



Australian Government

Department of the Environment and Heritage

Response to the Productivity Commission Draft Report *Conservation of Australia's Historic Heritage Places*

22 February 2006

Introduction

The Australian Government Department of the Environment and Heritage welcomes the opportunity to make a submission in response to the Productivity Commission's draft report *Conservation of Australia's Historic Heritage Places* ('the draft report'). This submission follows two previous submissions to the Inquiry.

The basis for responsibilities of the various levels of government is provided by the 1997 COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, which endorsed the principle of subsidiarity for heritage. This establishes that the Australian Government is responsible for matters of national environmental significance, such as places of national heritage significance, and for proposals on Commonwealth lands and waters, and proposals which are beyond the jurisdictions of the states and territories.

Beyond these areas of formal responsibility, the Australian Government has an interest in the efficient workings of the heritage system more broadly. The interest is for three key reasons, which are:

- the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) protects the National Heritage values of listed places, whereas National Heritage places may have other heritage values that are protected by legislation at other levels of government;
- the need for a broad range of heritage data to inform policy decisions, much of which is held by other levels of government; and
- the frequent interaction between the heritage activities of the Australian Government and other levels of government (for example, on 16 January 2006 all places on the World Heritage List and the National Heritage List were also entered in lists held by other levels of government).

This interest in the overall effectiveness of the system is the reason that the Department's second submission to the Inquiry outlined an agenda for cooperative work with the states and territories. This work is being pursued through the Environment Protection and Heritage Council.

Whilst acknowledging that the Australian Government has an interest in the effective operation of the three-tier heritage system, this submission will in general not comment upon the merits or otherwise of particular aspects of the report that relate most directly to other levels of government. This submission will focus instead on some matters of fact and coverage, as well as enquiring about some of the Commission's recommendations and their implications.

The draft report

The draft report presents a broad analytical framework consistent with that outlined in the Department's first submission. The Department shares the Productivity Commission's view that heritage policy should consider both the costs and benefits to owners (both private and government), and to the community, of heritage. We welcome attempts to find improved ways to assess and weigh both the benefits and costs of protecting historic heritage places. The Department also agrees that more policy instruments are needed to encourage private conservation activity, and that the system should not rely solely on legislative controls.

The Department is not persuaded that the Productivity Commission's key draft recommendation would necessarily achieve higher net benefits to the community than other heritage systems, including the current system. While it would undoubtedly strengthen the focus on the costs of heritage listing – and the Department supports enhancing the consideration of the balance of benefits and costs in heritage listing – the way in which the Commission proposes to achieve this would have a number of drawbacks.

The Department suggest that further consideration should be given to:

- The broader incentive and funding implications and the associated effects on heritage protection of the system of voluntary conservation agreements recommended by the Commission. We suggest that the proposed solutions are a step too far in that they would, if implemented, cause other difficulties in adequately protecting heritage values;
- It would assist governments to better target heritage conservation if the Commission could assess and recommend appropriate mechanisms to estimate costs and benefits of conservation, including a discussion of current information and analytic gaps.

The first section of this submission discusses various aspects of these issues in more depth. The second section considers the scope of the draft report and the evidence that was presented to the Inquiry. The third section considers the need for improved analytic tools and data. The fourth section covers the need for a suite of policy instruments for historic heritage conservation. The final section offers some points of clarification regarding factual errors in the draft report about the Australian Government's heritage system.

Implications of the Commission's key recommendation

The Commission's key recommendation is that 'privately-owned properties should be included on a national, State, Territory, or local government statutory heritage list only after a negotiated conservation agreement has been entered into and should remain listed only while an agreement is in force' (recommendation 8.1). The key benefit of a negotiated agreement system is that it requires all parties to agree to the listing, which in theory implies that for all agreements the benefits outweigh the costs of listing (including all private and social benefits and costs).

