

2 September 2021

Attention: The Chairman  
Standing Committee on Social Issues  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Chairman,

### Response to Question on Notice regarding the objects of the NSW *Heritage Act 1977*

As per the request made by the Committee at my appearance in front of it on 17 August 2021, I have given further consideration to the objects of the *Heritage Act*, one of the matters I raised in my initial written submission, and which elicited some discussion during my evidence.

In the interests, of comparison and benchmarking with heritage legislation throughout Australia, I have extracted the objects of the various pieces of heritage legislation from across the country, presented in no particular order:

#### **NSW Heritage Act 1977**

Surtitle: An Act to conserve the environmental heritage of the State.

#### Current objects (Section 3)

- (a) to promote an understanding of the State's heritage,
- (b) to encourage the conservation of the State's heritage,
- (c) to provide for the identification and registration of items of State heritage significance,
- (d) to provide for the interim protection of items of State heritage significance,
- (e) to encourage the adaptive reuse of items of State heritage significance,
- (f) to constitute the Heritage Council of New South Wales and confer on it functions relating to the State's heritage,
- (g) to assist owners with the conservation of items of State heritage significance.

These are the current objects of the Act, which came into force in 2010, following amendments in 2009.

Compare with other jurisdictions around the country:

### **Victoria Heritage Act 2017**

#### Section 1

The purpose of this Act is to re-enact with amendments the Heritage Act 1995—

- (a) to provide for the protection and conservation of the cultural heritage of the State; and
- (b) to establish a Victorian Heritage Register for the registration of places and objects; and
- (c) to establish a Heritage Inventory for the recording of archaeological sites and approved sites of archaeological value; and
- (d) to establish a Heritage Council to perform functions in relation to cultural heritage; and
- (e) to establish a Heritage Fund to provide for the conservation and management of cultural heritage; and
- (f) to provide for the management of places included in the World Heritage List; and
- (g) to create offences and other enforcement measures to protect and conserve cultural heritage.

### **Queensland Heritage Act 1992**

#### Section 2

- (1) The object of this Act is to provide for the conservation of Queensland's cultural heritage for the benefit of the community and future generations.
- (2) The object is to be primarily achieved by—
  - (a) establishing the Queensland Heritage Council; and
  - (b) keeping a register of places and areas of State cultural heritage significance called the Queensland heritage register; and
  - (c) requiring the reporting of the discovery of archaeological artefacts and underwater cultural heritage artefacts; and
  - (d) providing for the identification and management of places of local cultural heritage significance by local governments; and
  - (e) regulating, in conjunction with other legislation, development affecting the cultural heritage significance of Queensland heritage places; and
  - (f) providing for heritage agreements to encourage appropriate management of Queensland heritage places; and
  - (g) providing for appropriate enforcement powers to help protect Queensland's cultural heritage.
- (3) In exercising powers conferred by this Act, the Minister, the chief executive, the council and other persons and entities concerned in its administration must seek to achieve—
  - (a) the retention of the cultural heritage significance of the places and artefacts to which it applies; and

- (b) the greatest sustainable benefit to the community from those places and artefacts consistent with the conservation of their cultural heritage significance.

### **Tasmanian Historic Cultural Heritage Act 1995**

#### Section 4

- 4A(1)(a) the retention of the historic cultural heritage significance of the place;

### **South Australia Heritage Places Act 1993**

#### Section 2

- (a) to recognise the importance of South Australia's heritage places and related objects in understanding the course of the State's history, including its natural history; and
- (b) to provide for the identification and documentation of places and related objects of State heritage significance; and
- (c) to provide for and promote the conservation of places and related objects of State heritage significance; and
- (d) to promote an understanding and appreciation of the State's heritage; and
- (e) to encourage the sustainable use and adaptation of heritage places in a manner consistent with high standards of conservation practice, the retention of their heritage significance, and relevant development policies.

