



Ms Andrea Griffiths
Secretary
ECITA References Committee
S1.57 Parliament House
CANBERRA ACT 2600

Dear Ms Griffiths

I refer you your invitation of 8 January 2001 for me to make a submission to the Committee's inquiry on the three heritage Bills.

Please find attached the submission.

Yours sincerely

Bruce Leaver
Executive Director
2 February 2001

Submission to Senate Heritage Bills Inquiry

B H Leaver

1 SUBMITTER BACKGROUND

Professional

Since 1970 I have been involved in heritage management. Positions have included:

- Regional Director, NSW National Parks and Wildlife Service (including Aboriginal heritage and historic site management);
- Park Management Coordinator, Australian National Parks and Wildlife Service;
- Director of the South Australian National Parks and Wildlife Service;
- CEO of the SA Department of Environment and Planning (including responsibility for SA Heritage Act, Aboriginal Heritage Act and SA planning system);
- CEO of the SA Department of Conservation and Land Management (former position + Crown lands administration, Surveyor General, titles, Valuer General and pastoral zone administration);
- Executive Commissioner, Tasmanian Resource Planning and Development Commission (responsible of public land allocation recommendations, the local government planning system and major project inquiries); and
- Now - Executive Director, Australian Heritage Commission and Head, Australian and World Heritage Group, Environment Australia.

Involvement in proposed new Commonwealth heritage regime

Before joining the Australian Heritage Commission, in my Tasmanian capacity in 1997, I assisted the AHC in chairing workshops on a new direction for Australian heritage. I was also a keynote speaker at the 1998 National Heritage Convention at Old Parliament House.

I joined the Commonwealth in August 1999 and chaired a national working group of senior officials on the National Heritage Places Strategy. When the basic policy decisions were taken in relation to the new Commonwealth regime I conducted 65 briefing sessions around Australia to inform interested parties as to the nature of the system that was under consideration. This complemented to the extensive consultation that had been undertaken since 1996 on a new direction for Australian heritage. The briefings were conducted in capital cities and certain regional centres involving a range of heritage stakeholders including indigenous bodies, governments including heritage councils and agencies, and private individuals. All site visits included a public meeting.

2 COMMENT ON THE BILLS - The role of the Australian Heritage Council

In my other function as an officer of Environment Australia I played a role in the drafting of the Bills under the Minister's direction. It is not appropriate for me to comment on the structure or content of the Bills except to discuss an element that was a common subject of discussion and debate in the national briefings.

There was considerable discussion about the Council having independent listing powers (*vis a vis* the Australian Heritage Commission and the Register of the National Estate (RNE)) as opposed to the advisory role now specified in the Bills. The discussions invariably fleshed out similar pros and cons:

Points for independent Council listing powers

- Council would be seen to be independent
- Decisions could be made solely on the basis of heritage merits
- The process would be expected to engender public confidence
- The outcomes would be seen as being not influenced by politics

- This role mirrors the tradition of the Australian Heritage Commission

Points for Ministerial listing powers

- The EPBC Act's protection provisions (unlike the *Aust. Heritage Commission Act 1975*) has major enforcement, social and economic ramifications including matters binding on the Government
- There is an argument that such crucial decisions should be made by elected Government, accountable to the electorate and Parliament. A more valid comparison would be Government processes associated with World Heritage Listing, rather than listing under the Register of the National Estate.
- There is an argument that the Government should own such decisions and own the budget implications. An independent listing process runs the risk of the outcomes being marginalised by Government in the absence of ownership.
- There are key issues of federal-state relations involved more akin to World Heritage Listing. The precedents for conflict include the Tasmanian dams and forests controversies and the controversy associated with the listing of the Wet Tropics Rainforests. It is difficult to contemplate that these issues could have been managed by independent heritage listing bodies.

The comparison with State Heritage Councils

Debate on the issue often assumes that State Heritage Councils have independent listing powers. In fact only South Australia, Tasmania and Victoria have listing powers, the balance of the State/Territory Heritage Councils have advisory roles to the Minister.

Even given the fact that only 3 of the 8 State/Territory bodies have listing powers. There is often a fundamental misunderstanding of the heritage scope of the State/Territory bodies. 'Heritage' at the Commonwealth level covers historic, natural and cultural heritage. Heritage at the State/Territory level invariably means *historic heritage*. When the operation of independent state Heritage Councils is advanced in support of a similar Commonwealth arrangement the argument is like comparing chalk and cheese. The state arrangements work comparatively smoothly because by and large they only deal with historic heritage. Some historic heritage issues precipitate debate but these are the exception rather than the rule.

States and Territories deal with natural and indigenous cultural heritage in quite different ways to historic heritage. These heritage elements are managed by agencies under legislation quite separate to the operation of their Heritage Councils. Decisions on natural and indigenous cultural heritage can be deeply controversial and, as a result, decisions are most often made at the State Cabinet level or even by Parliament. The notion of an independent body deciding on these heritage listing conflict outcomes is difficult to accept and, in all probability, would be unworkable because of the major land use conflict issues involved, often dealing with complex political, social and economic issues. Examples of independent bodies involved in natural heritage protection include the recommendations making role of the Land Conservation Council in Victoria (and its successor the Environment Conservation Council), the NSW Resource and Conservation Assessment Council and my role in Tasmania with the Public Land Use Commission and its successor the Resource Planning and Development Commission. Examples at the Commonwealth level are the Resource Assessment Commission and the Fox Inquiry into the Alligator Rivers Region and the Helsham Tasmanian Forest Inquiry. I cannot think of any example where an independent body made the natural heritage land use decisions involved. These were made by Governments.

The controversial element is mainly natural heritage, not historic heritage

The history of the operation of the Register of the National Estate points to the problem. Whilst some 85% of the listings are historic heritage sites, it is the natural sites that have stimulated vigorous debates. The issues associated with national estate forests, even with the mild *Australian Heritage Commission Act* section 30 obligations regarding advice associated with woodchip export licences, stimulated major debate and intergovernmental (and intragovernmental) conflict. When managing state planning systems I repeatedly was faced with strident government and community reactions against RNE natural area listing proposals whereas historic listings were almost always made without comment.

Natural justice

The concept of an independent listing authority making the type of listing decisions as proposed in the EPBC Act amendments (as opposed to the traditional RNE listings) is fraught with natural justice and procedural fairness difficulties. The implications of current RNE listings only rest with Commonwealth Ministers and agencies. The proposed EPBC heritage listings impose profound civil and criminal implications for individuals and bodies corporate. In my experience before the Courts on planning matters there is simply no way a decision-making Council can confine its deliberations to heritage matters alone where the wider interests of citizens are involved. An assessment process must allow those adversely impacted the opportunity to put their case. A body of heritage experts would be very poorly placed indeed to reasonably deal with the economic and social arguments that may be advanced by affected parties. The current Bills provide for the opportunity to put a case (324F(2), 324G). The case is put to the Minister who would presumably weigh up the heritage and other arguments before making a decision to list or not to list. It would be manifestly unfair to expect a body of heritage experts to undertake this weighing up of the various social and economic arguments (let alone the political) versus the heritage protection arguments.

The natural justice issue *vis a vis* the Council is currently reflected in the Bills. The potential problem of the Council adjudicating on objections to their own listing nomination and assessment is accommodated in sections 324G(4) and 341(G). Firstly the comments are received by the Minister (not the Council) and:

The Minister may ask the Australian Heritage Council or a person with appropriate qualifications or expertise to assess the merits of any comments received by the Minister that comply with this section.

This avoids the potential ‘judge and jury’ situation that could offend the principles of natural justice and procedural fairness.