

## **Australian Heritage Council**

### **Submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999***

The Australian Heritage Council ('the Council') makes the following submission to Dr Alan Hawke, independent reviewer of the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act'). The Australian Heritage Council is a body of experts established by the *Australian Heritage Council Act 2003* ('the AHC Act'), and is the principal advisor to the Australian Government on heritage matters. The Australian Heritage Council is referred to in Part 15 of the EPBC Act regarding National and Commonwealth heritage listing and management and Part 15A, which deals with the List of Overseas Places of Historic Significance to Australia. The Council notes that its first periodic report (2004 – 2007), which is attached, canvassed some issues relevant to the current review.

#### **Introductory comment**

The Council recognises the strength of the current EPBC Act in its application to heritage matters. The Council does not support views that a separate piece of heritage legislation should be established, as was the case prior to the EPBC Act. The EPBC Act has a major advantage in bringing together natural, historic and indigenous values, as the National Heritage List. Philosophically, and in terms of good conservation methodology, this is very desirable. However, the EPBC Act as it currently stands is very complex and not readily accessible to the lay person. This is a concern for all elements of the EPBC Act. The heritage parts of the EPBC Act need to be made clearer, to be grouped together, and be presented in a way that is more user friendly. The Council supports producing an electronic heritage-specific version of the EPBC Act. Presentation, rather than legislative change, has the capacity to increase understanding and compliance. An electronic heritage-specific version of the EPBC Act could achieve this end. The Council also supports ensuring greater education on the operation of the EPBC Act, especially to Indigenous communities.

*Recommendation 1: That the heritage provisions are maintained within the EPBC Act.*

*Recommendation 2: Consideration is given to including Heritage in the title of the Act.*

*Recommendation 3: An electronic heritage-specific annotated summary of the EPBC Act be produced for easier use and accessibility.*

*Recommendation 4: A public education campaign be initiated on the operation of the EPBC Act, particularly in Indigenous communities.*

#### **Independence of the Council:**

The Council supports the continued identification of properties of National and Commonwealth heritage significance being carried out by the Council, thereby ensuring the integrity of the Council's work.

*Recommendation 5: The Council is solely responsible for calling for nominations and determining the National and Commonwealth Priority Assessment Lists.*

The Council recognises that in most Australian jurisdictions heritage councils make decisions on heritage listings. The separation of listing and management represents an important heritage conservation principle. The EPBC Act is a system in which, when making a listing decision the Minister, rather than the Council, takes into account heritage values and other relevant considerations. The Council submits that it would be appropriate

to have within the EPBC Act a provision requiring the Council to maintain a public list of its listing recommendations, which are based purely on heritage values, and the subsequent Ministerial listing decision. The list would serve as a concise public record of the Council's recommendations. However it would not be published until the Minister has had a set period to reach his view.

*Recommendation 6: The EPBC Act makes provision for a public listing of the Council's recommendations and subsequent Ministerial decisions.*

The Council is aware that the decisions it makes have implications for both land owners and managers in terms of financial and other external costs. This was made particularly evident by the Productivity Commission Inquiry into Historic Heritage. The Council is very aware of the rights of owners/occupiers to express their concerns regarding heritage listing, including the costs of maintaining heritage places. Without removing the critical requirement that assessment advice to the Minister should be solely based on heritage values, the Council should be further permitted to make representations to the Minister on the costs, including opportunity costs, of heritage listings. While the Council sees all comments received from interested parties, including those not relating to values, and has provided advice to the Minister under s.5(h) of the AHC Act regarding the implications of heritage listing, this should be reflected in the EPBC Act.

*Recommendation 7: The Council be enabled to report to the Minister on the implications of any submissions, including those that deal with issues other than heritage values.*

The EPBC Act currently allows the Minister to declare Assessment themes. To date, this has only occurred once and this was on the advice of the Council. Council is of the view that the EPBC Act should explicitly provide that the Minister may only declare a theme for a period on the advice of the Australian Heritage Council and that there should be a rolling program of these three years ahead.

