

SUBMISSION TO THE EPBC ACT REVIEW

ANON-QJCP-UGZD-8

Organisation

Australian Heritage Council

State or Territory

National

Areas of interest

The objects of the Act; Indigenous Australians; Heritage; Matters of National Environmental Significance; Decision making; Public participation in decision making; Conservation;

Attachment provided?

Yes

Do you give permission for your submission to be published?

Yes – with my name and/or organisation

SUBMISSION RESPONSES

This submission was provided as an attachment only. The attachment is provided on the following pages of this document.



Australian Government
Australian Heritage Council

Professor Graham Samuel AC
Independent Review of the EPBC Act
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Dear Professor Samuel

I am pleased to provide the Australian Heritage Council's submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*.

For further information on information provided in the Submission, please contact the Council's Secretariat at AHC@environment.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dr Kemp'.

The Hon Dr Kemp AC
Chair
Australian Heritage Council
4 May 2020



Australian Government

Australian Heritage Council

**Submission to the Independent Review of the
*Environment Protection and Biodiversity
Conservation Act 1999***

MAY 2020

Introduction

The Australian Heritage Council (the Council) makes the following submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The Council is a body of experts appointed by the Minister for the Environment established by the *Australian Heritage Council Act 2003* (the AHC Act) and is the principal advisor to the Australian Government on heritage matters.

In relation to the EPBC Act, the Council has the functions conferred by Part 15 of the EPBC Act regarding National and Commonwealth heritage listing and management, and Part 15A, which deals with the List of Overseas Places of Historic Significance to Australia. The complete detail of the functions of the Council is set out in section 5 of the AHC Act.

In this submission, the Council does not address all questions in the Review discussion paper. The Council has focussed on certain key matters which it considers would improve outcomes for the protection and management of National and Commonwealth heritage properties and related processes. The Council has addressed these matters below in relation to the Discussion Paper and the Review's 'focus areas' for reform.

General comments

As a general comment, the Council considers that the Act has been effective in providing for the protection of Australia's National and Commonwealth heritage. However the Act is overly complex, inflexible and would benefit from simplification and streamlining. The Act would also benefit from an increased focus on promoting good heritage outcomes, and complementarity with potentially related legislation, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

A. The role of the EPBC Act

The Council considers that there is significant scope for the Act to improve the focus on improving heritage outcomes and reduce the extent of detail and prescriptive processes that may hinder effective outcomes.

Management plans

Significant mechanisms for achieving heritage outcomes are management plans and strategies for listed heritage places. The planning and management for heritage areas in Australia is complex due to diverse property managers, stakeholders, international obligations, and associated legislation. For example, in relation to World Heritage properties (that are also all National Heritage properties):

- Seven properties are managed under mixed responsibilities across the Commonwealth, State government and/or private landholders, generally related to World Heritage properties with multiple locations or large geographical areas.
- Four properties are under direct Commonwealth management.
- Nine properties are under direct State government agency management.
- Commonwealth financial contributions vary, but annual grants are normally used to support heritage planning and/or administration positions, and larger multi-year funding agreements may also support ongoing heritage management activities.

- There are many legislative and reporting obligations, including under the UNESCO World Heritage Convention, the EPBC Act and Regulations and the World Heritage Intergovernmental Agreement (Commonwealth, States and Territories).
- There is a range of governance forums – including the World Heritage Committee (UNESCO), Meeting of Environment Ministers (MEM), state heritage advisory councils and the Australian World Heritage Advisory Committee (AWHAC).
- All World Heritage listed places are also on the National Heritage List, which has a number of similar but differing EPBC legislative obligations related to Heritage Management planning and approvals).

The Council has a role in providing advice to Commonwealth agencies on heritage strategies and assessments for Commonwealth heritage places, providing advice to the Minister on National Heritage Places in a Commonwealth area, and may provide such other advice as it determines. The Council has only a partial role in providing advice on the management arrangements for heritage places.

