

**Duncan Marshall**

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23 December 2008

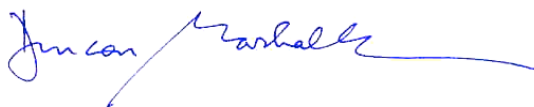
Independent Review of the EPBC Act  
GPO Box 787  
Canberra ACT 2601

By email: [epbcreview@environment.gov.au](mailto:epbcreview@environment.gov.au)

Dear Madam or Sir

I write to make a submission to this review. I apologise that this submission is provided shortly after the deadline but hope it can still be considered.

Yours sincerely



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# SUBMISSION TO THE EPBC ACT REVIEW

**Duncan Marshall**

B.Arch (Hons), BA, MICOMOS

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## **Introduction**

Australia's heritage is such a wonderful subject, and we do pretty well in lots of ways. But the potential is so much greater, and as a sector, we are hungry for a better future. This unrealised potential is the great shame – it is not rocket science, and we have most of the tools. Just not enough commitment in the right places, by the key people, not enough resources, and we don't apply our manifest expertise uniformly.

Why is there such a gap between the many good things we have achieved and the much greater potential? Perhaps we dream only small dreams, and perhaps we are too timid as a sector, too scared to reveal our faults and needs, or their true extent. The reasons are no doubt many, and variously shared amongst all involved.

The EPBC Act review is but the latest in a long list of heritage reviews, inquiries, studies and the like. Will it make a difference or is it just the latest government process which will burn brightly for a moment and then be lost? While we might hope for a meaningful outcome, the review should be mindful of past inquiries and studies, and the very mixed history of such processes.

Some useful issues the review can address are:

- national leadership in heritage conservation;
- the poor level of resourcing provided at the national and other levels of government for heritage conservation;
- the poor level of resourcing for the Commonwealth Government's heritage systems;
- the apparent complexity and possible flaws of the Commonwealth Government's heritage system, especially that relating to the legislation; and
- the need for the national heritage system to be guided and administered by people with a good standard of expertise and who are able to provide independent advice.

In addition, I also wish to raise issues related to heritage impact statements and conservation management plans.

This submission addresses all of these issues.

## **Background**

It may be helpful to understand who I am in order to understand the basis for my comments.

I am an architect by training and have essentially worked my whole professional life in heritage conservation – some 25 years. I have worked for the private sector, for government with the former Australian Heritage Commission, and for the non-government sector with the Australian Council of National Trusts. In addition, I have made a very long and substantial voluntary contribution to a range of heritage NGOs, especially Australia ICOMOS.

Most of my work has related to the Commonwealth Government's heritage activities and systems. In particular, I was heavily involved with the process to develop the current heritage regime. My consulting work in the last 15 years has included some large survey projects and conservation management planning for the some of the most important heritage places in Australia.

I am now probably one of the most senior heritage consultants practising in Australia, especially regarding the Commonwealth Government's heritage activities and systems.

### **Comments on the Review Process and Structure**

I very much welcome the current review because the Commonwealth Government's heritage activities and systems seem fraught with problems which need to be addressed.

However, I am not fully confident about the review process and structure:

- the review structure has very little solid heritage expertise integrated with the process;
- heritage issues are a very low priority in DEWHA; and
- I am not sure if the submissions by DEWHA or other government agencies are going to be made public.

The heritage industry suffered through a largely useless and pointless Productivity Commission inquiry in 2005-06. In part the problem seemed to be the lack of embedded heritage expertise in that Commission's processes. There is some wariness that the EPBC Act review is headed down a similar path.

In addition, mindful that there are a number of very substantial heritage submissions that have been made (eg. by the ACNT), the question must be asked whether the current review is the right vehicle to address all of the heritage issues?

*Recommendation 1 Additional heritage expertise must be integrated with the review process, perhaps by appointing someone to the panel of experts.*

*Recommendation 2 The DEWHA and other government agency submissions to the review should be made public.*

*Recommendation 3 Consideration should be given to whether the current review is the right vehicle to address the very substantial number of heritage issues raised.*

### **National Leadership in Heritage Conservation**

We need national leadership in heritage conservation, and the Australian Government should provide it. There is a widespread perception in the heritage sector that this leadership is missing, or at least weak.

