

# CULTURAL HERITAGE PROTECTION IN AUSTRALIA –LEGISLATION AND SOME COMMENTS

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## 1. Introduction

This paper gives a brief overview of the legislative and regulatory aspects of the conservation system in Australia. It uses as its local examples the state of New South Wales, where the state level system has been operating longer than in many other states, where local government and the community have developed considerable grass roots experience in the implementation of the various laws and regulations.

The format is of outline description of the main legislation and its administration, and outline analysis and discussion of the strengths and weaknesses of the system. The paper concludes with some comments on the adequacy of legislative and administrative mechanisms for the protection of cultural heritage.

Australia has a federal governmental system with the powers of the national government rigorously defined by the constitution. The constitution is a detailed and legalistic piece of legislation under which the former British colonies (now the States) agreed to cede powers to the Commonwealth upon voluntary federation in 1901. It can be amended only by a referendum system which makes change very difficult. Under the Constitution, the States retain their powers over land use and development, including the conservation of cultural (and natural) heritage. The significance of this will become clear shortly.

## 2. Federal heritage legislation and administration

The primary pieces of legislation at the Federal level are the Australian Heritage Commission Act (1975), and the World Heritage Properties Conservation Act (1983). There is also legislation dealing with Moveable Cultural Heritage (aimed primarily at preventing unauthorised export) (1986), and Aboriginal and Torres Strait Islander Heritage (protecting certain registered items and areas significant to the heritage of the indigenous people of the nation) (1984).

The World Heritage Properties Conservation Act Commits the Commonwealth government to adhere to the principles of the World Heritage Convention. In a notable test case, this Act gave the Commonwealth the power to over-ride state government decisions on land uses and development in World Heritage areas, even though the Constitution ostensibly gives such matters to the states. The High Court held that this was an Act ratifying an international treaty,

and as such the Commonwealth's powers to deal with international affairs was paramount over the state's powers over land use.

However, this has led to the reluctance of some states and some sections of the community to support proposals for World Heritage listing, because of the fear that state powers in such areas are implicitly ceded to the Commonwealth. For the same reasons, when a national government is in power which favours states' rights over the power of the Commonwealth, there is on occasions a reluctance of the national government to nominate sites for World Heritage listing because of the fear of potentially infringing states' rights.

The Australian Heritage Commission Act does four main things. It establishes an Australian Heritage Commission, an independent adviser to the relevant minister. The Commission is responsible for

- Coordinating all heritage conservation activities at the national level
- Undertaking scientific and technical studies into all subjects concerning heritage conservation
- Preparing a comprehensive 'Register of the National Estate', a list of all items of heritage significance across the nation., and
- Advising the Minister on matters of heritage which are under Commonwealth jurisdiction and which are subject to dispute.

The Heritage Commission has done, in my opinion, a magnificent job in the 27 years of its existence. There is a very large and comprehensive list of the nation's cultural heritage. Government agencies have been forced to account for the heritage impacts of their activities. There has been a high level of scientific knowledge advance about specifically Australian heritage conservation problems. At the same time, there have been significant problems, largely related to the Constitution and to political will. Under the Constitution, the vast majority of places on the Register are not Commonwealth owned or controlled. As such, the Act has no statutory effect over them. They are simply listed as places of significance to the nation, and the remainder of the conservation task is left to others. Secondly, the funding of the Commission varies wildly according to will of the Government of the day, as does the attention paid to the advice of the Commission. At present, the Commission is under-funded, under-staffed, and its advice is often neglected by government.

#### 4. State legislation and administration (the case of New South Wales)

Under the Constitution, the States are primarily responsible for control of land use planning, heritage identification and conservation and development control. New South Wales (NSW), the oldest and most populous state, has a well established system for this, and all other states have similar systems. Local government is established under state law, it is not mentioned in the Constitution, and its powers and duties are specified by the State Government. It will be discussed in the next section.

New South Wales has four major pieces of legislation which impact directly on heritage conservation:

- The Heritage Act (1977)
- The Environmental Planning and Assessment Act (1979)
- The National Parks and Wildlife Act (1974),
- Local Government Act (1993).

The Heritage Act establishes a state Heritage Council, serviced by the Heritage Office. The Council considers places for listing on the State Heritage Register, and recommends their listing to the Minister. This can be problematic, because the Minister may, for his own reasons, decide not to act on the recommendation. The Heritage Office also maintains a web directory of all places listed by any agency as having heritage significance. In addition the Heritage Office distributes small amounts of funds to assist in the conservation of places on the Register, and it publishes guidelines and directives for local government and practitioners on the processes and practice of conservation. These refer to and incorporate the practices and principles of the Australia ICOMOS Burra Charter. Finally, under the Heritage Act, all government agencies are required to maintain a public register of significant places under their control, and report annually to the Heritage Council on their condition.

The Environmental Planning and Assessment Act establishes the state Planning Department, and the Department requires that when any statutory plans are prepared (either by itself or local government) which contain places of heritage significance the plan should contain mechanisms to assist in their protection. This has resulted in fairly uniform measures for heritage protection in all plans across the state (which may or may not be a good thing).

The National Parks and Wildlife Service is clearly responsible for natural heritage, but also has cultural heritage functions. This is because:

- Significant places may be included within national parks;
- The Service has the power to declare and protect historic places (but it must fund their acquisition and protection from its already limited budget); and
- The Service is formally responsible for the protection of sites and places of aboriginal cultural significance,

including rock art, trees, physical remains, and places of intangible cultural significance. It is not required to acquire or maintain such places, but tries to ensure that the current owners do maintain and protect them.