The Council considers that heritage outcomes could be improved by:

- Streamlining the Act and providing more flexibility around heritage management arrangements. This could include, for example, aligning the planning cycles for management planning between World and National Heritage properties.
- Allowing for risk-based approaches to management planning and strategies to avoid unnecessary administrative burden. The Act requires the Council in all cases to provide advice to Commonwealth agencies on heritage strategies for places that have Commonwealth heritage values. Under a risk-based approach, the Minister might have the flexibility to request the Council to provide advice on a subset of strategies or management arrangements for properties with more difficult or complex heritage issues. This approach would better direct the limited resources of the Council to the areas of greater need.
- A risk-based approach would also provide for the review of management plans according to priority and need. The Act is currently prescriptive about requirements for the review of plans. In the case of World Heritage properties, it is 7 years (EPBC Regulations, Schedule 5, 2.02(h)) and for National Heritage places in Commonwealth areas it is 5 years (s.325W). In practice, the consultation around reviews of heritage management plans can be extensive and can take a number of years, making it difficult to achieve the strict timeframes in the Act.
- Allowing for the Act to take more of a ‘standard setting’ approach to the achievement of heritage outcomes, which could include standards for management plans, or the outcomes to be achieved, for heritage places/properties. Standards might be set by the Minister on the advice of the Council. The ability to set standards outside the Act, in policy documents as non-legislative instruments, or in regulations under the Act, would allow for greater flexibility and adaptive management, including in relation to emerging threats to the heritage values of places, such as bushfires and climate change. While the EPBC Regulations currently include detailed prescriptions for National and Commonwealth Heritage management plans, the content of the Regulations is largely directed to process rather than heritage outcomes.

'Best endeavours' provisions

Section 324X of the EPBC Act requires the Australian Government to use its 'best endeavours' to ensure that a management plan that is consistent with the National Heritage management principles is prepared and implemented in cooperation with the relevant State or Territory government for National Heritage places that are not entirely within a Commonwealth area and are either:

- in a State or,
- in a self-governing Territory or,
- on, over or under the seabed vested in a State by the *Coastal Waters (State Title) Act 1980* or in the *Northern Territory by the Coastal Waters (Northern Territory Title) Act 1980*.

These conditions apply to more than eighty places. The Council notes that the Commonwealth provides financial assistance under the Australian Heritage Grants program to support the development of management plans for these places, and has previously provided funding under the Protecting National Historic Sites grants program (no longer in operation) to support the development of several management plans. However, there remain a number of places which do not have any form of management plan in place – the Council notes that the Department identified 17 in the report *The National Heritage List and the Commonwealth Heritage List: 1 July 2013-30 June 2019* (Jan 2019) (<https://environment.gov.au/heritage/publications/national-heritage-list-and-commonwealth-heritage-list-2013-2018>).

While the Council notes that it may not be possible for the EPBC Act to impose positive obligations on planning undertaken at the State level, the Act could impose a positive obligation on the Commonwealth to prepare and implement a plan of management for that part of the place that is in a Commonwealth area, and provide that plan to the relevant State or Territory. The plan, and the associated Council advice on it, could then be taken into account by the State in whether to adopt a similar plan. The Act could also allow for revision of a plan to reflect any joint commitment by the State.

Definition of management plans

For World Heritage properties and National Heritage places in Commonwealth areas, the Act provides a clear and detailed process for the preparation of relevant plans (sections 316 and 324S).

For World Heritage properties and National Heritage places in states and territories (i.e. not entirely in a Commonwealth area) the EPBC Act is less clear. The EPBC Act does not prescribe a particular process for making or adopting plans under section 321 or section 324X. For these reasons, it may be unclear whether a particular plan that has been prepared is a plan as described in sections 321 or 324X.

The Council recommends that a definition be included in the Regulations to make it clear that a 'management plan' is one that addresses the matters set out in Schedule 5A of the Regulations (in relation to National Heritage places) or Schedule 7A (in relation to Commonwealth Heritage places) and is described as a management plan for the purpose of the Act.

Additional management plan requirements

The Council recommends that heritage management plan requirements should include measures to address the risk of bushfires and other natural disasters and include measures for climate change adaptation. Given the significance of heritage assets, it is important for emergency services and place managers to consider information from heritage management plans and such risk management policies when prioritising and directing actions during natural disasters.