The Australian Government suffers from the high expectations of others, and will probably always struggle in this area. But the long review and development process of the new national heritage system from the mid 1990s raised expectations that the Australian Government was going to raise the standard and provide a world-class heritage system. The reality has been underwhelming so far.

The following text relates to issues in the last decade, much of it in the life of the last Government. That these problems could arise under the Act, albeit under another Government, is still telling. There is little indication the situation has improved much.

In 1998 the then Prime Minister wrote,

My Government is committed to responsibly protecting Australia's environment and heritage... Much more needs to be done, of course, including refining the respective roles of governments on heritage generally through the development of a National Heritage Places Strategy. (Letter to the National Heritage Convention, 6 August 1998)

Ten years later there is no national strategy, nor apparently the prospect of one any time soon.

In 2002 the then Minister for the Environment & Heritage said,

The Commonwealth is committed to demonstrating leadership in relation to the management of heritage properties it owns or controls... (Dr David Kemp, Second reading speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2002, Hansard, 27 June 2002)

In the first half of 2005 the sorry saga of roadworks at Gallipoli was a major issue. While not within the Australian Government's direct control, Gallipoli has been recognised as a very important heritage site for a long time, indeed, the then Prime Minister intended to nominate it for the National Heritage List in 2003. This issue arose again during 2008. Heritage conservation can be achieved through many means, and it looks like Australia has repeatedly failed to use its best endeavours to conserve Gallipoli. Where is the heritage leadership regarding such an iconic place in Australia's history?

In June 2005, the Joint Standing Committee on the National Capital and External Territories recommended,

that additional funding be provided to enable the Australian Antarctic Division to comply with its responsibilities under the Environment Protection and Biodiversity Conservation Act (1999) for its work with the cultural heritage management of Mawson's Huts. The Committee also encourages the continuation of partnership links with community sponsors to continue the restoration work of Mawson's Huts. (Joint Standing Committee on the National Capital and External Territories 2005, *Antarctica: Australia's pristine frontier*, p. 70)

The Antarctic Division at the time had a budget of about \$100 million and was part of the Minister for the Environment & Heritage's own portfolio. Yet it was apparently unable to fund, or unwilling to give priority to funding for its statutory heritage obligations. If the Minister's own portfolio can't demonstrate leadership, why should the rest of the Australian Government? To make matters worse, it was apparently not the Minister or the Department or the Division which was actively defining the problem and seeking a solution. That task had fallen to a Parliamentary committee. This does not look like a commitment to demonstrating leadership.

In July 2005, the then Heritage Minister provided a statement of reasons in relation to an emergency listing request which was to result in the loss of large amounts of heritage fabric from a Commonwealth Heritage listed place, the RAN Transmitting Station, Belconnen. The decision appeared to be seriously flawed and was far from the leadership promised by the then Minister,

My aim is to make sure the Government is not only providing best policy and practice, but that people know what we are doing. (Senator the Honourable Ian Campbell, *The West Australian* 23 July 2005)

There are other examples:

- the intellectual leadership by the Australian Government has all but stalled, there is little apparent research going on, little capacity and no research program funding. While not lavishly supported in past decades, this was a solid and highly valued component of Australian Government activity;
- the government's key expert advisory body, the Australian Heritage Council, has all but disappeared from view and there is no independent, expert public champion of heritage at the national government level. Though it is unfashionable to refer to the work of the former Australian Heritage Commission, it seemed much more willing and able to work in the public realm. Partly this was facilitated by ready access to public affairs staff – something that seems to have been made more difficult by departmental re-arrangements. One may well ask why the current AHC, as the government's primary expert heritage adviser, is not undertaking a component of the current inquiry – into heritage and the EPBC Act? and
- DEWHA does not appear to have the presence required to provide leadership in heritage matters. The level of heritage expertise and degree of independence appear eroded. The Heritage Division still seems somewhat timid and introverted, or so strapped for resources as to be unable to engage with a wider constituency. In addition, the heritage processes have been rolled into the *EPBC Act* and its processes, and heritage has become a dependent on environmental processes which do not seem to really understand heritage nor act to protect it to the degree required.

Creating the National Heritage List and improving the protection and management of Commonwealth heritage are fine objectives but they should not define the full extent of Australian Government heritage activity. In any event, the system seems to be struggling with even these objectives.

The current Minister and Prime Minister have variously made encouraging general statements about Australia's heritage, and the Labour platform contains some worthy statements about heritage. But we are yet to see any real and substantial action to match these statements.

