

**Submission
No 40**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Woollahra Municipal Council

Date Received: 25 June 2021



Council Ref: Planning & Place Division
SC6206 - 21/79215

25 June 2021

The Hon Shayne Mallard MLC
NSW Legislative Council Standing Committee on Social Issues
Parliament House,
6 Macquarie Street, Sydney, NSW 2000

Dear Mr Mallard

Submission to the Review of *NSW Heritage Act*

Woollahra Council thanks you for the opportunity to comment on this important review of the *NSW Heritage Act*. Our detailed submission in response to the Discussion Paper is attached, and our key issues raised are summarised below.

Woollahra Council highly values the role of heritage at both strategic and statutory levels. We are proud of our heritage and invest in strategic heritage planning and assessment of heritage impacts to ensure our heritage is identified and protected for the future generations. Both the *Woollahra Local Strategic Planning Statement* and our Community Strategic Plan *Woollahra 2030* has identified the high quality of our places and landscapes as a key legacy to maintain for the future.

We welcome a review of the New South Wales (NSW) *Heritage Act 1977*, but are mindful that the review should aim to strengthen the role of heritage. For example, we believe that the key objective of the Heritage Act must be ‘to conserve the State’s heritage’. All other objectives should stem from that central tenet.

The overall tone of the Discussion Paper is that heritage is a “problem” that needs to be managed and streamlined. We do not want this sentiment reflected in the objectives of the Heritage Act.

As a ‘Guardian’ of the State Heritage Register (SHR), the Heritage Act must continue to play a key role in ensuring that heritage in NSW is identified, protected and properly documented. With this in mind, we are concerned about some of the reform proposals in the Discussion Paper.

In particular, we do not support the proposal to introduce four categories of items within the SHR. An item either has, or does not have, state significance. We are concerned that the categories will lead to increased complexity of the heritage system and diminish and dilute protections for SHR items. In particular those items in Categories 3 and 4.

Similarly, we are concerned about proposals to streamline impact assessments and amendments to existing SHR listing. All applications need to be properly assessed and considered on merit. Streamlining the assessment process will diminish heritage outcomes. Competent assessments must be valued and retained as fundamental to the heritage framework. The most direct and effective way to achieve this is by ensuring that Heritage NSW is suitably staffed and resourced in step with the increased development pressure NSW is experiencing.

With regards to the listing process, we are concerned that the streamlining of the delisting process in the event of fire or flood is a short-sighted change that does not acknowledge the heritage significance of sites outside of their built form. Such streamlining would impede opportunities for restoration, reconstruction or other interpretation of important sites.



We acknowledge that there are a number of positive proposals in the Discussion Paper. For example, we support the changes to strengthen compliance and enforcement, and support the need to enhance the community's understanding of state heritage.

Heritage conservation should be an integral part of the *Environmental Planning & Assessment Act 1979* and the two Acts should operate together by facilitating heritage conservation outcomes through planning. We would welcome changes in relation to Interim Heritage Orders (IHO) procedures, especially in relation to delegations to Local Governments for potential items in conservation areas and provisions to extend IHOs beyond 12 months if the planning proposal is yet to be finalised.

Overall, we find that the existing heritage framework does not need an overhaul as proposed in the Discussion Paper, but rather fine-tuning. The most pressing needs are appropriate resourcing for Heritage NSW, greater credence in the professional advice of its staff, and more effective information, incentives and concessions to encourage and inspire heritage protection by land owners. The stewardship role of land owners must be better addressed to recognise that ownership is temporary, and that the significance of a heritage item is perpetual and should endure beyond the current owner.

If you require any further information about our submission please contact Jacquelyne Della Bosca, Executive Planner, on (02) 9391 7046.

Yours sincerely

Nick Economou
Acting Director Planning and Place



Submission to the Review of NSW Heritage Act

Focus Question 1: What should be the composition, skills and qualities of the Heritage Council of NSW?

