

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Blue Mountains City Council

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NSW Legislative Assembly
Standing Committee on Social Issues

Dear Committee Members,

SUBJECT NSW Heritage Act 1977 – Inquiry and review

Please find attached Blue Mountains City Council's submission to the inquiry and review of the NSW Heritage Act 1977 and related matters.

Should you have any questions or wish to discuss the matter further, Council's contact officer is Kim Barrett, Manager City Planning,

Yours faithfully

ROSEMARY DILLON
Chief Executive Officer



NSW Heritage Act 1977 review – Submission from Blue Mountains City Council

25 June 2021

Introduction to our submission

Blue Mountains City Council has a notably high quantity and quality of heritage items within its local government area. From historic towns and villages, to remnants of our colonial Western Road, to the exceptional natural and Aboriginal cultural heritage of the broader area, our environment is rich and diverse in its heritage. The protection and celebration of our rich heritage is a key priority for our community, and Council is heavily invested in its protection, for our residents and visitors.

The character and history of NSW's heritage towns, precincts and key sites are major drawcards for local and international tourism. The qualities of historic urban and regional areas tell the stories of the past. Historic buildings provide valuable embodied energy and further, are attractive, often decorative and well-built structures that are highly desirable to live in.

There must be passionate and strong-held support for cultural heritage across the political spectrum. *Dr Samantha Ratnam, leader of the Victorian Greens, speaking in the Legislative Council on 18 March 2021 about the recent Victorian Planning and Environment Bill 2021:*

"One of the reasons why this topic is often so contentious is that we actually do value things differently. Some of that difference is because of our aesthetic preferences, historic knowledge or our sensitivity and values about the preservation of culture. It can also be contentious because what we value and want for our future built form can differ a lot between us. But acknowledging that we have different preferences and values does not mean that we should not attempt to reach some sort of agreement about what we value collectively as a society. Yes, not everyone will agree, but without a collective agreement of what we value and therefore what we should preserve, we are vulnerable to those with the most to gain and the most resources getting to impose their values on us. And if history is anything to go by, it is big corporate developers with everything to gain by demolishing the things we value for their own profits that get to dominate what our neighbourhoods and our towns will look like and feel like and determine if our natural environment is even given the smallest chance to survive."

Locally, we have highly significant issues in Western Sydney with the proposed raising of the Warragamba Dam Wall, potentially destroying numerous Aboriginal cultural heritage sites and permanently damaging parts of our World Heritage Area, and the Great Western Highway upgrades which are changing the character of our towns and villages. Further, we are very concerned about the ongoing and systematic erosion of heritage protections that has been evident within NSW statutory frameworks. Examples include:

- the 'interiors listing' changes to the listing description requirements in the LEP schedule and Clause 5.10 of the Standard Instrument that have left many heritage interiors without protections;
- the 'turning off' of heritage protections under State significant development;

- changes to the Complying Development Code that will affect buildings in heritage conservation areas;

We are also concerned with the pace of development in NSW and Sydney in particular, and the sweeping aside of heritage values in the face of large-scale development. This includes:

- Willow Grove in Parramatta
- Loss of heritage housing and streetscapes in Haberfield for the WestConnex
- Comments made by the state treasurer about the White Bay Power Station
- Protection of the Sirius Building in The Rocks

The discussion paper presents as current, the view that any change is bad and should be prohibited. To suggest that this is a commonly held view is disingenuous. If anything, certain statements within the exhibited paper suggest views that are ‘stuck in the past’, referencing that heritage listing sterilises a site (or ‘freezes a place in time’ as it is worded). Concepts such as adaptive reuse, conservation of embodied energy, and other ideas of recycling and reuse are already commonplace in best heritage practice.

The promotion of such negative ideology and viewpoints within the discussion paper is counter-productive, and can only work to reinforce an idea that heritage is a burden. The heritage profession is fundamentally aware that heritage listing does not ‘stop all change or freeze a place in time’. The tone of the discussion paper is overly negative, using words such as ‘inflexibly bound’, ‘mothballed’ ‘onerous processes’, and works from the premise that this is the status quo or agreed view. It is not agreed that this is how heritage is viewed by the public and should not be the premise on which a state government discussion paper is presented.