### **ACT Heritage Act 2004**

#### Section 3

- (a) to establish a system for the recognition, registration and conservation of the following:
  - (i) places and objects that have natural heritage significance;
  - (ii) places and objects that have cultural heritage significance;
  - (iii) Aboriginal places and objects;
- (b) to establish the heritage council;
- (c) to provide for heritage agreements to encourage the conservation of heritage places and objects;
- (d) to establish enforcement and offence provisions to provide greater protection for heritage places and objects;
- (e) to provide a system integrated with land planning and development to consider development applications having regard to the heritage significance of places and heritage guidelines.

## **Northern Territory Heritage Act 2011**

### Section 3

- (1) The object of this Act is to provide for the conservation of the Territory's cultural and natural heritage.
- (2) The object is achieved by:
  - (a) declaring places and objects of heritage significance to be heritage places and objects; and
  - (b) declaring classes of places and objects of heritage significance to be protected classes of heritage places and objects; and
  - (c) establishing the Heritage Council; and
- (3) providing for heritage agreements to encourage the conservation, use and management of heritage places and objects; and
- (d) regulating work on heritage places and objects; and
- (e) establishing enforcement and offence provisions.

## **Western Australia Heritage Act 2018**

### Section 3

The objectives of this Act are, with due regard for the rights of property ownership —

- (a) to promote understanding and appreciation of Western Australia's cultural heritage; and
- (b) to recognise the importance of places of cultural heritage significance and their stories in understanding the course of Western Australia's history; and
- (c) to provide for the identification and documentation of Western Australia's places of cultural heritage significance; and
- (d) to encourage and facilitate the conservation, continuing use, development and adaptive reuse of places of cultural heritage significance in ways that represent high standards of heritage conservation and are in harmony with cultural heritage values.

## **Commonwealth Environment Protection and Biodiversity Conservation Act 1999**

### Section 3

- (1) The objects of this Act are:
  - (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
  - (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
  - (c) to promote the conservation of biodiversity; and
  - (ca) to provide for the protection and conservation of heritage; and
  - (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and

- (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
- (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

### **A comparison of the objects**

Almost all pieces of heritage legislation note the protection of “significance” as a key object (all except Victoria). In this context, this is arguably about the significant aspects of the place as opposed to the physical place itself, and almost all identify conservation as a key objective (all but Tasmania, which does talk about “retention”). In this context, latter object is more about the retention of the physical place and its characteristics. A heritage place may therefore have multiple aspects which need protecting or conserving – the physical place itself, as well as other less tangible or intangible aspects which also need protection.

As an example, consider a war memorial: the memorial itself may have significance for its architectural or artistic aspects, which can be protected through conserving its physical fabric, but it also has intangible significance through its role in memorialising war dead and keeping their memories alive. Thus, while the conservation of the physical fabric is relatively straightforward, and the fabric could in theory could be reused, the intangible significance is more fragile, and requires protection in a different manner. To further expand on this example, it might be possible to adaptively reuse an historic building for a fast-food restaurant (as the physical building can be conserved), but to suggest such a use for a place with intangible values such as a war memorial would damage those values. So, the objects of the Act should reflect the need to protect all aspects of significance, the tangible and the intangible. The current objects do not necessarily achieve this.

The other matters dealt with in the various objects provisions are primarily administrative:

- 6 reference the establishment of registers (NSW, Vic, NT, WA, ACT, Qld)
- 5 reference identification and/or understanding of heritage places (NSW, Qld, WA, SA, NT)
- 5 reference the establishment of Heritage Councils (NSW, Vic, NT, ACT, Qld)
- 4 reference enforcement powers (Vic, Qld, NT, ACT)
- 3 reference heritage agreements (ACT, NT, Qld)
- 2 reference regulation of heritage (Qld, NT)
- 2 reference funding or assistance to owners (NSW, VIC)
- 2 reference Aboriginal/indigenous heritage (Cth, ACT)
- 2 reference archaeology (Vic, Qld)

- 2 reference adaptive reuse (NSW, WA)
- 1 references interim protection (NSW)

Each Act tends to have additional objects unique to that Act, which presumably reflect local concerns at the time of enactment (e.g. Victoria references World Heritage, while WA references the rights of property owners).

What this analysis suggests is that there is broad agreement that the main purpose of heritage legislation is to protect the significance of heritage places (their aspects of significance, as judged against the heritage significance criteria) as well as conserving the physical places themselves.