Council's response:

- The Heritage Council and its decisions must not be politicised through the Minister's appointment process. Change needs to be made to the current process whereby eight people are appointed by the Minister as this process compromises, or leads to the perception of political influence over the decisions of the Heritage Council.
- The role of the Heritage Council is to make decisions about the care and protection of heritage places and items. It needs to be an independent body of people with appropriate skills, and the skills should be directly relevant to its role of caring and protecting places on the SHR. Including skill sets that are not directly aligned with heritage erodes the validity of the heritage system.
- We recommend that at least six of the nine members of the Heritage Council possess expertise in the fields of Aboriginal cultural heritage, archaeology, architecture, and heritage conservation. Local Government should always be represented, and "rural interests" (if retained) should be named "rural heritage" to ensure that the focus is on heritage rather than the pursuit of broader and general rural interests.
- There is a role for property economics but we question the need for experts in law and the development industry on the Heritage Council. Advice from these sectors would be better channelled through committees or advisory panels established by the Heritage Council.
- Whatever the composition of the Heritage Council, what is most important is that the Heritage Council listens to and takes the advice of Heritage NSW. Similar to the Victorian process, the Minister should not be able to override the advice of the Heritage Council and should not have control over listings.

Focus Question 2: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act

Council's response

- There seems to be a disconnect between the *National Parks and Wildlife Act 1974* and the *Heritage Act 1977*. For example, improvements are needed in regards to how Aboriginal cultural heritage is identified and nominated to the SHR, and how proposed changes are assessed.
- We note that Queensland, South Australia, Tasmania, Victoria, and Western Australia all have a separate Act to address Aboriginal cultural heritage and we see that there may be merit in this approach for New South Wales.

Focus Question 3: Are the objectives of the Heritage Act still relevant?

Council's response:

- The overall tone of the Discussion Paper is that heritage is a “problem” that needs to be managed and streamlined. We do not want this sentiment reflected in the objectives of the Heritage Act.
- The existing objectives of the Act are still relevant. However, the first objective should be ‘to conserve the State’s heritage’, not to simply encourage its conservation. All other objectives descend from the aim to conserve NSW heritage, including the promotion of an understanding, the identification, registration and adaptive re-use of items of State heritage significance, among others objectives.

Focus Question 4: Does the Act adequately reflect the expectations of the contemporary NSW community?

Council's response:

- The NSW Government’s guiding themes to underpin the review are about “*making heritage easy, putting heritage to work and making heritage relevant*” (page 7). These are the NSW Government’s expectations for heritage. These cannot and must not be taken as the expectation of the contemporary NSW community.
- There is nothing in the Discussion Paper which explains or provides any evidence about the broader community’s expectations. Community expectations can be determined and influenced by their level of appreciation and understanding of the significance of an item. Therefore greater community awareness, promotion, engagement and celebration of heritage is important. It is also important to ensure that the items on the SHR reflect the diversity of the community. For example, there could be more non-Caucasian heritage such as immigrant architecture, or more representation from regional NSW.
- The views and expectations of developers must not be seen to be, or to override, the wider community’s expectations.
- The fundamental expectations for heritage protection in NSW should be:
 - Heritage protection is enshrined in legislation. Legislation is the most effective way to recognise and conserve the important heritage of NSW. Without legislation, protections will be diminished.
 - Heritage conservation is an integral part of the *Environmental Planning & Assessment Act 1979* (EP&A Act) and the two Acts should work better together by facilitating heritage conservation outcomes through planning.
 - Public interest must always come before self-interest. Private assets still provide a public benefit as these assets contribute to the collective understanding of our history.
 - Ownership is temporary, the significance of a SHR item is perpetual and should endure beyond the current owner.

Focus Question 5: How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?

Council's response:

- We support an approach to heritage that encourages conservation and promotes care and responsible management of heritage items by the current owners through additional financial assistance e.g. stewardship payments, tax incentives, grants or

other concessions etc. However, any framework for incentives and concessions need to recognise that ownership is temporary, the significance of a SHR item is perpetual and should endure beyond the current owner.

- Transferrable heritage floor space schemes are generally only suitable in the Sydney CBD. In lower density areas these schemes should be avoided as they tend to result in incompatible and unacceptable built form outcomes. Furthermore, this can have an unacceptable impact on the wider streetscape, as the height and FSR anomalies that arise from such developments are used as justification for increasing development on adjoining sites.
- The NSW Government should consider an enhanced role for heritage agreements as a mechanism to facilitate the conservation and management of heritage items. These agreements (or covenants) move away from a solely regulatory approach to long term heritage conservation through the use of negotiated legally binding agreements made under contract law that are registered on the title of a site. This is currently an underutilised approach that could be successfully applied to incentivise the ownership, activation and adaptive reuse of heritage, provided appropriate resources are allocated to the monitoring and auditing of these agreements.