Nonetheless, a number of issues remain to be considered more fully before it can be claimed that the negotiated agreement system recommended by the Commission in its draft report would be beneficial:

- Moving to a negotiated agreement system affects not only the distribution of costs but also the level of costs borne by affected parties (including governments) of protecting historic heritage. This can have the effect of changing the cost benefit ratio of listing any given property. The Commission offers no estimates of transactions costs but, prima facie, it would appear that such costs could be more substantial under a negotiated agreement system (including legal and contract management costs as well as the time cost of negotiations) than under the current system. Thus, properties that have a heritage value that is smaller than these potentially large transactions cost, would no longer be efficient to list. This is likely to be particularly problematic for local heritage.
- Although the Commission appears convinced that, in the majority of cases, sufficient alternative sites are available that embody the heritage values sought, it has not provided evidence in this regard. To the extent that heritage values are rare (ie only held by a limited number of owners), the private owners would, under the system proposed by the Productivity Commission, have a financial incentive to engage in rent seeking. The Commission's proposed solution to this is compulsory acquisition. However, compulsory acquisition only acts as a cap and does little to address rent-seeking up to the cap. Furthermore, even as a cap, given the costs associated with compulsory acquisition (and its impracticability) it is not likely to be binding, even where the heritage values in question are large, let alone when the heritage values are modest (which they often are in the case of local heritage).
- Unless there is a large reduction in the heritage listing of privately-owned places, then there is a broader question as to where adequate funding is to come from to implement the Productivity Commission's approach.
- When governments offer payment for private owners to undertake a specific activity, those private owners who would have undertaken that activity anyway have a financial incentive to seek funding. However, it is often difficult for governments to distinguish between activity that would have taken place anyway and activity that is the direct result of a policy. This can lead to payments for activities that may have taken place anyway. The harder it is to avoid such payments, the weaker is the case for the government to pay for policy outcomes more broadly.

- The report should clarify whether the proposed system will also apply to heritage listing between different levels of government, for instance the inclusion of state-owned places in the National Heritage List.
- There may also be implications for natural and Indigenous heritage conservation. For instance, many heritage places will have natural and cultural heritage values, and it may not be appropriate for them to be managed under two different regimes. It is also not clear from the draft report whether the proposed system of voluntary conservation agreements would be applicable for natural and Indigenous heritage conservation, or whether a different policy framework is being recommended for historic heritage conservation, which would have a number of ramifications, particularly in jurisdictions which have achieved an integrated approach to conserving heritage places. To the extent consistent with the terms of reference, it would be useful for the position to be made explicit in either case, and for the report to identify the potential impacts of its preferred approach.

The scope of the draft report and the evidence presented to the Inquiry.

The draft report currently focuses upon a single problem (privately-owned buildings which are located outside heritage zones) and applies a single solution (conservation agreements negotiated under conditions of private owner veto). The key recommendation for a system of conservation agreements for privately-owned buildings may not be compatible with the systems that are in place for government-owned heritage, and there are no recommendations with regard to other types of heritage places, for instance archaeological sites, cultural landscapes or bridges.

It is widely-accepted that there are considerable gaps in the data for historic heritage. However, there is still a considerable amount of information available on historic heritage, including the public submissions to the Inquiry and the State of the Environment reports. The Department would like to see more of this information used in the final report, as the draft report has relied in part on anecdote and assertion rather than statistical evidence to make some key points, for instance about the level of private-owner dissatisfaction with heritage listing.

In terms of the evidence provided to the Inquiry, there appears to be insufficient support for draft finding 6.1, which implies that heritage listing typically has a negative impact on market value. The draft report does not provide convincing evidence for this assertion, and ignores other evidence that suggests that heritage listing can preserve or increase market value. It is also possible that the opportunity costs arising from listing a property may be higher as the result of heritage restrictions on nearby properties. Thus, the last owner in an area to have their property listed may claim a greater opportunity cost than the first owner who had their property listed.

The draft report states that there is widespread neglect, demolition or defacement of heritage places in private ownership from owners wishing to avoid or sidestep heritage controls, but it does not provide any evidence to support the claimed magnitude of this problem. If this practise is widespread, it would be useful if the final report analysed whether there were any particular characteristics of this problem that might lead to targeted policy responses. For example, perhaps there are fewer problems with some categories of heritage places, for instance where the heritage values are broadly accepted. An appreciation of the incidence and character of any problem could help to achieve targeted policy solutions.

Similarly, the report contains very little international comparative information. Yet the issues that the report considers are, in different ways, relevant in many other countries. It would be useful for the report to outline lessons that might be learned from other jurisdictions. For example, we understand from material provided by the New Zealand Historic Places Trust to the Heritage Chairs and Officials of Australia and New Zealand, that in New Zealand the effectiveness of heritage listing under the former *Town and Country Planning Act 1977* was reduced by compensation provisions for instances of refused development consent. This resulted in many listed places being demolished, as development consent was rarely refused by local government. The community concern about reduced heritage conservation resulted in the development of the *Historic Places Act 1993* and the *Resource Management Act 1991*.