*Recommendation 8: The Minister only declares a theme and a period of the theme on the advice of the Australian Heritage Council.*

### **The listing process for National and Commonwealth Heritage places:**

In addition to ensuring the independence of the Council, there are several process based issues that need to be addressed by the review. Consistent with the 2006 amendments to the EPBC Act, the Council wishes to be able to consolidate existing multiple listings into one single listing. Such examples would be to consolidate the many places on the Commonwealth Heritage List in Canberra's parliamentary triangle and consolidate Mt Tyrendarra and Mt Eccles / Lake Condah into one Budj Bim National Heritage place.

*Recommendation 9: Provision be made in the EPBC Act to retrospectively consolidate listings where appropriate.*

The appropriate time for public comment needs to be examined. At present, the Council receives general comment from interested members of the public on release of the finalised priority assessment list. This is the only time the general public can comment, when only limited information is available. The Council proposes that general comment be sought at the 'might have values' stage so that it increases the transparency of the listing process and engages a broader part of the community in discussions about the merits of a listing.

*Recommendation 10: Remove public comment following the release of the assessment list and allow general public comment at the 'might have values' stage of assessment.*

### **Management planning for listed places and the relationship with states and territories:**

The current focus on the process of creating management plans, for less complex heritage places, can take away from achieving desired heritage conservation outcomes. Management plans, which may take a long time to develop may delay effective protection being undertaken (given the cost or delay in decision making). The Council considers that the merits of other options (e.g. conservation advice) that achieve good results, rather than a strict management plan process, should be considered. A flexible series of instruments focused on good outcomes is more desirable than the current focus on management planning as set out in the EPBC Act.

*Recommendation 11: Management arrangements should focus on successful outcomes rather than meeting process requirements.*

### **Assessment of Commonwealth heritage places and the role of the Register of the National Estate:**

The Council notes that a number of Commonwealth agencies are not meeting their heritage requirements under the EPBC Act or not fully taking opportunities for a whole-of-government approach to heritage. Commonwealth agencies are required to create heritage strategies and they should be required to link that strategy with subsequent nominations to the Commonwealth and National Heritage List. Commonwealth agencies should also be actively considering places within their control that are currently on the Register of the National Estate for Commonwealth Heritage listing.

*Recommendation 12: Greater scrutiny of Commonwealth agencies should be undertaken to ensure that they act in accordance with their heritage responsibilities.*

*Recommendation 13: Allow for the inclusion of places identified in an Agencies Heritage Strategy as having Commonwealth Heritage values into the Commonwealth Heritage List through a streamlined process.*

The statutory timeline for cessation of the Register of the National Estate (RNE) as a list is fast approaching. Considering the poor take up by States and Territories to date, it is highly likely that some deserving places on the RNE will not be able to be transferred to appropriate heritage list (local, state or Commonwealth) before the list expires. The transfer of places from the RNE to the Commonwealth Heritage List needs to be streamlined. The Council also recommends that the RNE should remain as a statutory list until such a time that each place that merits transfer can be transferred. The Council recommends that, rather than ceasing altogether in 2012, the RNE be permitted to cease in the jurisdiction of a state or territory when the Commonwealth is satisfied that all places in that jurisdiction are appropriately protected through other statutory instruments.

*Recommendation 14: Allow for the transfer of places on the Register of the National Estate to the Commonwealth Heritage List through a streamlined process.*

*Recommendation 15: Retain the RNE as a statutory list until all places can be assessed for possible inclusion in an appropriate heritage list or appropriately protected in another statutory way.*

### **EPBC Act-wide issues:**

The *Environment Protection and Biodiversity Conservation Act 1999* requires the Minister for the Environment, Heritage and the Arts to table in Parliament a report on the State of the Australian Environment, every five years (s.516B). The current State of the Environment report has little benefit for heritage protection under the EPBC Act. Under s24A of the AHC Act, the Council may report to the Minister on any issue at any time. The Council recommends that its current practice of preparing a 3 yearly periodic report be

continued, and mandated by legislation. A copy of the first periodic report (2004 – 2007) is attached for information. This report could be incorporated into the State of the Environment report where appropriate.

*Recommendation 16: That the Council be mandated by legislation to produce the 'Australian Heritage Council – Periodic Report' every three years.*

Under the EPBC Act, Indigenous people with a right or interest must be consulted as part of the assessment process. The Council would like the EPBC Act to explicitly require free and informed prior consent to be sought from Indigenous people with a right or interest prior to a listing decision.