Our submission outlines our key concerns with any changes to the *NSW Heritage Act 1977* and its operating functions including the *NSW Heritage Regulation 2012*, and makes a number of recommendations, both at a broad, thematic and strategic level, and also as a detailed response to the five proposed reforms outlined in the Discussion Paper.

Part 1 – Broad thematic response to proposed changes to the Heritage Act

1. Continued legislative focus on protection as the key role of the Act.

We acknowledge that heritage protection has evolved from grass-roots activism, to an increasingly complex multilevel system of heritage laws and procedures. However, we believe that changes to the *NSW Heritage Act 1977* are not necessary, and that the legislation and its objectives remain relevant and fundamentally important to the successful protection and conservation of State-significant cultural heritage in NSW.

The discussion paper states that the Act is “out of step with trends in heritage conservation and land use planning and development... onerous, procedurally complex and adversarial to adaptive re-use.” We do not agree.

Recommendation: *The NSW Heritage Act 1977 should continue to fulfil its primary role as a piece of legislation with the purpose of protection. There should be no further erosion of its powers to identify, protect, fund and penalise misdemeanours in regard to heritage conservation, amongst its other functions.*

The issues of sustainability, change, development, public participation are all enshrined in the role of Heritage NSW and in our core heritage documents, such as the principles within the Burra Charter.

2. Focus on modernisation of Aboriginal Cultural heritage management work

For more than a decade, the NSW government has been examining the antiquated structure in which Aboriginal cultural heritage is largely administered under the National Parks and Wildlife Act (1974). Instead of completing that important work, attention has prematurely shifted to the less troubling Heritage Act.

This century, Queensland and Victoria have modernised their Aboriginal heritage legislation to bring Aboriginal decision-making to the fore.

Recommendation: *We support an increased focus on Aboriginal cultural heritage management. This should occur prior to any changes to the NSW Heritage Act and Regulation. The passage of Aboriginal heritage legislation in NSW should be the first priority in any updated plan for improving heritage management at a high level. We recommend that the NSW government consider the Queensland and Victorian models that have modernised Aboriginal cultural heritage management, putting Aboriginal people at the centre of the decision-making processes.*

Not only would this correct a fundamental historical failing, but it would also provide a set of policy precedents and pathways for linking up heritage policy in the state.

3. Heritage governance must put heritage at centre of social, environmental and economic sustainability. Develop a Heritage Strategy or Operating Plan.

We agree that heritage has in many cases some unrealised capacity to better respond to social, environmental, economic and cultural opportunities. The discussion paper acknowledges shifting public and development attitudes, and recognises heritage has new, enhanced and sophisticated roles to play in contemporary society.

The inquiry will need to articulate a clear vision for heritage governance and management.

Recommendation: *The role of heritage in society should be explored strategically not legislatively, through a NSW State Heritage Strategy, that sets out the vision, principles and implementation for how it will develop heritage management along the four key principles of 'knowing, protecting, supporting, and promoting' [from the Heritage Victoria toolkit, and the basis for our own Blue Mountains Heritage Strategy, on our website here: <https://www.bmcc.nsw.gov.au/documents/blue-mountains-heritage-strategy-2021-2025>]*

Authorities should be developing models of heritage governance that enhance public participation and the inherited environment. Heritage conservation needs to be reimagined to renew its mission as a centrepiece of aspirations towards social, environmental, economic and cultural sustainability. We note that, for example, Historic Environment Scotland has developed a two-year operating plan that incorporates a holistic vision for heritage management.

Recommendation: *The State government and Heritage NSW should develop an operating plan based on an enhanced budget for heritage resourcing and management.*

4. Adequate budgeting for Heritage NSW

Cultural heritage in NSW is chronically underfunded; this is well known. This includes dwindling support and resourcing given to the staff at Heritage NSW. Existing legislation is not the underlying cause of all the identified concerns. Rather, authorities responsible for heritage are under-resourced.