The Australian Government can do a lot more to provide national leadership in heritage, across a wide range of activities. And this should be clearly articulated as part of its overall and broader heritage role.

*Recommendation 4 The Australian Government should provide national leadership in heritage conservation, and this should be clearly articulated as part of its overall and broader heritage role.*

*Recommendation 5 A truly national heritage places strategy should be developed as a priority.*

*Recommendation 6 The Australian Government should re-commit itself to demonstrating leadership in relation to the management of heritage properties it owns or controls.*

*Recommendation 7 The Minister for the Environment, Heritage and the Arts should ensure his own portfolio demonstrates a high level of real commitment and priority for heritage.*

*Recommendation 8 The Australian Government should demonstrate intellectual leadership in heritage conservation, including the establishment of a program to fund research.*

*Recommendation 9 The Australian Heritage Council should be an independent, expert public champion of heritage at the national level.*

*Recommendation 10 DEWHA should foster a high level of expertise in heritage conservation within its staff, and encourage the provision of sound independent advice. (Other recommendations below address this issue in more detail.)*

*Recommendation 11 Mechanisms should be examined to strengthen the heritage voice in EPBC heritage referral matters, such that heritage is the dominant advice.*

### **Resourcing provided at the national and other levels of government for Heritage Conservation**

This is such a large issue with so many dimensions. Dare I suggest that none are satisfactorily addressed.

The current review might be tempted to ignore resourcing issues, focusing instead on just the theoretical situation of the legislation. The review should not be so narrow. It must deal with the full package of heritage measures of which the EPBC Act is a part, and it must deal with resourcing. Otherwise the review will be of limited value at best, or irrelevant at worst.

This submission identifies elsewhere a range of issues where resourcing either does not exist or is inadequate. This includes:

- resources to develop a truly national heritage places strategy;
- resources for the Antarctic Division to deal with heritage matters under the *EPBC Act*;
- research funding;
- resources for the AHC to become a public champion of heritage at the national level;
- the number and level of heritage experts in DEWHA; and
- program funding for DEWHA to deal with heritage.

There is a widespread perception that resourcing for heritage at national and other levels of government is declining. I have no national data on this question. However, the case has been argued by the National Cultural Heritage Forum and others about the pitiful state with funding for heritage conservation by the Commonwealth. An analysis of the 2008 Budget indicates that funding for historic heritage has declined even further compared to recent years. The modest conservation funding for on-ground works has finally been reduced to almost nothing - \$200,000 for the whole of Australia for the current financial year.

This is a pathetic contribution.

By contrast, hundreds of millions of dollars seems to be spent on natural heritage conservation by the Australian Government.

Australian Governments have been keen to implement a policy of mutual obligation in the social policy area, whereby the government provides support but also expects recipients to contribute. This is all in the name of achieving some broader public good. Why can't this

principle be applied in heritage as well? The owners of heritage places have their properties listed, sometimes reluctantly, to achieve some broader public benefit – the conservation of our heritage, Australia’s heritage. But what contribution does the community make in return? In most cases, probably none. Even if the public benefit was small, there is no commensurate small incentive/encouragement to achieve the objective of the listing, that is conservation.

But before this suggestion gets dissolved by the thought that the national government might contribute only in the case of national heritage, states in the case of state heritage, etc, it might be worth looking at the approach of governments to the natural environment/natural heritage. Such a review shows that the so-called subsidiarity principle does not apply to many sectors of government activity, nor to natural heritage.

A consistent policy approach by the Australian Government would suggest it could provide resources for historic heritage:

- which involved partnerships between all levels of community and government;
- which improved the conservation and management of Australia's historic heritage resources; and
- which supported community groups, regional priorities and national priorities.

To this should be added private owners.

There is and will be no shortage of suggestions about funding/assistance options that governments could implement. The National Cultural Heritage Forum in its *Vision* document made many, for example, and no doubt submissions to the current inquiry will make many more.