B. Better environment and heritage outcomes

Improving outcomes for heritage management

The requirements for the nomination of a place to the National Heritage list primarily require (under section 324J of the Act) that the nomination demonstrate how the place meets one or more of the National Heritage criteria. The Council considers that it would be useful if nominations additionally were required to describe whether place managers have developed, or have the capacity to develop, management systems for the ongoing protection of the nominated values. This would improve visibility of the potential for ongoing protection and management of important heritage places and may help to identify early where there are capacity issues for monitoring, evaluation and reporting on heritage management and inform resourcing accordingly.

Resourcing

The secretariat to the Council is provided by the Department of Agriculture, Water and the Environment. The Council notes that resourcing of its statutory functions is a matter for Government. The extent to which the Council can effectively perform its statutory functions is critically dependent on adequate resourcing and those resources are currently limited. This has resulted in the timeframes for many assessments extending over long periods of time and extensions to statutory timeframes.

Beyond the remuneration payable to Council members, determined by the Remuneration Tribunal, the resourcing allocated to its functions is otherwise not transparent to the public. The Council recommends that there could be more transparency around the resourcing allocated to support its functions. In addition to improving accountability, this may allow for realistic expectations about the timeframes within which it can progress assessments of nominations, and otherwise undertake its functions. For this to be informative, it may need to be benchmarked with the provision of resources to support other similar bodies.

Alternatively, the Council considers there is merit in the Council being given legislative authority to hold and spend funds, and report on the use of those funds under the existing reporting requirements in the AHC Act. Such a mechanism could be achieved by amendment to the AHC Act. It would be an alternative way to provide greater public transparency around the funding allocated to the functions of the Council, and allow the Council to have discretion to allocate resourcing to meet its statutory functions.

Given limited resources, the Council also considers it is imperative that the Act be simplified and modernised, to ensure that the Council can achieve efficiencies while continuing to perform its statutory functions.

Place-based vs values-based heritage protection

Question 12 of the Discussion Paper asks whether protection and management of (heritage) should be place-based instead of values based.

A fundamental component of heritage protection under the Act is the protection of the heritage values for which a place is listed. The values of a place may extend beyond the boundary of an area, where those values are intrinsic and significant to the listing. This is a long-standing principle, established under the first court case (the 'Flying Fox' case¹) brought under the EPBC Act. That case established that Spectacled Flying Foxes (which were not then listed in their own right) were a natural value of the Wet Tropics World Heritage Area and therefore protected in that respect.

The Council does not support a reduction in the scope for which a place may be listed for its natural, historic or Indigenous values. Limiting the values in this way would necessarily require the Council to artificially limit its assessment of the values of an area to those which could be strictly contained within a physical boundary. In addition to natural heritage of the kind mentioned in the Flying Fox case, it would also have the potential to diminish the protections for Indigenous cultural heritage, which may include intangible cultural heritage that may exist in relation to a particular place, such as songlines. Such a change would diminish the capacity of heritage listings to adequately represent Indigenous culturally important places.

C. More efficient and effective regulation and administration

Improving National and Commonwealth heritage listing processes

Serial listings

In the World Heritage System, serial World Heritage properties are properties with two or more distinct, geographically separated areas that together are included on the World Heritage List. A serial property may be an appropriate basis for a World Heritage nomination where the Outstanding Universal Value is revealed at the scale of more than a single area.

The guidance on serial nominations is provided in paragraphs 137-139 of the World Heritage Committee's *Operational Guidelines for the Implementation of the World Heritage Convention*. According to the paragraph 137 serial properties (national and transnational): "include component parts related because they belong to:

- a) the same historico – cultural group
- b) the same type of property which is characteristic of the geographical zone
- c) the same geological, geomorphological formation, the same biogeographic province, or the same ecosystem type

and provided it is the series as a whole – and not necessarily the individual parts of it – which are of Outstanding Universal Value". That is, for the World Heritage List (WHL), the series, not the individual part, must be of Outstanding Universal Value.

