See <http://www.environment.gov.au/heritage/publications/pubs/priority-assessment-nhl.pdf> and <http://www.environment.gov.au/heritage/publications/pubs/nhl-priority-list-0809.pdf>

In addition, an examination of the details of the applications posted on the Public Notices section of the EPBC Act Web site<sup>8</sup> indicates that the vast majority of the applications received in response to the Minister's notices were from small non-governmental groups and private individuals. In contrast, the vast majority of applications included on the priority assessment lists were initiated by the Minister or by officials within the Commonwealth, State and Local Government bureaucracies.

It is not clear whether this is due to a predilection within the Heritage Division for nominations by officials or, as seems far more likely, because of the greater ability of officials to prepare applications that, by 'ticking all the right boxes', more effectively 'sell' the merits of the site being proposed for listing. Nevertheless, the 'strike' rate for applications from the general public was effectively zero, while that for applications from officials appears to have been about 50%.

This is likely to have three consequences.

- 1 An examination of the Public Notices section of the EPBC Act Web site shows, officials tend to suggest large, sweeping sites, while non-governmental applicants propose a mixture of large and small sites.<sup>9</sup> The effect of this, combined with the effective exclusion of nominations from non-governmental sources, is to bias the National Heritage List in favour of large, sweeping sites and to ignore small sites of particular interest and value.
- 2 The apparent total rejection of applications from non-governmental sources and individuals has been noticed within the heritage and history communities. If comments made to the author of this submission are representative, the number of applications that will be made by those groups, or by individuals, in future assessment periods will decline, probably significantly. This may further bias the National Heritage List.
- 3 Again, if comments to the author are representative, the apparent total rejection of applications from non-governmental sources and individuals also has led to a degree of resignation and cynicism within the heritage and history communities. The long-term result may be that the National Heritage List will come to be regarded as *the Government's* National Heritage List and, as such, will have only limited credibility among these important groups of stakeholders.

*Use of priority assessments lists risks that assessment standards may vary.*

It is clear from the details provided in the published priority assessment lists that, in addition to selecting the applications most likely to succeed, the lists also define and limit the work load for the Heritage Branch. However, it appears probable that allowing officials to limit the number of applications included in the Priority Assessment list so as to control their subsequent workload runs the risk of undesirable consequences, including the adoption of relative, rather than absolute, standards for inclusion on the National Heritage list.

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8 Follow links from [http://www.environment.gov.au/cgi-bin/epbc/heritage\\_ap.pl](http://www.environment.gov.au/cgi-bin/epbc/heritage_ap.pl)

9 For example, in 2007-08 the following sites were among those included in the Priority Assessment List: City of Broken Hill, Bondi Beach, Longreach Airport, Goldfields Water Supply Scheme, Hobart's Sullivans Cove, the Adelaide Parklands and the Myall Creek Memorial. Among those excluded were Cairns Wharf, Adelaide Meeting House, Albury Railway Station, Macquarie House, three important churches and the Bendigo Pottery. Some large sites proposed by non-governmental applicants were also excluded.

For example, if the number of exceptional applications received in an assessment period exceeds the capacity of the Heritage Division, some highly meritorious sites or buildings may fail to be included in that period's priority assessment list. If this scenario were repeated in the subsequent assessment period these meritorious sites might then be excluded under the terms of Section 324JB(3)(c). On the other hand, if the number of highly meritorious applications received in two successive assessment periods is less than the assessment capacity of the Heritage Division, applications for sites of lesser relative value (though still worthy of assessment) may proceed to a full assessment on their merits.

This analysis suggests that, to some degree, the standard at the cut-off for inclusion on a priority assessment list depends, to some degree, on the quality of applications received in the preceding and current assessment period; ie is relative rather than absolute. If so, assessment standards may vary from year to year.

Surely, due process requires that all applications be considered against the same absolute and appropriate standards.

It also suggests that there is an inappropriate risk that some sites that both have outstanding natural, Indigenous or historic heritage value to the nation and pass the appropriate threshold test<sup>10</sup> may not be included on the National Heritage List. It is not suggested that there is a risk that some sites may be included inappropriately.