Our experience in local government has taught us that the best way to improve heritage conservation outcomes in local areas is to resource qualified staff. Therefore endowing additional

value to heritage processes and conservation outcomes should focus on the consolidation of expertise and experience at Heritage NSW. Expand the number of qualified staff. Create regional offices of Heritage NSW, such as exist within the Government Architects Advisory, and the Department of Planning Industry and Environment, for example in Wagga Wagga, Grafton, Lismore and other mid-sized towns. Decentralisation of state heritage management will bring heritage expertise closer to regional property owners and government, and provide more regional jobs, and better regional heritage outcomes.

5. Heritage properties must receive financial support and creative development solutions

Recommendation: *The urgent care and conservation of heritage properties should receive substantial financial support and creative development solutions for owners, developers, and the community through tax concessions, incentives and other overseas examples of assistance.*

6. Provide local government mechanisms to discourage demolition by neglect

Arts Minister Don Harwin, in announcing this review stated that “Too often we see once cherished heritage properties experience dilapidation by neglect.” However, the discussion paper does not directly mention this issue, and does not propose mechanisms to overcome this cynical exploitation of an apparent loophole in the system.

In fact, the Heritage Act does already give the Minister powers under Clause 161(1)(a) to prohibit development for up to 10 years in certain circumstances.

Recommendation: *We would like to see this clause in the Act being used visibly and as often as necessary to demonstrate a clear deterrent to the demolition of heritage properties.*

The Victorian government has recently passed a Bill, the Planning and Environment Amendment Bill 2021, to discourage the practice of allowing protected buildings to fall into disrepair, and to enable existing permits to be revoked and allow for new permits to be issued for specific purposes including reconstruction or repair of a heritage building.

Recommendation: *The inquiry should consider the Victorian model, and consider both legislatively and in practice, how the government can and will discourage and penalise heritage property owners who do not protect heritage values.*

At a local level, Blue Mountains City Council has advocated strongly for similar local powers, to enable local government to enforce minimum standards of maintenance and repair, aligned with those of the Heritage Act and Heritage Regulation for state-listed heritage items. Note the following recommendations have been previously provided to the Department of Premier and Cabinet, Heritage Division, as endorsed by Local Government NSW (Recommendation 40) in 2019 at their annual conference.

Recommendation: *The inquiry should consider providing stronger powers to State Government and local government agencies, to require that locally listed heritage items meet minimum standards of maintenance and repair, and the power to enforce these requirements; and recommend that these minimum standards align with those required for State-listed heritage items under the Heritage Act 1977.*

7. Heritage NSW to proactively pursue philanthropy and fundraising

We support the increase in reach to access funding for specific heritage conservation projects.

Recommendation: That an externally-facing arm of Heritage NSW be set up to proactively seek philanthropic opportunities for heritage conservation projects, and to support particular building conservation projects, particularly in rural settings. Networks such as the Australian Environmental Grantmakers Network (AEGN) and similar should provide connections to philanthropists with environmental objectives ready to initiate conservation projects. There are various not for profit and cyclical funding models in use globally.

Recommendation: The Heritage Act already provides for a Heritage Conservation Fund and a Heritage Incentive Fund (Clauses 103 and 105A respectively). These vehicles should be used as the starting point to develop a funding model, with possible financial incentives for contributors to the Fund/s, to initiate conservation projects. If managed successfully, these projects can be 'good news stories' for media circulation, awards nominations, and partner with at-risk or charity enterprises to find new uses for conserved buildings.

8. Adaptive re-use is key to achieving sustainability and ensuring planetary health

Acknowledgement that adaptive re-use of historic buildings is of pivotal importance to achieving sustainability, mitigating the impact of climate change, and ensuring planetary health.

Recommendation: That the inquiry propose a working group of heritage experts to identify, scope and fund adaptive re-use projects of disused or abandoned buildings to showcase the government's ability to care for its heritage assets, in conjunction with sustainability outcomes associated with the embodied energy of existing buildings. State significant examples include the White Bay Power Station (which has majestic-scale interiors), while local examples include the Katoomba Goods Yard buildings at Katoomba Railway Station.