Different jurisdictions have taken differing approaches to the task. The majority see the identification and registration of heritage places as a key method for protection, and the majority call for the establishment of a Heritage Council (though it should be noted that every jurisdiction has some form of Heritage Council – it is just not necessarily an object of every act).

In the context of the review of the NSW *Heritage Act*, consideration should be given to amending and replacing some of the objects of the Act. The objects of the Act were inserted into the legislation by the *Heritage Amendment Act 2009*. Prior to that date, there were no explicit objects in the Act. The objects have remained unchanged since 2009.

Section 33 of the NSW *Interpretation Act 1987* provides guidance as to the purpose of having objects within an act:

*In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.*

Thus, when looked at from an administrative point of view, the objects of an act should be interpreted to encourage the implementation of necessary administrative and legislative actions which further those objects. These objects may also be given weight by a court when matters come before it.

The objects of the NSW Act, as they currently stand, can be divided into two sections – first, those objects which establish the underlying philosophy of the legislation:

- (a) to promote an understanding of the State's heritage,
- (b) to encourage the conservation of the State's heritage,

These are the “what” part of the legislation – this is what the Act is meant to achieve.

The remaining objects of the Act are primarily the “how” – they are administrative actions which support the first two objects:

- (c) to provide for the identification and registration of items of State heritage significance,
- (d) to provide for the interim protection of items of State heritage significance,
- (e) to encourage the adaptive reuse of items of State heritage significance,
- (f) to constitute the Heritage Council of New South Wales and confer on it functions relating to the State’s heritage,
- (g) to assist owners with the conservation of items of State heritage significance.

In practice, there has been a concentration on objects (c), (d) and (f), and considerably less emphasis on objects (e) and (g). Objects (c), (d) and (f) and their intent are well-embedded within the legislation itself and are supported by long-standing administrative practices. Part 3A of the Act addresses object (c), Part 3 addresses object (d) and Part 2 addresses object (f). It may therefore be worth considering the replacement of these well-established objects with new, forward-thinking objects which provide an aspiration for what the Act *should* do, which it presently is not doing, or supplementing these objects with additional aspirational objects.

If we look at object (e) – adaptive reuse – this is actually something that is fundamental to heritage conservation, and to a degree it is tautological and redundant to have it called out as a specific object. To conserve something is to encourage its use or reuse or, to quote the Burra Charter Article 1.4, conservation “means all the processes of looking after a place so as to retain its cultural significance” – this can include its continued use or adaptive reuse. If we conserve a historic house, it is generally so it can continue to be a home. If we conserve a historic commercial or industrial building, it is again generally for some ongoing use for either those purposes or other purposes (e.g. conversion to residential use). There are very limited circumstances where conservation is undertaken *without* the intention for the item to be reused. From my own professional practice, this has even included heritage items which are active infrastructure assets, which have been able to be conserved and still continue to provide essential services. Even a heritage place such as a landscape or a monument which has been conserved will continue to have a use value – be that passive recreation or the memorialisation of past events, although this use may be difficult to quantify in economic terms. In this context, the inclusion of adaptive reuse as an object of the Act seems unnecessary, as it is embedded within the context of object (b), “to encourage the conservation of the State’s heritage”.

Object (g) however remains an aspirational object for the Act; it is perhaps one of the least successfully implemented parts of the Act. Partly, this is due to the limited mechanisms for “assistance” – primarily limited to heritage agreements, and the very limited availability of grants under section 106 of the Act. It is therefore worth considering what is needed within the Act itself to further this object – this could be through the

expansion of the grants program, or the establishment of advisory services, rate relief or other proactive actions which actively assist owners. Other jurisdictions (e.g. the United Kingdom) have implemented heritage funding through lotteries.

Incentive mechanisms are admittedly not my area of expertise, though in the limited use of heritage agreements over my career, the process of negotiating and establishing such an agreement has been complicated, protracted and, I would suggest, onerous for all but the most well-resourced owners of heritage assets. It would be useful if there were a review of the extent, scope and effectiveness of heritage agreements which have been issued under the Act, prior to further expanding their use. Certainly, in some circumstances heritage agreements will have utility, and should be retained, but their ability to be used in a widespread manner is questionable.