Focus Question 6: How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?

Council's response:

- As stated above we support use of tax incentives. However incentives or concessions must be conditional, for example, to require the owner to undertake a minimum standard of maintenance on the property. This also includes state owned assets listed under Section 170 of the *Heritage Act 1977*.

Focus Question 7: What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?

Council's response:

- We do not have any suggestions for initiatives, but support investigations into how philanthropic investment could be encouraged to support the heritage sector.

Focus Question 8: How could tailored heritage protections enhance heritage conservation?

Council response:

- We do not support the proposal to introduce four categories of items within the SHR. An item either has, or does not have, significance.
- These proposed categories establish a tiered or ranking system within the SHR. For example, exceptional state significant heritage (Category 1 items) will be “conserved to the highest standard”, while most other items of state significance will be “covered by consistent and easy to understand protections that support conservation, activation and celebration”. This implies a dilution in the importance of listing an item on the SHR, which is alarming.
- There is an insufficient explanation or criteria regarding the categories. For example, how would this category approach deal with places like Millers Point where properties are individually and collectively listed on the State Heritage Register? If individual buildings are dealt with as Category 3 items there would be a cumulative

erosion of individual heritage items that would diminish the heritage significance of the broader conservation area.

- This is not a tailored approach to heritage protection. It is an over-simplified blunt instrument. It will replace assessment of individual items with exemptions based on the asset class and category, and lead to diminished protections for SHR items.
- Heritage conservation is about identifying what is significant and what impact proposed changes are likely to have on the heritage significance of the item. The suitability of proposed work on any SHR item should be assessed having regard to the impact on the significance of that particular item, not according to its category. The proposed asset class provisions are directly contrary to the principals of the Burra Charter which advise to first understand the significance of the place (**not** the **type** of place) and to tailor the approach to the item on the basis of this understanding.
- The best way to provide tailored heritage protections is to ensure that the heritage inventory sheets are updated to suitably identify all elements that contribute to the item's significance, and to make sure that it is clear what elements can be removed/modified and which cannot. Comprehensive inventory sheets, including for State owned items, will create certainty for landowners and make the process for proposing changes to a SHR item more streamlined because owners will have a clearer understanding of the item's tolerance for change.

Adaptive Reuse and Activation:

- Under the Discussion Paper it is proposed that the Minister should also consider what opportunities there are for adaptive reuse and activation. We do not support this change. Listings and management must be two separate processes. Management issues are not a reason not to list a building that has heritage significance.
- Adaptive re-use of heritage sites is appropriate and important in order to ensure that the ongoing management of their conservation can be financed and that heritage buildings and places continue to be responsive to the changing needs of the community. However, the proposed changes place an overemphasis on the activation of heritage sites in order to ensure that they make an economic contribution.
- Not every item will be an easy candidate for adaptive reuse and activation. The ideas and opportunities for adaptive reuse and activation should be driven by the creative and commercial talents of the owners and property managers. These matters are beyond the scope of what the Minister should be considering.
- Any suitable new use must be framed by the principles of conserving and restoring first. More attention needs to be placed on the Burra Charter, which advocates a cautious approach to change and an emphasis on recognising the cultural significance of buildings and places.
- Adaptive re-use of heritage places, while acceptable in lieu of demolition by neglect, must have the principal aim to restore and maintain existing fabric while accommodating new uses. There needs to be a strong emphasis on conserving the built and social fabric of NSW in the reviewed Heritage Act.
- Greater consideration should also be given to sustainable heritage practices aimed at reusing embodied energy in existing buildings, regardless of their acknowledged heritage status, in order to reduce carbon emissions.
- The NSW Government should look at ways to encourage and inspire adaptive reuse and activation. This may be through tax incentives, grants and other concessions such as long term leasing at nominal rents.