The Inquiry's terms of reference include a requirement for the Commission to examine the positive/negative impacts of taxation arrangements on the conservation of historic heritage places. The issue is raised in a number of submissions to the Inquiry. However, the draft report contains very few references to taxation arrangements. The draft report mentions the now discontinued income tax rebate for historic heritage conservation, and notes that the rebate was abolished because it was found to be less transparent and accountable than direct financial assistance.¹

The Department considers that the Commission should more fully consider this aspect of its terms of reference, and investigate the negative and positive impact of a range of possible taxation arrangements. In this respect, the taxation treatment of heritage might usefully be compared with the taxation treatment of, for example, biodiversity conservation.

Voluntary agreements and the natural environment

The Victorian Government's BushTender system and the Trust for Nature (a non-profit organisation) encourage voluntary conservation activities on privately-owned land. The draft report suggests that a system of voluntary conservation agreements for historic heritage could be similar in approach. However, the BushTender system and the Trust for Nature complement, rather than replace, existing government legislation, policies and programmes. While market-based instruments can produce good conservation outcomes and may be a positive contribution to the suite of policy instruments available to conserve historic heritage, they will not be effective if they are the only policy instrument that is available to government.

In Victoria, the BushTender system operates with land owners competitively tendering for government contracts (payments) to conserve or enhance their native vegetation. Land owners develop tenders on the basis of their expected conservation costs, and the tenders are considered for their "value for money", taking into account the current conservation value of the site, the conservation services that will be provided and the payment requested by the owner. The auction process means that the property owner is encouraged to reveal their costs, which in turn helps to reveal the most cost-effective options for government spending on conservation. The Trust for Nature utilises its own revolving fund to purchase and protect bushland. It places covenants on the land to protect native vegetation before selling it to replenish the fund and allow future purchases. The revolving fund has been supported by bequests, donations and significant government funding.

The Victorian Government's policy of "net gain", as outlined in Victoria's Biodiversity Strategy, provides the broader context for the success of the BushTender system and the Trust for Nature. The "net gain" policy is underpinned by Clause 52.17 in the Planning and Environment Act 1987 and action statements prepared under the Flora and Fauna Guarantee Act 1988. Clause 52.17 provides a key mechanism for protection of biodiversity in Victoria. It is part of all planning schemes and requires a permit to be obtained to clear any native vegetation on contiguous land in one ownership of 0.4ha or greater in area (subject to certain exemptions). This legislation provides a "safety net" which ensures that public good conservation outcomes will be met on privately-owned land. It provides an indirect incentive for property owners to participate in the BushTender system and the Trust for Nature, as the restrictions on land clearing make participation in these programmes more attractive to land owners.

An effective market-based approach also requires the availability of adequate data on historic heritage to assist with determining conservation priorities. The BushTender system and the Trust for Nature are supported by established data sets (which have been expensive to establish and paid for through federal and state funding) on the threatened ecological vegetation classes in the Interim Bioregionalisation for Australia (IBRA). Equivalent data sets are not currently available for historic heritage, and it is difficult for the market to provide a socially optimal level of conservation without this information.

¹ Draft Report, p. 121

Improved analytic tools and data for historic heritage

In previous submissions to the Inquiry, the Department has argued that some level of government intervention to protect heritage is justified for economic and social reasons, but that the benefits of intervention must outweigh the costs. In support of this approach, the Department is identifying ways in which the national heritage system can operate on a more sustainable basis to make best use of the available resources and to achieve a socially optimal level of heritage conservation. The Department is also seeking a more comprehensive analytical framework with which to weigh the benefits of conservation against its costs.

The draft report states that the proposed system of voluntary conservation agreements will need to be supported by appropriate mechanisms to assess the benefits and costs of conservation, and to rank candidate places in terms of the net social benefits arising from their conservation. However, the draft report also acknowledges the absence of robust data sources and analytic frameworks to support this process. It would be useful for the final report to include recommendations about how to close the information and analytic gaps, including suggestions on the range of data that is required.

The Department considers that improved data sets could provide more information about the pressures on different categories of heritage places, which would assist with setting priorities for funding and inform decisions about appropriate forms of intervention. An important first step would be the standardisation of indicators for State of the Environment reporting and provision of the requisite data, which requires cooperative action by all levels of government. Also, the development of appropriate methodologies to determine the costs of conservation for different categories of heritage places would assist governments to better target funding for heritage conservation.