*Recommendation 12 The Australian Government should acknowledge the principle that conserving heritage places achieves a broader community objective, and the community should be willing to provide some level of assistance.*

*Recommendation 13 The review (or some other process) should consider the subsidiary principles which might govern the provision of assistance including related factors such as:*

- *public versus private benefits;*
- *need;*
- *the capacity of classes of owners (eg. private residential owners, commercial owners, community owners);*
- *types of work that might be supported (eg. maintenance, other conservation work - reconstruction, adaptation, interpretation);*
- *promoting better access in return for assistance;*
- *the form of assistance (eg. funding, technical assistance); and*
- *the mechanism of providing assistance.*

*Recommendation 14 The Australian Government should provide substantial resources for historic heritage, commensurate with the needs of the sector:*

- *which involve partnerships between all levels of community and government;*
- *which improve the conservation and management of Australia's historic heritage; and*
- *which support private owners, community groups, regional priorities and national priorities.*

*While some priority might be given to national heritage places, the Australian Government should acknowledge that it also has a role to contribute to the conservation of other levels of heritage places.*

## **Complexity and Apparent Flaws of the Commonwealth Government's Heritage Systems**

Throughout the process to develop the new systems, concern was expressed in many quarters about the complexity of the legislation. Australia ICOMOS has a series of objectives for heritage legislation, the first of which is,

An Act which is simple to operate and simple to understand

Unfortunately, the heritage components in the *EPBC Act* together with the *AHC Act* constitute a system which is neither simple to operate or understand. One solution to this problem was the suggestion the Australian Government would devote significant resources and effort to initially explaining the system. While there have been some efforts in this regard, a range of issues still remain such as:

- a continuing poor and confused level of understanding by Australian Government agencies about their obligations and processes under the legislation; and
- there is still no sign of guidelines for heritage assessments.

Many of these are establishment-phase issues but we are a long way past the introduction of the heritage provisions and the problems persist.

In addition, dealing with referrals of actions and management plans under the *EPBC Act* look rather more complicated than seems desirable. Leaving aside the formal steps in the process which are dictated by legislation, there are also the technical/administrative processes. The listing processes are a model of complexity.

It is not clear yet whether heritage strategies and the EPBC-style of management plans are effective conservation tools. Research is needed to explore this question.

The implementation of the new heritage system has exposed a few problems to date which seem to relate to the statutory framework itself. These include an unreasonably narrow definition of the term aesthetic.

Then there are problems arising with the system because of apparent errors in decisions, such as the case of the RAN Transmitting Station mentioned above. It is not yet clear whether the statutory framework has the necessary checks and balances to deal with such errors. At this stage though, the only formal course available is an appeal under the *Administrative Decisions (Judicial Review) Act*. Such a course is highly unsatisfactory as it involves:

- the need for legal advice which would either be a significant cost or rely on an already overburdened legal aid/environmental defenders system;
- significant court fees;
- the possibility of having costs awarded against the applicant if unsuccessful; and
- the case can only consider whether the law has been followed – the merits of the decision cannot be reviewed.

For individual nominators or community organisations, these obstacles are simply far too great. Under the old system, public objections to listing decisions were dealt with in a way which did not involve these obstacles.

The final issue to mention is concern about the effectiveness of the protection mechanisms in the *EPBC Act* related to heritage places. Again, concern was expressed in some quarters during the development of the new heritage systems that the protection offered might not be as effective as the old system. In part this related to the changed model of protection: the old system relying on a heritage Act-based model and the new systems operating with an environmental impact assessment model. Concern was expressed that the EIA model was not suited to dealing with the scale and nature of changes to heritage places.

There is apparently no definitive answer, yet, to concern about this issue, as no one has examined the relative effectiveness of the two systems. But there is some evidence for this continuing concern. For example, in 1999-2000, the old system dealt with 1,590 referrals of Commonwealth actions of which 161 were found to have significant adverse effects. In 2000-01, there were 1,212 referrals and 106 actions involving significant adverse effects.

In 2003-04, there were just 292 referrals for all matters dealt with by the *EPBC Act*. This would appear to include many more categories of matters than just heritage. Of this, the number of actions involving the Commonwealth where adverse impacts have been addressed was only 8. The currently available statistics (2007-08) do not seem to record adverse impacts, and so an up to date comparison is not possible.

This data may not represent a meaningful snapshot of the effectiveness of the *EPBC Act* in protecting heritage places. None the less, it is cause to question what is going on. If on average there were 100-160 significant adverse impacts arising from Commonwealth actions each year which were dealt with under the old system, and the new system is addressing only about 10 a year, what is the cause of this dramatic difference? Has there been a change in the level of effectiveness? This matter deserves serious consideration.