Focus Question 9: How should heritage items that are residential properties be accommodated under a proposed category scheme?

Council's response:

- Under the proposal most “standard residential properties” in the SHR will fall under Category 3. As set out in our response to Question 8 we do not support the proposal to introduce 4 categories of items within State Heritage Register (SHR). We see the category approach as a way to reduce heritage protections for SHR items in Category 3. Furthermore, an additional categorisation will also increase the complexity the system.
- The Discussion Paper refers to “*nuanced approaches to heritage conservation, for example, the New York heritage framework, which protects private residential building exteriors while allowing the updating and remodelling of their interiors.*” (Page 14). We do not support the New York “façadist” approach. The significance of a residential property may not necessarily be limited to the exterior. The interior layout or decorative finishes can contribute substantially to the heritage significance and therefore requires protection.
- The most effective way to provide a nuanced and tailored approach to residential properties is to update the heritage inventory sheets. The inventory sheet will identify if the building exterior and/or the interiors have significance, list the significant elements which are to be retained, and also identify what does not have significance. The Government should invest more resources in updating heritage inventory sheets.

Low regulation options for low risk items:

- The Discussion Paper states that “*low regulation options could be negotiated where appropriate for straightforward or low risk items*” (page 15). However, the Paper does not identify what a low risk item is (presumably it is a Category 3), and does not provide examples of low regulation options.
- We do not agree with the concept of “low risk items”. An item either has, or does not have significance.
- We acknowledge that low regulation options may be suitable but only where the eligibility is based on the nature of work and potential impact and NOT the category of SHR item that the work is proposed on.
- Section 60 of the Heritage Act is currently used to provide a streamlined approval pathway for works that have (or have the potential to have) a minor impact on the heritage significance of State heritage items. The new fast track pathway offers landholders/owners a simplified process and determination of applications within 21 days. There may be scope to build on the section 60 process, or establish a separate and specific low regulation mechanism to address low risk work and activities. However, this should not be extended to “low risk items”.
- Furthermore, any changes must not create additional responsibilities for local governments, which are already under-resourced.

Tailored and streamlined approaches for items with multiple owners:

- The Discussion Paper states that “*more complex items, such as those with multiple owners, could receive more tailored and streamlined protections.*” (Page 15). However, the Paper provides no justification as to why a property with multiple owners (such as a strata titled building) should be eligible for streamlined protections.

- We do not support this as the heritage protections should be based on the significance of an item and NOT based on how many owners share the ownership of the building.

Focus Question 10: Would greater community engagement deliver a more robust State Heritage Register?

Council's response:

- In principle we support the idea of a community-driven nomination process as it is important to ask people what buildings, landscapes and places are significant to them.
- Any community-driven nomination process if established with set a closing date for nominations, should not replace or limit the ability for someone to instigate the nomination process at any other time.
- The community-driven nomination process should be conducted by a suitably qualified heritage professional and additional staff and resourcing should be given to Heritage NSW to guide these processes. Alternatively, appropriate funding could be given to the National Trust to assist the community with providing appropriate skills to prepare nominations.
- Local government-driven nominations should be taken into more account, regardless of an owner's desires, the level of threat of an item or the priorities and resources available.
- The listing process needs to be based on merit. Where it is shown that an item has State significance the listing needs to be mandatory; owners should not be provided with discretion as to whether their property is listed. Ownership is transitory and temporary however our State cultural heritage should be enduring.

Focus Question 11: Would streamlining enhance the listing process?

Council's response:

- We agree there may be value in streamlining the process to update/amend an existing listing, but we require more detail about how this would be achieved to ensure that the quality of information in the listings is not compromised and there is an opportunity for robust community engagement.
- We are concerned about a streamlined delisting process. For example, an item should not necessarily be delisted if it has been destroyed by bushfire or flood. The significance of the item may not solely rely on the built form, and the item could be re-interpreted despite being impacted by bushfire or flood.
- Also, rather than abridging the listing and delisting process, timeframes could be improved under existing processes by:
 - Convening the Heritage Council meetings more frequently
 - Ensuring that Heritage NSW is sufficiently staffed and resourced
 - Improving information on the Heritage NSW website providing notification of proposed changes to the lists and inviting public comment.