#### *Use of a priority assessment list leads to waste of resources by applicants*

As indicated above, preparation of the application to include the Adelaide Meeting House on the National Heritage List required some hundreds of hours and several thousand dollars. Time was required to access and interpret records, engage and manage consultants, and engage and seek support from neighbours and from the heritage, history, architecture and engineering communities. Money was expended for fees for records, documents and exhibits, for cadastral, architectural and engineering surveys, for engaging consultants and for the preparation of final documents.

If comments made to the author of this submission by other applicants are representative, it appears that this expenditure of time and money is typical.

Therefore, the resources expended to prepare the 98 applications that were excluded on 6 May 2008 were probably of the order \$500k in direct costs as well as 12 person-years (equivalent, at current consultancy rates to about \$2M). As these applications were never subjected to full assessment on the merits, **these resources were wasted**.

The suggestion, by the Heritage Division, that these excluded sites could be renominated, shows either an ignorance of, or a disregard for, the costs of preparing and lodging an application and the burden this places on applicants. Given that private applications appear to have little success in gaining inclusion on a priority assessment list, few could be expected to participate in a second round of administrative roulette.

#### *Disclosure*

The Minister for the Environment, Heritage and the Arts, and the Heritage Division of the Department of the Environment, Water, Heritage and the Arts, has been made aware of these concerns.

## **Suggestions**

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10 See <http://www.environment.gov.au/heritage/about/national/criteria.html>

It is clear that the amendments to the Act introduced by the *Environment and Heritage Legislation Amendment Act (No. 1), 2006* were either poorly thought out or poorly drafted. This applies especially to the amendments to Part 15 that introduced the priority assessment process. In particular, it appears that, while the attempt to limit the demands on the Heritage Division was successful, the impact on other stakeholders was not understood or disregarded. For the future credibility of the National Heritage List these latter impacts must, now, be reversed.

A first step might be to revisit the very concept of the priority assessment list.

The intention outlined in the Acting Minister's second reading speech, that there be a "more strategic approach to the listing of heritage places" appears unexceptional. However, limiting the number of applications on the resultant priority assessment list, and excluding applications not included in two successive assessment periods, has impacted unduly, inappropriately and unfairly on some applicants, including small non-government groups and individuals.

Therefore, I suggest that the legislation should be amended so that future priority assessment lists include all outstanding applications that meet the appropriate threshold tests. Further, the order in which applications are listed and assessed on the merits should be based on a weighted scale involving both the "natural, Indigenous or historic heritage value to the nation" and the length of time since the application was received. The Heritage Division and the Australian Heritage Council should then work through the list in order, assessing as many applications as possible during the assessment period. Any applications not assessed in the period should then be reassessed for, and included in, the subsequent priority assessment period; moving up that, and subsequent, lists (if necessary) in accordance with the perceived value of the other applications and the lengthening time since receipt. Eventually, all applications that passed the threshold tests would be assessed on their merits and either included or excluded from the National Heritage List.

While I am not trained in drafting legislation, it seems to me that were the relevant sections of the Act amended to read:

324JB(2) The proposed priority assessment list is to consist of such of the places that are eligible for assessment consideration in relation to the assessment period as the Australian Heritage Council considers it appropriate to include in the list, having regard to:

- (a) any heritage themes determined by the Minister under section 324H in relation to the assessment period; and
- (b) the Council's own views about what should be given priority in relation to the assessment period; and
- (c) the Council's capacity to make assessments under this Division while still performing its other functions; and
- (d) the time since the nomination was received, and
- (e) any other matters that the Council considers appropriate.

324JB(3) A place is **eligible for assessment consideration** in relation to the assessment period if:

- (a) the place has been nominated by a nomination referred to in subsection (1); or
- (b) the Council itself wishes to nominate the place for inclusion in the National Heritage List; or
- (c) the place was eligible for assessment consideration, ~~otherwise than because of this paragraph,~~ in relation to the immediately preceding assessment period (if any) ~~but was not included in the finalised priority assessment list for that assessment period;~~ or
- (d) each part of the place is either a place to which paragraph (a) applies, a place to which paragraph (b) applies or a place to which paragraph (c) applies.

the fairness and credibility of the processes for assessing nominations would be restored. Of course, transition arrangements would be required to bring applications currently excluded back into the assessment process.

Herbert Stock  
18 December 2008.