To improve consistency with the guidelines for World Heritage properties, and flexibility in the scope of National Heritage listings, the situation for the National Heritage List regarding serial listing could be made explicit in the EPBC Act. The Council recommends that the Act could make it clear that places linked or not linked by immediate spatial proximity are still eligible, as

¹ Booth v Bosworth [2001] FCA 1453.

a group, for listing on the National Heritage List if they are connected in a way that meets the relevant criteria and thresholds. Examples of places with immediate spatial proximity might include a number of islands in an archipelago, and a number of locations within the same area or region, which are commonly recognised as a single place. Examples of places not linked by proximity, but linked by a theme, story or intangible heritage could include songlines, a series of rock art sites in a region, or important cultural trading routes.

The Council supports further clarification in the Act in relation to serial listings. This would improve the protection of heritage places important to the nation, while reducing the administrative and decision-making burden in the listing process if related nominations were otherwise to proceed separately. In this respect, the Act could more clearly allow for National Heritage listings to:

- recognise a group of sites that are each important to collectively tell a story that is of outstanding heritage value to the nation (a parallel to serial World Heritage listed properties—the series as a whole, and not necessarily the individual parts, is what is considered to have National Heritage values), and
- include more than one site out of a category.

Alignment of boundaries

Currently the World Heritage, National Heritage and Commonwealth heritage boundary of a single place that is on more than one of those lists, may be different. Most notably, all World Heritage places are also listed as National Heritage properties. The potential for these differences can create confusion in the recognition and management of, and assessment of development proposals relating to, the place.

As an example, the Budj Bim Cultural Landscape World Heritage Area was inscribed on the World Heritage List in 2019 with slightly different boundaries than its [National Heritage Listing](#). To amend the boundaries the Council would need to undertake a further assessment of the Budj Bim National Heritage place to amend the National Heritage listing and align it with the World Heritage boundary.

The Council considers this situation could be addressed by allowing it to make recommendations to the Minister on amending the boundaries of a National or Commonwealth heritage listed place, where the purpose of the amendment is to align the boundary for more than one listing for the place. In some cases, such a recommendation could be for the expansion or contraction of a boundary. A simplified approach to ensuring alignment of boundaries, with the consent of Traditional Owners and other relevant parties, and on the advice of the Council, would present significant administrative advantages.

The Council notes that, by comparison, World Heritage properties can have their boundaries modified either by re-nomination of new boundaries/values to the World Heritage Committee, or by application to the World Heritage Committee for a minor boundary modification under the provisions of the Operational Guidelines. The latter option applies if the requested boundary variation is relatively small, involving an additional area of no more than about 15% of the area of the original property, and does not involve a proposal to add new values. The EPBC Act does not have similar provisions for National or Commonwealth Heritage places.

For example, in 2013, the Tasmanian Wilderness World Heritage Area was expanded by over 170,000 hectares through the World Heritage Committee's minor boundary modification process. Although now part of the Tasmanian Wilderness World Heritage Area, that additional

land is not on the National Heritage List. See:

<http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness>.

To allow additional flexibility in relation to National and Commonwealth heritage places, the Council considers that the Act and Regulations would benefit from provisions to:

- extend National and Commonwealth Heritage place boundaries to align a National Heritage boundary with an extended World Heritage property boundary.
- allow World Heritage properties and extensions of them to be added automatically to the National Heritage List. A provision for this purpose existed prior to 2007.
- extend boundaries of National Heritage List places to encompass values that were considered as part of the Council's original assessment of the place and found to satisfy one or more criteria, but not listed at the time. This problem can be illustrated by example: The initial National Heritage Listing for the Cascades Female Factory (part of the Australian Convict Sites World Heritage serial listing) excluded Yard 4 of the place, due not to a lack of values but to an objection by the then-lessee of Yard 4. Several years later, after the expiry of the lease and the departure of the lessee, Yard 4 was listed for the same values as the already-listed Female Factory place. However, it could not be included in the original listing by a boundary variation and therefore was listed as a separate National Heritage place, despite the values being identical with those of the initially listed place. See <http://www.environment.gov.au/heritage/places/national/cascade-female-factory>.

