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.