Focus Question 12: How could we improve the current approval permit system?

Council's response:

- The State Government's intent to streamline the application process may result in a reduced assessment of changes to SHR items than is provided for local items under clause 5.10 of each local council's Local Environmental Plan.
- All applications need to be properly assessed on its merit. Streamlining applications will compromise positive heritage outcomes.
- The current approval system works quite well and we do not see merit in making significant changes. In particular, the requirement for a Section 60 after integrated development application (IDA) is a necessary mechanism to ensure the General Terms of Approval are being appropriately incorporated into the final scheme.
- The existing system could be improved by:
 - Actively encouraging a pre-lodgement consultation process between the proponent and the assessing officer at Heritage NSW. This would facilitate more complete applications and robust considerations and solutions
 - Introducing "stop the clock" provisions where the proponent needs to provide more information to support the application.
 - Ensuring Heritage NSW is suitably resourced with enough staff to assess applications in a timely manner.
- There may be scope to consider expansion of the fast track pathway. However, eligibility must be about the nature of work and impact and not the class or category of SHR item that the work is proposed on. Any such changes would require wide consultation with the community and other stakeholders. There should also not be an additional burden on local governments that are already under-resourced.
- The non-notifiable standard exemptions in place from December 2020 allow for sufficient minor works to be undertaken without endorsement from Heritage NSW. This mechanism should be accompanied by a requirement for all works carried out under this provision to submit details of the works to Heritage NSW for auditing and cumulative impact assessment purposes in a manner similar to the requirement to register with the local council Complying Development Certificates issued by Private Certifiers under the *Environmental Planning and Assessment Act 1979*.

Focus Question 13: Are the current determination criteria for heritage permits still appropriate?

Council's response:

- The criteria could be improved to address incremental change. The current determination process does not provide suitable scope to consider previous work and the impact of incremental change on the overall significance on the item.
- Proximity provisions should be included for SHR items, similar to those afforded by Clause 5.10 in the Standard Instrument LEP. This would ensure more thorough impact assessments.
- However, overall the current determination criteria for heritage permits are appropriate, and the current system provides a suitable degree of flexibility depending on the nature of the work and potential impact on the significance of the heritage item.

Focus Question 14: How could we improve heritage consideration within land use planning systems?

Council's response:

- We do not support the view that ongoing refinements to the EP&A Act have delivered better-quality planning outcomes, and applying this approach to SHR items will certainly diminish heritage protections.
- In regards to the development application assessment framework:
 - heritage considerations for SHR items must be kept separate to the planning system, otherwise heritage will be eroded and compromised. In particular:
 - the need for an applicant to submit a section 60 application after (or before) the IDA process must be kept.
 - heritage considerations must not fall under the ambit of private certifiers and the complying development framework.
 - the heritage significance of buildings that are subject to an IHO must be a matter for consideration when assessing a DA under section 4.15 of the EPA Act. Currently, only a draft heritage listing (subject to a planning proposal which has been placed on public exhibition) is a matter for consideration. Ensuring the IHO process is appropriately recognised within the DA process will improve heritage consideration within the land use planning system.
- In regards to planning proposals (PP) and heritage listing the current EP&A Act and the Heritage Act do not work efficiently together and the following issues need to be addressed:
 - The PP process can be protracted (for example the Department of Planning, Infrastructure and the Environment may take months to issue the Gateway Determination) which delays public exhibition of the PP. This means that the listing of local heritage items in the LEP can take well over 12 months from inception to publication (commencement).
 - On the other hand, the interim heritage order (IHO) process is a stringent time based process (issued for 12 months) and may be lifted before the LEP is amended. Once the IHO is lifted, and without the LEP listing, the building is under threat.
 - This gap between the two acts must be addressed, and provision must be made to allow IHOs to be extended to align with the PP process.

Focus Question 15: Are there opportunities to enhance consideration of heritage at the strategic level?

