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Heritage Inquiry
Productivity Commission
PO Box 80
Belconnen ACT 2616

Dear Madam or Sir

Please find attached my submission regarding this inquiry.

I would be happy to provide further comments, in writing or at a hearing, if desired.

Your sincerely

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SUBMISSION REGARDING THE PRODUCTIVITY COMMISSION INQUIRY – CONSERVATION OF AUSTRALIA’S HISTORIC HERITAGE PLACES

Duncan Marshall
27 July 2005

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.

The Productivity Commission inquiry 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? If the government was really seized by the need to do more for heritage there are much easier and more direct paths than the current inquiry. I have watched too many Ministers wring their hands in apparent sympathy for the problems, and then do little or nothing, but mostly nothing.

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. When was the last time the Australian Government Minister for Heritage took a truly large heritage funding package to Cabinet – something to rival the Landcare or Bushcare funding? Never? When was the last time the Minister’s Department or independent expert advisory body recommended such a package? How many paid lobbyists for heritage are there at the national level? One, though not even fulltime really.

The most useful issues the Productivity Commission inquiry 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 national heritage system, especially in the establishment phase of the new system;
- the apparent complexity and possible flaws of the national 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.

By way of background, I am a heritage consultant with over 20 years experience in the private sector, the government sector and in non-government organisations. I have been particularly involved with the mechanisms of government including legislation, policies and programs. This has focused on the national realm, and has included a long period dealing with the politics of heritage.

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.

In 1998 the 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)

Seven years later there is no national strategy, nor apparently the prospect of one.

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 Prime Minister intended to nominate it for the National Heritage List in 2003. Heritage conservation can be achieved through many means, and it looks like Australia has 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 has a budget of \$100 million and is part of the Minister for the Environment & Heritage's own portfolio. Yet it is 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 is apparently not the Minister or the Department or the Division which is actively defining the problem and seeking a solution. That task has fallen to a Parliamentary committee. This does not look like a commitment to demonstrating leadership.

In July 2005, the current Minister provided a statement of reasons in relation to an emergency listing request which will result in the loss of large amounts of heritage fabric from a Commonwealth Heritage listed place, the RAN Transmitting Station, Belconnen. The decision would appear to be seriously flawed and is far from the leadership promised by Dr Kemp or indeed Minister Campbell who said in the same month,

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

There are other examples:

- the intellectual leadership by the Australian Government has all but stalled – leaving aside the special case of the substantial preparations for this inquiry, 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. The current AHC has issued one press release in 19 months! Though it is unfashionable to refer to the work of the former Australian Heritage Commission, it seemed 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 recent departmental re-arrangements. One may well ask why the current AHC, as the government's primary expert heritage adviser, is not undertaking this inquiry into heritage, rather than the Productivity Commission? and
- DEH 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 seems somewhat timid and introverted. 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 Australian Government can do a lot more to provide national leadership in heritage, across a wide range of activities.

- Recommendation 1. The Australian Government should provide national leadership in heritage conservation.
- Recommendation 2. A truly national heritage places strategy should be developed as a priority.
- Recommendation 3. The Australian Government should re-commit itself to demonstrating leadership in relation to the management of heritage properties it owns or controls.

- Recommendation 4. The Minister for the Environment & Heritage should ensure his own portfolio demonstrates a high level of real commitment and priority for heritage.
- Recommendation 5. The Australian Government should demonstrate intellectual leadership in heritage conservation, including the establishment of a program to fund research.
- Recommendation 6. The Australian Heritage Council should be an independent, expert public champion of heritage at the national government level.
- Recommendation 7. DEH 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 8. 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.

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 government level;
- establishment-phase resources for DEH;
- the number and level of heritage experts in DEH; and
- establishment-phase resources for DEH, including staff.

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. But I am aware that Australian Government funding assistance for conservation work is a tiny amount, something like \$7 million in the 2005 Budget, of which \$5 million is for two churches and the remainder may not even go to historic heritage conservation. This is a pathetic contribution.

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

The Australian Government has 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.

For example, the Natural Heritage Trust is a \$3 billion program which involves “partnerships between all levels of community and Government” which aims “to improve the management of Australia's natural resources” and it does this through the Australian Government Envirofund for community groups, regional investments and national investments. However, only national investments deal with *national* priorities. The Australian Government does not appear to be focused only on national environmental matters but seems to provide substantial support for all levels of the natural environment. (<http://www.nrm.gov.au/about-nrm.html>; <http://www.nht.gov.au/>)

Perhaps natural heritage/environment is different from historic heritage? Perhaps not. 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.