9. Management of NSW government agency assets

Government should always strive to be exemplary in its management of its own cultural heritage assets. Most State Heritage Register items, [66% according to the National Trust 'Heritage Act Facts and Figures'], are owned by government (not including the thousands of locally-listed items in NSW that are also owned and/or managed by federal, state and local government). The discussion paper does not adequately focus on government management of heritage sites and properties, and how this can be better resourced and outcomes improved. The discussion paper is therefore silent on two-thirds of our state listed heritage items.

If the state government is serious about wanting to improve heritage outcomes, it needs to take responsibility for the management of state significant items. State agencies should also consistently apply due processes, as per the State Agency Heritage Guide, and protect items of local significance.

By way of a local example, to date, strong community and local government support and advocacy for the retention of the Woodford Footbridge across the railway at Woodford (owned by Transport for New South Wales and of high significance for the village of Woodford), has not been taken into account in regard to ongoing decisions and maintenance of this item.

Recommendation: The inquiry should consider how policies, processes and practices within state government, including state agencies, can be improved and better resourced to ensure that due care is taken to protect the heritage values of properties owned by the state government, of both state and local significance. This should be mandated through the Heritage Act and the Heritage Regulation.

10. Local government

Support for local government is vital for adequate identification, protection and conservation of the state's 40,000+ local listed heritage places.

Recommendation: *The recent Heritage Near Me program was a highly successful funding and networking program that should be continued. The program created excellent collaboration between local and state government staff, and promoted interpretive material and projects of great interest and potential. This program of funding and engagement should be reinstated.*

Part 6 of the discussion paper states that 'The NSW Government could seek innovative ways to support and celebrate local heritage, for example, through best practice guidance on local heritage management.' Heritage NSW already does this, with the Local Government Guidelines, its various publications on heritage management, technical details and so on that have been available on the Heritage NSW website for many years. The Government Architect's Office has also expanded somewhat into this role, by producing various general guidelines including heritage guidelines.

Recommendation: *We would like to see a broad strategic document produced by Heritage NSW, based on an internal/external funding model, for a say 4-year strategy for how the state government will support a range of initiatives that promote and celebrate heritage.*

11. Heritage Council should be prominent heritage experts not property developers and lawyers

[Focus Question 1]: The members of the Heritage Council and by default the criteria for membership, should be purely prominent heritage experts and independent champions of heritage advising purely in public interest terms. There should be a strong focus on recognised and respected heritage expertise, particularly in the arenas of architecture, archaeology, landscape, Aboriginal cultural heritage and history. There should always be an Aboriginal cultural heritage representative member.

Recommendation: *There is no rationale to include individuals from the property industry, lawyers, bankers or investment consultants, and these criteria should be discontinued and removed from the Act. Remove sections from Clause 8 of the Act as follows: delete (d) the building, development and property industries, and (l) property, planning or environmental law, and (m) property economics, unless this is secondary to recognised heritage expertise in a member.*

12. Erosion of heritage protections in state legislation

Recommendation: *State significant development should not turn off heritage protections.*

13. Do not allow fast-tracked development or de-listings or a weakening of heritage protections

Recommendation: *Any proposed changes to the legislation should not weaken existing protections, or allow increased likelihood of adverse changes to heritage items or places, particularly through fast-track processes.*

14. Interaction with other state legislation

The Terms of Reference ask: "how the Act could more effectively intersect with related legislation, such as heritage elements of the Environmental Planning and Assessment Act 1979". However, this is not included in the discussion paper. There is no mention of heritage in the EP&A Act, apart from 1.3 Objects of Act, "to promote ... the conservation of the State's natural and other resources".

The discussion paper mentions the ongoing changes to the EP&A Act ('designed to deliver simpler, faster, better quality planning outcomes, such as community-driven strategic planning'), which have removed planning and decision-making powers from our local representatives.