In the opening to my evidence and in my written submission, I raised the concern that the Act had become too concerned with the process of administering the heritage system, rather than focusing on the outcomes of heritage conservation. Amending the objects of the Act provides an opportunity to better direct the focus of the Act's administration and implementation towards an outcomes focus.

### **New objects**

Turning to the question of what the objects of the Act should be, I would suggest that again the objects are broken into parts – those objects which establish the underlying philosophy and objectives of the Act, and those which identify actions and administrative processes which are to be undertaken to facilitate those higher-level objectives, followed finally by objects which focus on the desired outcomes of the legislation.

In this regard, the construction of the objects of the *Queensland Heritage Act 1992* is instructive:

- (1) The object of this Act is to provide for the conservation of Queensland's cultural heritage for the benefit of the community and future generations.
- (2) The object is to be primarily achieved by—
  - (a) establishing the Queensland Heritage Council; and
  - (b) keeping a register of places and areas of State cultural heritage significance called the Queensland heritage register; and
  - (c) requiring the reporting of the discovery of archaeological artefacts and underwater cultural heritage artefacts; and
  - (d) providing for the identification and management of places of local cultural heritage significance by local governments; and
  - (e) regulating, in conjunction with other legislation, development affecting the cultural heritage significance of Queensland heritage places; and
  - (f) providing for heritage agreements to encourage appropriate management of Queensland heritage places; and
  - (g) providing for appropriate enforcement powers to help protect Queensland's cultural heritage.



- (3) In exercising powers conferred by this Act, the Minister, the chief executive, the council and other persons and entities concerned in its administration must seek to achieve—
- (a) the retention of the cultural heritage significance of the places and artefacts to which it applies; and
  - (b) the greatest sustainable benefit to the community from those places and artefacts consistent with the conservation of their cultural heritage significance.

Subsection 1 establishes the primary object – “conservation of Queensland’s cultural heritage for the benefit of the community and future generations”. This is the “what” part of the objects – it establishes the long-term goal or vision for the Act.

Subsection 2 establishes the “how” – the creation of a Heritage Council, a register, identification, regulation, and enforcement. These are the administrative tools available to achieve the primary object.

Subsection 3 establishes the “why” of the act and restates the goal in subsection 1 in an outcomes-focused way: retention of significance and community benefit.

Were the objects of the NSW Act to be amended in a similar fashion, then the objects could look something like as follows:

- (1) The object of this Act is to facilitate the understanding, conservation, appreciation and celebration of the tangible and intangible heritage of NSW;
- (2) This will be achieved through:
  - a. The establishment of the Heritage Council, to provide leadership, guidance and decision-making on heritage conservation matters;
  - b. The establishment, maintenance and review of the State Heritage Register, to identify and provide information on the state’s heritage and its significance;
  - c. The promotion of the State’s heritage;
  - d. The provision of incentives for the conservation, adaptation<sup>1</sup> and promotion of the State’s heritage;
  - e. The improved integration of heritage conservation with land use planning and indigenous heritage management;
  - f. The development of regulatory and enforcement mechanisms required to facilitate conservation;
- (3) These objects are designed to ensure:
  - a. That the State’s heritage is conserved to the greatest degree for current and future generations;

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<sup>1</sup> Note I have deliberately left “adaptation” in this example, as it is clearly a matter of concern in the Discussion Paper, and it may not be immediately apparent to a layperson that conservation does in fact include adaptation.

- b. That heritage matters are given appropriate consideration and weight in land use planning and decision-making;
- c. Tangible benefits are derived from the conservation of heritage places.

Other options to consider could include functions related to local heritage (as per the *Queensland Heritage Act's* object 2(d)) or an object related to funding (as per the *Victorian Heritage Act* object (e)).

These suggested objects capture the vision, the implementation, and the outcome of a comprehensive approach to heritage conservation by NSW. They are, I believe, broadly in keeping with the high-level goals set out in the Government's Discussion Paper and embed the critical tools for heritage management with an aspirational direction for the future of heritage conservation in this state. I would be pleased to discuss this matter further with the Committee, at its convenience.

Yours sincerely,

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