A great pity in the Productivity Commission inquiry to date is an apparent reluctance to deal openly with the big question the heritage sector wants it to address – the level funding assistance needed for heritage conservation and that which should be provided. Hopefully the Commission will find a satisfactory way to deal with this major issue.

Recommendation 9. 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 10. The Productivity Commission 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 11. 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 National Heritage System

Throughout the process to develop the new system, 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 explaining the system. While there have been some efforts in this regard, a range of issues still remain such as:

- an apparently poor level of understanding by nominators to the National Heritage List about the real threshold for listing and the desired minimum level of documentation;
- a continuing poor and confused level of understanding by Australian Government agencies about their obligations and processes under the legislation; and
- management plan guidelines are still not finalised, and there is no sign of guidelines for assessments.

Many of these are establishment-phase issues but some will continue beyond into the future.

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. These processes might, for example in the case of a referred action, involve three sections within the Approvals & Wildlife Division plus one section in the Heritage Division. In the case of management plans, these processes may involve two different sections within the Heritage Division. As the basis for all of these deliberations is essentially the same expertise, why can't they be dealt with by one area?

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; and
- possible problems with subsections 324E(4) and 341E(4) which all but neutralise the use of these subsections to help manage poor quality nominations.

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 national heritage system 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 system 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 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 the latest available annual report for DEH, for 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.

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.

As a footnote, I am also aware of the recent Australia Institute report, *Environment Protection and Biodiversity Conservation Act, A Five Year Assessment* (Macintosh & Wilkinson 2005). I have not had a chance to digest this report but note that it generally raises concerns about the effectiveness of the *EPBC Act* to protect the environment including heritage places. This seems to lend weight to my concerns.

Recommendation 12. Establishment phase resources should be provided to address apparent issues with the implementation of the new heritage system including for:

- promoting a better understanding of the concept of National Heritage and the minimum level of documentation sought amongst potential nominators;
- promoting a better level of understanding about the obligations of Australian Government agencies and processes under the legislation; and
- the finalisation of management plan guidelines and the development of assessment guidelines.

Recommendation 13. Internal processes related to the referrals of actions and management plans under the *EPBC Act* should be reviewed to see whether they might be simplified, including reducing the number of departmental sections which deal with such matters.

Recommendation 14. A review should be undertaken to identify problems with the legislation, and these should be resolved by amendment where necessary. This includes addressing the:

- definition of the term aesthetic;
- possible problems with subsections 324E(4) and 341E(4);
- 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 15. 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.

Expertise and the National Heritage System

The credibility of the national heritage system rests 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.

In the first instance, the number of senior, experienced and expert historic environment professionals is very small, about 4 people working on assessments and 2.5 people working on management/advice issues. The highest position amongst these people is the EL1 or Assistant Director level.

In addition, there are 2 part-time Australian Heritage Councillors, one of whom is a senior, experienced and expert historic environment professional and the other has substantial experience in heritage matters generally.

The second issue is the level of expertise in the overall government hierarchy. As noted, the most senior DEH public servant who is a historic environment expert working on such matters is at the EL1 level. Above this are 5 levels of management – EL2/Director to Departmental Secretary. Above this again is the Minister.

The current trend is to favour management generalists in all positions for EL1 and above.

All of this creates several issues:

- the historic environment needs senior experts in senior positions; and
- senior experts are not attracted to ASO6 positions or below.

It is apparent the existing professional staff are struggling with the workload of the new national heritage system. It is understood that no additional staff resources were provided in the historic environment to deal with the establishment phase of the new system, although some additional resources are now to be provided. Accordingly, management plan guidelines are still not finalised, and there is no sign of guidelines for assessments. In addition, the system is generating:

- substantial numbers of nominations especially to the National Heritage List;
- conservation management plans; and
- heritage strategies.

All of these require substantial expert review/work, and with very limited resources the system is overstretched trying to deal with them. It is not clear that the new resources will be sufficient to address all the problems, nor that the new people will have the degree of expertise required.

Recommendation 16. The number of senior, experienced and expert historic environment professionals working on historic environment matters in DEH should be substantially increased.

Recommendation 17. Senior historic environment experts should be appointed to senior positions, at least the EL2 level.

Recommendation 18. Additional establishment-phase resources should be provided to/within DEH, including staff.

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 19. 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.

Recommendation 20. Conservation management plans should be prepared or at least substantially drafted before development proposals, and should be available prior to any pre-development application discussions which might give some level of support to a proposal.