Changes to values of listed places

The National Heritage List has been in place since 2003. The Council notes that over time new information will become available, and as a nation our values and sense of identity will evolve. These developments can be reflected by adding new places to the National Heritage List, or by amending existing listings to reflect additional values that were either not considered, or considered but deemed at the time to be below the required threshold.

This is an issue in particular for places which were listed for their natural heritage values (reflecting approaches to heritage from an earlier era), but not their Indigenous values. The Greater Blue Mountains is an example of a place which was deemed not to meet the threshold for recognition of Indigenous values at the time it was listed, but where there are now calls for recognition of these values due to new evidence or interpretation.

Incorporation of new information or different perspectives provides the opportunity to enrich the knowledge of and protection of National Heritage places.

At present, recognising additional values for places which have already been listed is not straightforward. The provisions related to the inclusion of additional values to a National Heritage Listed place are set out in Regulations made under section 324N of the Act. These require a process of assessment and consultation consistent with those for listing a place which has never previously been considered. The practice of assessments is further governed by the Council's practices in undertaking assessments, as set out in our guidance on assessing places (<http://www.environment.gov.au/resource/guidelines-assessment-places-national-heritage-list>).

The Council considers the Review could usefully consider if there are ways of streamlining the process of recognising additional values in places that have already been listed. While the Council should retain its role in providing advice to the Minister and proper consultation is

required, the Council is of the view this is an area where process can be an obstacle to good outcomes.

Reform to nomination process

At present, the only way to remove a place from the Proposed Priority Assessment List or the Finalised Priority Assessment List is for the Council to go through the full process to complete the assessment and make their recommendation to the Minister. In some cases, it may become clear before completing an assessment that a recommendation of listing is not appropriate (for example, in cases where free, prior and informed consent is withheld). To reduce administrative burden, rationalise work programs and focus existing resources on assessments likely to result in successful outcomes, the Council recommends including an option for the Council to recommend to the Minister to discontinue the assessment process for a place and remove it from the Finalised Priority Assessment List.

Relationship between the management of World Heritage properties and National Heritage places

Currently the Regulations prescribe principles for the management of World Heritage properties as well as National Heritage places. This has the potential to create confusion where a place is both listed as a World Heritage property as well as a National Heritage place. (This is the case for all World Heritage properties currently listed under the Act). The Council recommends that this matter could be clarified by prescribing that for a place which is listed as a World Heritage property, only the World Heritage management principles are relevant, even if the property is also listed on the National Heritage list.

D. Indigenous Australians' knowledge and experience

Improving outcomes for Indigenous heritage

While a number of National, World and Commonwealth heritage places are listed for or recognise Indigenous cultural heritage values, not all do. A number of other matters of national environmental significance may also have particular significance as part of Indigenous peoples' heritage whether or not that significance is recognised in listings under the Act.

The Council considers that the Act could make better provision for the recognition of Indigenous peoples' heritage, improve processes for consultation with Indigenous peoples about their heritage, and be better aligned with related legislation.

Consultation with Indigenous peoples

The provisions of the Act relating to public consultation do not make particular provision for consultation with Indigenous peoples, relating to matters of national environmental significance that may have cultural heritage significance. The effect is that some assessments may not be fully informed about the impacts of likely proposals on Indigenous cultural heritage, may be inconsistent with State and Territory processes, or may increase the likelihood of alternative processes being used to protect Indigenous heritage (in particular the processes under the ATSIHP Act).

To better address this, the Council recommends that:

- The Act require that all nominations to the National and Commonwealth Heritage lists should identify which Indigenous people have rights or interests and provide evidence of consultation on the nomination. Where Indigenous people have rights or interests,

the nomination should include evidence of free, prior and informed consent² of those Indigenous people. Processes already in place for consultation under the *Native Title Act 1993*, or processes in place under State or Territory heritage protection legislation, might be used for this purpose. In practice, the Council seeks to ensure that nominations are informed by such consultation. Providing a statutory mechanism in the Act to this effect would provide clarity to all parties and ensure consistency in consultation requirements.