A suite of policy tools is needed for historic heritage

The Commission has indicated that negotiated conservation agreements provide a better incentive for private owners to proactively conserve their heritage places. It would be helpful if the Commission could investigate other ways of achieving this objective, for instance by enhancing private returns through other policy approaches. These other approaches may include non-financial motivations that can be attended to in achieving better conservation outcomes.

A suite of policy tools is needed to conserve Australia's historic heritage. There are different types of heritage places, with varying degrees of significance, and a range of pressures can affect their conservation. Reliance on voluntary conservation agreements would lack sufficient flexibility and probably would not have the benefit of eliciting the true costs and benefits of heritage conservation.

There are other ways in which governments can achieve good conservation outcomes without imposing costs on private property owners. For example, in its second submission to the Inquiry, the Department proposed an approach that shifted the costs from private owners to the wider community by supporting activities such as tourism, branding and partnerships. There may be other ways to harness the benefits from heritage places, and the Department supports additional research and extension work in this area.

Australian Government powers and processes

The Australian Government has an effective legislative framework to protect places of National Heritage significance, including places in private ownership, which is not adequately reflected in the draft report. The report currently understates the scope and balance of the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The draft report states that:

The approval process is limited by the constitutional powers of the Australian Government. That is, it only applies to the Australian Government, its agencies and corporations, and other people who fall within a constitutional head of power (such as an action for the purposes of trade or commerce, and an action in a Commonwealth area or Territory). For all other situations, the terms of

intervention depend upon the individual terms of the bilateral conservation agreement made between the Australian Government and land owner².

The heritage provisions of the EPBC Act rely on a range of constitutional powers, including the powers in relation to external affairs, trade and commerce, corporations and race. The EPBC Act prohibits actions that have, will have or are likely to have a significant impact on the World Heritage values of World Heritage properties. These provisions apply to all World Heritage properties in Australia, whether they are privately or public owned.

The draft report also states that 'listing without the consent of owners would have little statutory effect on non-Commonwealth owned or controlled places ...'³. This is not necessarily the case. Inclusion of non-Commonwealth owned or controlled places on either the World Heritage List or the National Heritage List imposes controls on the actions that may be undertaken in relation to those properties, whether the places are privately or publicly owned.

The provisions in relation to National Heritage places apply to actions which have, will have or are likely to have a significant impact on the National Heritage values of a National Heritage place where these actions:

- are taken by a constitutional corporation, the Commonwealth or a Commonwealth agency;
- in relation to privately-owned National Heritage places, the restrictions on actions by constitutional corporations are of obvious practical significance;
- are taken for the purpose of international or interstate trade or commerce, or trade or commerce between a State and a Territory, or between Territories;
- are taken in a Commonwealth area (which includes land owned or leased by the Commonwealth or a Commonwealth agency), or in a Territory;
- which have, will have or are likely to have a significant impact on the indigenous heritage values of National Heritage place; or
- which have, will have or are likely to have a significant impact on the National Heritage values of a National Heritage place in an area in respect of which Australia has obligations under Article 8 of the Convention on Biological Diversity.

It should be emphasised that it is the heritage values of the place that are protected rather than the place itself. As a result, only uses of the place that adversely affect the values are constrained, rather than all non-heritage uses. This provides greater flexibility in the options for adaptive reuse of heritage places.

The national heritage system provides for the Minister for the Environment and Heritage to enter into conservation agreements with any person. However, conservation agreements are not a central part of the national heritage system and they do not replace the statutory controls that have been outlined above. The Minister cannot enter into a conservation agreement for the protection and conservation of a National Heritage place unless satisfied that the agreement will result in a net benefit to the conservation of the place's heritage values and is not inconsistent with the National Heritage management principles. The administrative cost of conservation agreements is considerable, and they may not be cost-effective in all cases.

The main purpose of bilateral agreements that accredit state/territory assessment and approvals processes is to reduce duplication between the Australian Government and the states/territories, as they provide for the delegation of assessment and approval of actions under the EPBC Act to the states and territories, which stream lines the assessment and approvals process for proponents. Bilateral agreements operate in relation to places which can be protected by the provisions of the EPBC Act.

² Draft Report, p. 44.

³ Draft Report, p. xxviii