

Conservation of Historic Heritage Places

Submission on the Productivity Commission's Draft Report

Submission by
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When reading the Productivity Commission's draft report from its Inquiry into the *Conservation of Historic Heritage Places*, I find the Commission's comments relating to the legal basis of the Commonwealth's involvement in setting up regulatory regimes for the protection and conservation of heritage unclear.

In its Report the Productivity Commission expresses a clear preference in heritage matters to a reliance on voluntary agreements between the heritage regulator and the owners of heritage items. On my reading of its Report, this preference seems to derive in part from the Commission's view of the inadequacy of the Commonwealth's powers under the Australian Constitution to regulate heritage matters. The references in the Productivity Commission's Report to the legal and constitutional bases of the Commonwealth's role in heritage matters, however, lack precision and citation of supporting authority. Expressed in this way the Report may lead to confusion.

I will refer to parts of the Report.

The Commonwealth list is the only list where the Australian government has constitutional power to directly conserve and manage the listed place. p41

The significance of the use of the word "directly" is unclear, as much of what the Commonwealth does is without direct authority in the Constitution. This use, however, seems to be significant in the Commission's view when it goes on to say, for example:

As listing without the consent of owners would have little statutory effects on non-commonwealth owned or controlled places ... p xxviii

This statement should be heavily qualified. Left in this unqualified way, this statement seems incorrect.

In the heritage area, the Commonwealth's power to regulate with respect to World Heritage Places is not "direct" either, but is generally thought to be very expansive and to have more than little statutory effect.

Therefore, what does the Commission mean by “directly”, and what is the importance of this concept? I suggest that at least since the *Tasmanian Dams* case (1983)¹, we have got used to thinking of the Commonwealth’s powers not as a list of discrete matters primarily set out in s51 of the Constitution which give the Commonwealth the power to regulate “directly” but as deriving from the interplay of those and other factors.² The Commission’s references to legal matters, here, and in the rest of the Report, could be read as obscuring this 30 year old tradition.

It may be the case that, for constitutional reasons, the Commonwealth’s power to regulate heritage properties on the National Heritage places list owned by natural persons (if that is what the Commission means by “owners” in the second quote) is more limited than if property were owned by corporations. This statement has to be qualified though, as, it is only correct if the natural person, or the property, is not affected by legislative provisions based on other heads of Commonwealth power.

The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the EPBC Act) makes this clear in section like s15B and s15C dealing with National Heritage places, which refer to the full range of Commonwealth powers on which the drafting of the Act relies.

Also, in practical terms, the Commonwealth’s new concentration on a smaller number of items highlighted in the submission to the Commission from Australia ICOMOS (quoted in the Report at p50) may mean that this limitation even in the broad terms in the quoted statement is not that important. How many of the items on the reduced national list, the National Heritage List, are owned by natural persons?³

A further point is that, even if an item is so owned, apart from neglect, might not actions likely seriously to affect an item’s heritage values generally be taken with the assistance of a corporation, and therefore be caught by, say, s15C? If a corporation is guilty of an offence under s15C might not the natural person owner be liable as an accessory.

The Report summarises some of the Commonwealth’s powers under the EPBC Act (see, eg, p48 – 49) without qualification even though the summary seems to conflict with the Commission’s general statements of a lack of Commonwealth competence referred to above. In these, the Commission’s Report does not seem to reflect experience in dealing with the Commonwealth’s constitutional web of powers. The history of dealing with the *Trade Practices Act 1974* might be instructive. The Commonwealth has no “constitutional power to directly” regulate trade practices either, but under the ACCC this is an important area of very vigorous Commonwealth regulation.

¹ *Commonwealth v Tasmania* 1983 [158] CLR 1.

² A useful description of the approach is Crawford J, *The Constitution and the Environment*, (1991) 13 *Sydney Law Review* 1.

³ The Commission may be referring to this in the last sentence on p46, but I find the sentence unclear. I have assumed that, in the Commission’s approach, the phrase “adverse conservation outcomes” in the sentence does not refer to legal considerations.