Council's response:

- Heritage considerations must be an integral part of the strategic planning process at both the State and local level. Heritage should be at the front and centre of the planning process, especially when new precincts or major redevelopment are proposed.
- The fast pace of development in Sydney and beyond is putting enormous pressure on heritage protection and conservation. Heritage is part of the considerations at the strategic level. However there is not currently an adequate provision in the Heritage Act nor the political will to make heritage a priority consideration at the strategic level. For example:

- heritage is always identified within the strategic documents such as *Metropolis of Three Cities – The Greater Sydney Region Plan*. However, other issues such as residential development, economic feasibility and infrastructure tend to take priority above heritage considerations when development decisions are made.
- The Act is weakened by other legislation especially in regards to State significant development and State significant infrastructure, for example there should not be other acts switching off an assessment under the Heritage Act.
- Designation of heritage conservation areas should be more widely acknowledged and applied as it is a very effective tool for protecting heritage. Protecting the ambience of the area is key.

Focus Question 16: How could heritage compliance and enforcement be improved?

Council's response:

- The Heritage Act currently does not provide enough of a “stick” to deter non-compliance and there is a lack of enforcement action. Accordingly, we strongly support the proposal to introduce a series of intermediate enforcement powers. However, enhanced compliance and enforcement powers must be suitably resourced if they are to be effective.
- New enforcement powers should address, amongst other things, power to access premises to inspect premises for breaches, orders to stop demolition by dereliction, orders to remove unauthorised work and rebuild to reflect the original. Penalty enforcement notices should be used to provide on the spot fines.
- Under section 160 and 161 of the Heritage Act the Minister can restrict or stop development or use of the land for a period up to 10 years if an owner of land is convicted of an offence which involved demolishing, damaging or despoiling a heritage item or place. Though this appears to be a very strong deterrent it is rarely used, if not all, and therefore has limited value.
- The compliance and enforcement mechanisms of the EP&A Act and regulation may provide more appropriate compliance and enforcement provisions than the *Protection of the Environment Operations Act 1997*.
- Insertion of a provision extending the requirement for minimum standards of maintenance for locally listed heritage items, with appropriate enforcement mechanisms, would ensure that these items of local heritage significance are not subject to demolition by neglect.

Focus Question 17: How could understanding of state heritage be enhanced?

Council's response:

- Understanding of heritage could be enhanced by celebrating and engaging with the community through programs similar to the ‘Heritage Near Me Roadshows’.
- The Roadshows “encouraged communities to embrace their local heritage through regional events and local projects, assisted in the coordination of training and skill development opportunities, and enabled communities to promote and activate their local heritage.” <https://www.heritage.nsw.gov.au/celebrate/love-your-local-heritage/heritage-near-me-local-heritage-celebrations/>
- Improving heritage inventory sheets for SHR items and State owned items.

Focus Question 18: How could we improve heritage tourism or help activate heritage places for tourism?

Council's response:

- Heritage NSW should engage and collaborate with Tourism NSW to promote heritage places as desirable tourism destinations.

Focus Question 19: How could public heritage buildings be activated to meet the needs of communities?

Council's response:

- The strategy for surplus assets should not be to sell them. The NSW Government should actively engage with the community and local councils to identify spaces and services they need.
- The NSW Government could offer tax incentives, grants and other concessions such as long term leasing at nominal rents to Council or other entities, to encourage and inspire adaptive reuse and activation.

Other observations and comments

We also make the following comments for consideration:

- Archaeological relics:
 - There needs to be greater clarification between what is considered a relic and a work within the Heritage Act.
 - There should be greater clarification around Excavation Director requirements in the Heritage Act , including guidelines
- Sustainability:
 - There is a lack of emphasis on sustainability practices to reduce Australia's carbon emissions. This should be addressed in the reuse considerations.
- Funding:
 - There seems to be a diminution in status of the Heritage NSW, and its ability to function effectively is eroded by funding cuts of successive State governments. Historical knowledge and experience within government departments have been lost. This needs to be acknowledged and addressed as part of the review of the Heritage Act.
 - Local councils are starved of the necessary funds required to do heritage assessments on a broad scale and are too reliant on outside heritage consultants, who bring varying levels of expertise. There is very limited funding available by the State Government, and any new reforms should not pose additional burden on local governments in the protection of local heritage, rather provide more assistance to protect local heritage.
 - Local heritage societies are starved of funds and are closing due to lack of interest or expertise partly due to generational change. Their important advocacy role needs to be acknowledged and funded.