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Submission re the proposed amendments to the Australian Heritage Commission Act 1975

Proposed amendments to the Australian Heritage Commission Act are likely to result in the excision of section 30(2) of that Act relating to the need to be satisfied that there are no prudent and feasible alternatives prior to giving development approvals in listed areas.

NQCC recognises that section 30 has not been an effective provision in the Act. It has been badly analysed, ignored as unenforceable and has sat uncomfortably under other legislative mechanisms dealing with heritage listed sites.

However, the provision itself reflects a critical aspect of protecting areas of high natural and heritage value. It is now recognised in law in the United States that the assessment of prudent and feasible alternatives in the impact assessment process is the 'heart' of impact assessment. It is consider critical to proper and impartial decision-making and to protection of those areas that are held most valuable.

NQCC urges the Democrats to propose amendments to the new Heritage Act that will maintain and enhance the 'alternatives' provisions of the current Act.

Current law:

Section 30(2) of the AHC Act reads: "Without prejudice to the application of sub-section (1) in relation to any action to be taken by an authority of Australia, an authority of Australia shall not take any action that adversely affects, as part of the national estate, a place that is in the register unless the authority is satisfied that there is no feasible and prudent alternative, consistent with any relevant laws, to the taking of that action and that all measures that can reasonable be taken to minimise the adverse effect with be taken."

Section 30(4) of the AHC Act makes clear that the making of recommendations or the issuing of permits may be deemed actions that will adversely affect the place.

Section 30(2) creates a prohibition on the Commonwealth from doing anything that would harm the national estate. It also creates a general exception to that prohibition, permitting the Commonwealth to take 'action' (including approvals and recommendations) that may result in harm to the national estate if a two prong test is satisfied.

A Two Prong Test

The current Act creates a two prong test:

1. A proposal that is likely to adversely affect an area listed on the register of the National Estate, cannot be approved unless there is no alternative to the proposed action. The alternative must be prudent, feasible and consistent with relevant laws.
2. If there are no prudent and feasible alternatives then 'all measures' that can 'reasonably' be taken to minimise the action must be taken.

The onus is on the proponent to demonstrate that no prudent and feasible alternative exists. If the proponent cannot demonstrate this, then no permits should be issued.

Analysis

In order to assess prudent and feasible alternatives, the following analysis is proposed. This analysis conforms to current practice in the United States in relation to prudent and feasible alternatives requirements in impact assessment requirements under the National Environmental Policy Act (NEPA):

1. **Objective or purpose for the proposal.** In order to assess alternatives it is axiomatic that one must know what one is seeking alternatives too. Objectives must be defined in a manner that don't constrain the consideration of alternatives to a particular site or a particular manner of development. For instance, 'a safe harbour and canal estate in Nelly Bay' effectively prevents a proper analysis of prudent and feasible alternatives. In some circumstances, proposals, such as mine proposals will be site specific because of the nature of the development.
2. **Need.** A needs assessment is critical to a proper prudent and feasible alternatives analysis. Needs analysis is not the same as 'want' but a reflection of demand, social requirements, and the degree to which the proposal reflects a public good. Need should not be confused with 'perceived need', or with 'acceptance by the community', or with claimed economic benefits. Need as defined in the Concise Oxford Dictionary has a significantly different meaning. "Circumstances requiring some course of action...2. Necessity for presence or possession.
3. **Prudent and feasible alternatives.** Alternatives assessment should parallel that required under NEPA in the United States. The following selections from NEPA assumes certain alternatives have been eliminated as *prima facie* neither prudent nor feasible:

The EIS required by NEPA must discuss alternatives to the proposed action. 42 U.S.C. 4332(2)(C)(iii). NEPA's implementing regulations require that the EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a).

"Alternatives to the proposed action should include, where relevant, those not within the existing authority of the agency. A rigorous exploration and objective evaluation of the environmental impacts of all reasonable alternative actions are essential, particularly those actions that might enhance environmental quality or avoid some or all of the adverse environmental effects."

"When a cost-benefit analysis is prepared, the EA or EIS should discuss the relationship between the analysis and any analysis of unquantified environmental impacts, values and amenities. The weighing of the merits and drawbacks of the various alternatives need not be provided where there are important qualitative considerations. In any event, the analysis should at least indicate those considerations, including factors not related to environmental quality that are likely to be relevant and important to a decision. That will prevent premature foreclosure of options that might enhance environmental quality or have less detrimental effects. Examples of alternatives include:

- **Taking no action;** The no action alternative describes the most likely future condition that could be expected if you don't take action. It serves as a yardstick to compare other alternatives

to determine the magnitude of benefits and adverse effects. Although the no action alternative may contain a fatal flaw (e.g., violates a law, does not meet the need) it is still developed as a comparison. The no action alternative includes any actions which are certain as well as changes that would occur regardless of any proposed alternative.

- **Postponing action.**
- **Selecting actions of a significantly different nature** that would meet mission and project objectives with different environmental impacts;
- **Different designs** or details of the proposed action that would present different environmental impacts (including mitigation measures).

In each case, the analysis should be sufficiently detailed to reveal the agency's comparative evaluation of the proposed action and each reasonable alternative.

Throughout the EA or EIS, the discussion and analysis should be structured to prevent premature foreclosure of options that might enhance environmental quality or have less detrimental effects.

Proposed Amendment:

That all proposals that are in Commonwealth heritage listed areas and may cause harm to those sites be required to undertake an analysis of Prudent and Feasible Alternatives prior to any permits being issued. The requirement should constitute the current two prong test (which imposes a burden of proof on the proponents) and a significant analysis of alternatives that are deemed *prima facie* to be prudent and feasible.

NQCC would recommend that the guidelines that have emerged from 20+ years of American 'alternatives' legislation and litigation (and which are outlined above) form the framework for the regulatory structure to support the legislative requirement. It is critical that the analysis of alternatives not be simply 'consideration' and not simply declaration ('the proponents don't own any alternative sites therefore no other alternatives are prudent or feasible'); the analysis must provide sufficient data and detail to allow independent decision-making based on objective material.

Please feel free to call me if you would like more information on the issue or materials from the United States. Jeremy Tager, Coordinator, 07 4771 6226

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