- The Council does not consider that its recommendation for consultation with Indigenous people should be confined only to nominations for the listing of a place with Indigenous heritage values, although consultation in such a case would be even more important. While a place might not be nominated for its Indigenous heritage values, the place may still be of cultural significance to Indigenous people.
- The objects of the Act could be specific in relation to the role of Indigenous peoples in the identification and conservation of their heritage. In relation to Indigenous knowledge, the objects of the Act are currently only specific in relation to Indigenous peoples' knowledge of biodiversity (section 3(1)(g)).

Intangible cultural heritage

Under the EPBC Act, significant heritage values must be associated with a place or be within a specific boundary in order to gain protection. The application of heritage value using current heritage assessment processes is not always possible for Indigenous intangible heritage values.

Indigenous cultural heritage, in its many forms including intangible heritage, is central and important to Australia's heritage story. Indigenous intangible heritage is iterative and dynamic, with Indigenous knowledge presenting in multiple forms, linked to philosophical and legal traditions, language and education, stories, song and ceremonies.

The Council recommends that the reviewer consider whether the EPBC Act allows sufficient scope to recognise and protect matters of intangible heritage, particularly Australia's living and dynamic Indigenous traditions. Indigenous culture remains a significant part of the wider Australian culture and continues to evolve.

Moveable cultural heritage

At present, movable cultural heritage is dealt with under legislation at Commonwealth (e.g. the *Protection of Movable Cultural Heritage Act 1986*, administered by the Office for the Arts in the Department of Infrastructure, Transport, Regional Development and Communications) and at state and territory level. The Council is concerned that this results in uneven and inconsistent enforcement approaches.

² The concept of 'free, prior, and informed consent' is contained in the United Nations Declaration on the Rights of Indigenous Peoples, including in Article 19 which provides that 'States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.' A definition can be found in Free, Prior and Informed Consent – an Indigenous peoples' right and a good practice for local communities: <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>

In addition, the Council takes the view that it is not appropriate to consider some items of great significance to Indigenous people (for example, ancestral human remains) under legislation intended to cover artworks and other previous items. These items are inseparably tied to Country, and there are advantages to them being dealt with under the same legislation that protects places, which could more appropriately be the EPBC Act.

Alignment of the EPBC Act with the ATSIHP Act

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) establishes a Commonwealth regime for the protection of places and objects of particular significance in accordance with Aboriginal tradition that are under ‘threat of injury or desecration’. To the extent that the EPBC Act protects Indigenous heritage values for certain listed properties, its purpose may therefore overlap with the purpose and operation of the ATSIHP Act.

In effect, both Acts apply in relation to development proposals that may have impacts on Indigenous cultural heritage, but have different (but overlapping) scope and procedures. This can create confusion and uncertainty for all parties. It may also mean that a place which is listed under the EPBC Act for Indigenous cultural heritage values, and a proposal which is approved under the EPBC Act in that respect, may nevertheless be subject to a ‘last resort’ application for protection under the ATSIHP Act.

The Council notes that the Review presents an opportunity to consider the relationship between the EPBC Act and the ATSIHP Act, reduce duplication and promote the protection of Indigenous cultural heritage. As it predates the establishment of the AHC Act, the ATSIHP Act makes no reference to the role of the Council. Should the Review make recommendations on the relationship between the EPBC Act and the ATSIHP Act, and any expanded role for the Council, further consideration would be required on the appropriate structure and resourcing for the Council.

Relationship between the EPBC Act and the Native Title Act

In its past consideration of nominations for listings, the Council has noted there is ambiguity as to the implications of listings on the ‘future act’ provisions of the *Native Title Act 1993*. The Council recommends that EPBC Act be amended to clarify this ambiguity.

E. Community inclusion, trust and transparency

Community member representation on advisory bodies

Question 20 of the discussion paper asks whether community representation in environmental advisory and decision-making bodies should be increased. The Council does not support increased community member representation on the Australian Heritage Council. The Council considers that a strength of the Council is in its technical expert ‘pair’ structure that enables focused discussions informed by high-level experience in the fields of Indigenous, historic and natural heritage. The Council considers there are more appropriate methods to engage with the broader community to secure positive heritage outcomes.