The major problem in all the Service's functions is a lack of funding. This is tending to result in pressure for commercial use of sites, and in some cases in lower than desirable standards of protection.

The Local Government Act establishes and gives duties to local councils, including planning control and building control, as will be discussed in the next section.

#### 5. The role of Local Government

Local Councils have four main roles in heritage protection:

- The identification of heritage places within their local area;
- Preparing statutory plans (Local Environmental Planning Instruments) for the proper planning of their whole area, including protection of these places;
- Administration of development control and building control to achieve the objectives of these plans; and
- Frequently, the ownership and/or occupation of significant heritage places.

It is difficult to generalise about local councils in the state. Some are large, relatively wealthy, well resourced and highly professional in their approaches and actions. The majority, however, have small populations, a low resource base, and hence a lack of ability to employ and keep high level professional staff. In addition, heritage conservation is a highly politically contentious matter. Some councillors are strongly, almost dogmatically, in favour of heritage protection; others equally strongly at the opposite end of the spectrum; while many are simply uninformed about contemporary theory and practice of conservation. I will return to this at the end of the paper.

Identification of heritage within a local area is normally done by the formal process of a Heritage Study. This is normally jointly funded by the state Heritage office and the local council, and carried out by a multidisciplinary team of consultants. A standard process is used (almost regardless of the suitability of some details of that to a particular local area). Places are identified as being significant because of their relationship to a series of state-wide themes of development, and according to the ICOMOS Burra Charter's criteria and definitions for significance. The studies are generally of a high professional standard, and provide a comprehensive, permanent and public analysis of the area's history, significance and heritage.

The study is presented to the council for consideration as to incorporation into its Local Environmental Plan. The politics of the council and the reaction of the community will affect how much of the study's recommendations and how much of its identified list will be included in the plan. Owners of

identified places are frequently reluctant to have their property included, fearing (erroneously) that inclusion will freeze all future change to the place; or (more correctly in some places) that it will reduce their property value by reducing development potential. In addition, communities which are in decline and without cultural tourism potential may fear that heritage protection will prove a brake on any potential economic development. The list within the Local Environmental Plan is therefore often considerably shorter than the list prepared by the heritage study.

All development and building activity is then assessed against the provisions of the plan. When a development application is received, it must be accompanied by a statement of environmental effects. For a heritage place, there must also be a statement of heritage significance and a heritage impact statement. These are prepared for the developer, normally by a specialist consultant. They are prepared using either standard guidelines prepared by the Heritage Office, or some elaboration of these guidelines prepared by the council. The council's planning staff, sometimes assisted by a heritage adviser to the council, will then make a recommendation to the council on the future of the proposal. A final decision is made by the elected council, and at this point the problem of politics (referred to earlier) may reduce the level of protection a place is offered. In addition, assessment is often made by a council official with no expertise in heritage matters, leading to misunderstanding of the needs of the place. Councils own and/or control large quantities of land within their areas: parks, public buildings and community facilities, roads and bridges, etc. In many cases, many of these have heritage significance, but their control is fragmented within the council's administration. Too often decisions are made regarding these places by persons with no expertise or experience in heritage matters, and who in any case have a different agenda from that of heritage protection. This is often problematic for the proper protection of heritage places. The application process, requiring three professionally prepared reports, can be burdensome for many applicants.

A final activity of local councils is in the education and assistance it can offer to the community on heritage conservation. Many councils offer a range of educational material about heritage issues, have a good local studies section in their library covering history and heritage, and offer awards for successful examples of heritage protection work. In addition, many employ an official heritage adviser (funded jointly by the council and the state Heritage Office) to give free advice to people contemplating change or development affecting a heritage place.

## 6. Comments

In general, Australia's system of heritage protection is adequate. It is complicated, but relates successfully the relative powers of the various levels of government. Legislative change is usually comprehensively discussed, with considered input from heritage professionals and

members of ICOMOS. The legislation attempts with some success to integrate heritage protection with the broader planning and land use control systems. In addition, there are ample technical skills. But there remain problems.

1. The final decisions on heritage protection matters are almost always political ones, where technical recommendations can be ignored for other reasons. This will of course be a perennial problem in a democracy, where it is appropriate that those directly answerable to the people should be those who make the final decisions. Perhaps part of the answer may lie in better education of the politicians?
2. In the Australian context, there remain blurred lines of power and decision-making between the various levels of government. For example, it is not uncommon for the state government to remove crucial matters from local government, for reasons unrelated to the protection of the heritage. This creates uncertainty for all concerned in the protection of the place.
3. The issue of the relationship of indigenous heritage to non-indigenous and the proper means of protecting indigenous heritage remains unresolved. In some cases there is misunderstanding of what indigenous people consider to be their heritage. In other cases there is legislative lack of clarity as to who is properly responsible for the protection of indigenous cultural heritage.
4. There is not yet a method for conserving and protecting intangible cultural heritage. This to a large extent because heritage protection in Australia is so closely intertwined with land use planning and development control. That is a necessary intertwining, but it has to an extent led to the ignoring of intangible heritage.
5. The relationship between cultural and natural heritage is usually ignored within legislative systems. Different agencies are responsible for the two and different professionals usually work in the two areas. It is unfortunately common that there is no overall coordination of their activities.
6. Finally, of course, there is the perennial shortage of financial resources for heritage protection. I probably do not need to say much about this – it is a problem which affects us all.

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