Basis of voluntary agreements

I am also troubled by the second sentence in the following extract:

Application of a system of conservation agreements would involve a change in practice at the national level as use of negotiated agreements is currently not a requirement for the listing of non –government historic heritage properties. There is provision for their use where the Australian government does not have constitutional authority. (p xxxvi)

Later the Commission returns to this idea:

Due to constitutional limitations, the Australian Government has to rely on voluntary agreements to ensure conservation of places that are owned privately (s305) or by State governments (s45). Where no agreement exists, the Australian Government is unable to use the enforcement provisions of the EPBC Act, which in effect makes the controls and requirements of the of the Act inoperable. p44

A similar idea is expressed in the last paragraph on p71.

The extract again stresses a view of a lack of Commonwealth power, a view which can be contested. The sentence also seems to imply that the Commonwealth can act without constitutional authority. It would be useful if, for future reference, the Commission could give support for this statement.

The basic proposition would usually be that the Commonwealth can only act when empowered by the Constitution.

When the Commission says:

Due to constitutional limitations, the Australian Government has to rely on voluntary agreements to ensure conservation of places that are owned privately (s305) or by State governments (s45). p44

the question would arise: what then is the power that supports s305? If there is no power, might not the section be liable to be declared invalid. There might be a practical question of whether anyone would be interested in launching a challenge, but one could envisage, say, a suit by a successor in title (s307(c)) not happy with the restrictions on the use of the property agreed to an earlier time.

Otherwise, it might appear that the Commission's reasoning might go something like: section like s15C refer to constitutional powers, while section 304 (putting aside s306) does not. Therefore, in reading s304, there is no need to bear the Constitution in mind. This seems to me erroneous. S304 as with all sections in Commonwealth legislation has to be read in light of the Constitution. If my view is incorrect, I think it is widely held. As the Commission's Report is likely to become an important source document in the area of

heritage and heritage law, it would be useful if the Commission could give authority for its view.

Corporations power

The Commission's Report does not seem to place much reliance on the corporations power (s51(xx) of the Constitution). This is a very important Commonwealth power and we are waiting to see if the High Court will further expand its importance in litigation concerning the government's recent IR legislation. The Commission's Report does not make much mention of this power, and its Report could be taken as discounting it. Note the second sentence in the following extract.

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 the land owner. p44

Grammatically, when referring to corporations, this sentence seems to mean only corporations of the Australian government. The Commission's sentence explaining the EPBC Act, does not use the words of the Act, which uses the phrase "commonwealth agencies" and includes the Commonwealth's corporations within this phrase. Therefore, the Commission's sentence does not seem to include private sector and other public sector corporations. The words in brackets then do not include any reference to the corporations power, thus omitting potentially the Commonwealth's most important power. By contrast, s15C, for example, and other sections of the EPBC Act, impose liability on "constitutional corporations", which this extract ignores. As the Commission would be aware, this phrase "constitutional corporations" has little to do with corporations of the Australian government but, in the words of s51(xx) of the Constitution, refers to:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

.....

(xx) foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.

It seems a long time since I have had any substantial work done on my house by other than a constitutional corporation, whose activities would be subject to the Act.

I reiterate that the constitutional underpinnings of the Commonwealth's powers to regulate with respect to heritage matters are too complex to be dealt with as they are in a

Report, likely to become very important for heritage professionals. The Report is, therefore, liable to be misleading in this respect.

Another point:

At fn 12 on p66 the Commission remarks:

Curiously, in New South Wales there is only provision for the Minister to seek an injunction in Court for breaches, not the property owner.

The reasons may be varied. Injunctions are often seen as a speedy remedy. Generally the regulator will likely be the one needing to act quickly, eg to prevent or stop work that might damage a heritage item. The main remedies the other party to an agreement would have would be in contract. It might also have been though useful for the legislation to make it clear that the Minister, a statutory officer, has clear standing to seek an injunction, and when.

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