*Recommendation 17: The EPBC Act explicitly require free and informed prior consent from Indigenous people with a right or interest prior to a listing of Indigenous heritage values.*

The use of Part 3 of the EPBC Act should only be pursued as a last resort. Council considers utilising management frameworks and other consultative process will lead to significantly better heritage outcomes. The Council strongly supports the early consideration of any action on the National and other heritage values of listed places.

Over time the Council would like to see more decisions regarding controlled actions delegated to States and Territories. While such delegation should be measured, this objective would demonstrate the Commonwealth's willingness to recognise state and territory competence and enhance Australia's co-operative heritage system.

*Recommendation 18: Controlled actions should only be used as a last resort approach, when consultative and other management frameworks have not succeeded in achieving a proposal that is compatible with the heritage values of the place.*

#### **Other issues:**

While not matters strictly handled by this review, the Council would like to take this opportunity to raise further issues.

One of the most significant powers of the Council is its ability to produce reports to the Minister pursuant to section 24A of the AHC Act, which must be tabled before each House of the Parliament. This independent advocacy role of the Council is vital to its operations, as it provides an avenue to demonstrate its independence. While the Council continues to work well with the Government and Department, the Council does not have a guaranteed budget or resources available for this purpose, which means that the effective independence of the Council could be undermined by a lack of capacity to record and publish such requests. Via the EPBC Act or some related legislation the budget papers should define an amount available for section 24A reports.

*Recommendation 19: A guaranteed budget be provided for the Council to produce reports in accordance with s.24A of the Australian Heritage Council Act 2003 and to conduct its statutory functions.*

The Council also does not have the budgetary capacity for independent publicity, nor does it have its own staff. The Council is dependent on the Department to provide Secretariat support. The Council also does not have a dedicated budget to meet with concerned stakeholders and visit places to be assessed. It can be difficult for the Council to make decisions on heritage values when a member of the Council has not visited the place that is the subject of a listing recommendation.

*Recommendation 20: Consideration be given to providing budget to the Council for the purposes of independent publicity, maintaining its own staff and travel requirements.*

Due to Constitutional limitations of Commonwealth powers there is also a continued problem that some National Heritage places located in states or territories are not protected to a level required of their status. More needs to be done to implement the agreement reached in the 'National Heritage Protocol – Statement of Roles and Responsibilities'. This is specifically in relation to paragraph 3.6(j), which recognises the Constitutional limitations of Commonwealth power and requires a state government to use its best endeavours to ensure that a National Heritage place is protected to the maximum possible level through the application of state legislation, and that there is no gap in protection.

*Recommendation 21: That the Commonwealth do all it can to implement the National Heritage Protocol and ensure that State legislation can adequately protect National Heritage places where Commonwealth Constitutional power is limited.*

The Council notes recent efforts by the Commonwealth to strengthen relations with the states and territories to create a national heritage policy and program regime. This could in turn raise awareness for heritage protection to the benefit of all parties.

*Recommendation 22: Recent efforts to strengthen the partnership between the Commonwealth and states and territories on a proactive and articulated national heritage policy and programmed regime should be continued and enhanced.*

The Council considers the integrated assessment and management of the three heritage environments (natural, historic and Indigenous) is a fundamental premise of heritage protection, but notes that the treatment of historic heritage by the Commonwealth in recent years has not been to the same level as natural and Indigenous heritage. Biodiversity conservation programs have raised community awareness of the natural environment and biodiversity over the past 10 years. Unfortunately, similar programs have not been available in the historic heritage field, and the abolition of the National Estate Grants and more recent programs has resulted in no ongoing funding for historic heritage. The Council recognises and congratulates the government for the \$60 million made available to heritage in the recent economic stimulus package, and recommends that such funding become a permanent part of Commonwealth, state and community partnerships in the historic heritage area.

*Recommendation 23: That, considering the success of natural and Indigenous heritage programs over the past ten years, similar funding be made available for historic heritage programs to raise awareness and improve community engagement.*

**The Australian Heritage Council appreciates the opportunity to make this submission and is keen to meet the independent reviewer to further discuss the issue raised in this submission.**

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