Other possible protection problems relate to the threshold for triggering protection being too high, the range of accepted information to trigger protection appears too narrow, the narrow definition of action, and the focus on values rather than protecting places for their values. The system for allowing public involvement also appears highly ineffective – the website is too convoluted and actually relies on prior knowledge of a referral.

My personal impression is that overall the effectiveness of heritage protection has declined despite the supposedly improved powers. However, there are a few notable exceptions but this contrasts with the general trend.

The future of the various and many heritage lists in Australia, including the Register of the National Estate, is a major complex issue which deserves substantial, long-term and strategic consideration, which is probably beyond the capacity of the current review.

With regard to the complexity problems and the *EPBC Act* adopting the wrong approach for heritage, serious consideration should be given to creating a separate heritage Act.

*Recommendation 15 Resources should be provided to address apparent issues with the implementation of the heritage system including for:*

- *promoting a better level of understanding about the obligations of Australian Government agencies and processes under the legislation; and*

- *the finalisation assessment guidelines.*

*Recommendation 16 Processes related to listings, the referral of actions and management plans under the EPBC Act should be reviewed to see whether they might be simplified, without losing conservation benefits.*

*Recommendation 17 Research is needed to review the effectiveness of heritage strategies and EPBC-style management plans.*

*Recommendation 18 Problems with the legislation should be addressed, including:*

- *definition of the term aesthetic;*
- *possible problem with the existing legislative checks and balances to deal with errors made in decisions, such as in the case of the RAN Transmitting Station; and*
- *the need to reinstate a public objection system to listing decisions, similar to that available under the old system.*

*Recommendation 19 An independent expert review should be undertaken of the effectiveness of the protection mechanisms in the EPBC Act related to heritage places, partly comparing protection under the old system with the new.*

*Recommendation 20 A substantial, long-term and strategic review should be undertaken of the many heritage lists in Australia, including the Register of the National Estate.*

*Recommendation 21 Serious consideration should be given to the creation of a separate heritage Act in response to the many problems of heritage being included in the EPBC Act.*

## **Expertise and the National Heritage System**

The credibility of the Commonwealth Government's heritage systems rest significantly on the expertise available to guide and administer that system. The system includes the:

- National Heritage List;
- Commonwealth Heritage List;
- Register of the National Estate; and
- management and protection advice provided through conservation management plans and *EPBC Act* referrals.

Unfortunately, the historic environment expertise available in the Australian Government appears extremely limited and overstretched in the face of a considerable workload.

The second issue is the level of expertise in the overall government hierarchy. The highest level historic heritage expert in DEWHA is an EL2, and there are many layers of management above this level.

*Recommendation 22 The number of senior, experienced and expert historic environment professionals working on historic environment matters in DEWHA should be substantially increased.*

*Recommendation 23 Senior historic environment experts should be appointed to senior positions in DEWHA – EL2 level and above.*

### **Heritage impact statements and conservation management plans**

These can be very useful tools in achieving the good conservation of heritage places, and in identifying problems with development proposals. They are part of the standard suite of documents prepared in many jurisdictions. But there are potential problems in the way in which each gets used.

In the case of heritage impact statements, the main potential problem with these is that the developer commissions the HIS from a heritage consultant, and in subtle or more explicit ways the developer may pressure the heritage consultant in order to achieve a given outcome. It would be much better if the developer paid for the HIS but the heritage consultant actually worked for a neutral party or the heritage/planning authority. The consultant should also be chosen and commissioned by the neutral party or the heritage/planning authority. This would promote a truly objective assessment of the impact of a proposal affecting a heritage place.

The potential problem with CMPs relates to the stage at which they are commissioned and the nature of any pre-development application discussions between a developer and the heritage/planning authority. The problem can arise if a developer holds pre-DA discussions with the heritage/planning authority and essentially agrees an outcome prior to the availability of a CMP. In such cases, the CMP can have little effective outcome on the proposal whereas the CMP should have a major impact on the proposal. CMPs should be prepared or at least substantially drafted before development proposals, and should be available prior to any pre-DA discussions which might give some level of support to any proposal.

*Recommendation 24 Heritage impact statements should be prepared by heritage consultants chosen and commissioned by a neutral party or heritage/planning authority, and paid for by the developer/proponent.*

*Recommendation 25 Conservation management plans should be prepared or at least substantially drafted before development proposals, and should be available prior to any pre-development application/referral discussions which might give some level of support to a proposal.*