Recommendation: *Instead of amending the Heritage Act, we recommend the efforts be spent on considering the confusing and incompatible heritage legislation relationships at a local level between the heritage Standard Instrument provisions, the Codes SEPP and other state codes. For example, the Codes SEPP does not allow a minor building alteration to a heritage item, such as an internal architrave; however this work is absolved from the need for consent under Schedule 5 of the LEP. There should be a detailed and considered analysis of how heritage items, draft heritage items, heritage conservation areas and draft heritage conservation areas interact with the various SEPPs, as there are existing inconsistencies in terms of the consent pathways and approval requirements for changes to heritage properties.*

15. Request for ongoing involvement

We as a significant heritage stakeholder, request ongoing involvement in any change process. It is vital that later stages of the Review, such as Hearings, Draft White Papers and Draft Bills, are incorporated into the process so that the Review gives further opportunities for public comment.

Recommendation: *Blue Mountains City Council and all NSW local Councils should be kept informed of the progress of deliberations, and further public submissions called for at future stages of progress of any proposed changes to the Act or development of heritage strategies or new funding announcements.*

Part 2 – Specific response to the five reform proposals and the discussion paper

1. Reform Proposal 1: State Heritage Register categories to provide tailored protections

It is not clear what the purpose is of the proposed categories. We are concerned that mention is made of a set of different rules for rural 'landscape area' properties which may lead to the destruction of regional and rural 'country estates' including the loss of integrity, subdivision, loss of outbuildings etc. We are concerned that simplifying the rules for residential owners may lead to inappropriate change decisions based on a standardised approach which likely would not fit all circumstances.

Recommendation: *The process of identifying and listing cultural heritage places and items should be separate from the process of change management at these cultural heritage places. We do not support the separation into categories.*

There is already a categorisation process of World, national, state and local. This is sufficient and the basis on which to assess change decisions, based on the level of significance. Further categorisation will only complicate the process further, and leave the process open to inappropriate management (where a standardised change response does not suit specific circumstances).

2. Reform Proposal 2: Improving the listing process

The suggestion of 'community nominations' is not substantially different from how the process is managed now. Anyone in the community can nominate a listing.

Heritage NSW is already overstretched in its nominations assessment processes, and this is not acknowledged in the discussion paper.

Recommendation: *Continue to allow community nominations. Ensure the assessment of nominations is consistent, non-political and independent. Create more resourcing for the assessment of*

nominations. A numerical goal of 20 listings a year as per the current situation is an acceptable minimum considering the complex and detailed assessment process.

3. Reform Proposal 3: Amending existing listings on the State Heritage Register

Local government has an existing cyclical process whereby the LEP schedule/inventory is reviewed approximately every five years. Submissions from the public are considered, including amendments and de-listing requests. It is appropriate that a cyclical model is used to continuously update the inventory over time, adding and amending and deleting the listings, in accordance with a 'curating' or 'collections' ideology, to ensure the listings are up to date. Heritage NSW should be properly funded to ensure key qualified staff are available and engaged to take carriage of this important but time-consuming process.

Recommendation: *The state government, specifically Heritage NSW, should use the same model as local government to manage, update and amend the State Heritage Register. This model is straightforward although time-consuming.*

We are concerned that any 'abridged' or 'fast-tracked' de-listings or amendments appear likely to make it easier for listings to be amended to suit fast-tracked development. The entire listings process must be subject to the same rigorous public consultation, transparency and reporting as in the local listings context.

4. Reform Proposal 4: The heritage permit process

There are very few current scenarios where a heritage listing 'freezes a place in time', as suggested by the discussion paper. We are concerned this proposed 'streamlining' process could simply make it easier to approve rapid and adverse changes to heritage properties, and fast-track development upon the discretion of the Minister without the full impacts being fully considered.

There should be an acceptance that development (including conservation processes) is often complex and time-consuming, particularly for one-off developers such as 'mum and dad' developers. Recent state government efforts to reduce waiting times and delays in the development process have sadly resulted in unacceptable complexity, for example, the Exempt and Complying Development Codes, as well as poorly regulated environments such as the private certification system. These matters have led to the degradation of heritage buildings and the natural environment.

Recommendation: *We do not agree with 'streamlined' heritage processes, bearing in mind the discussion paper does not explain what this means. The standard exemptions process is relatively straightforward and allows many types of maintenance and repairs to be carried out. Proper assessment and due diligence on the part of applicants and assessment staff at Heritage NSW are key parts of any successful development process, in line with the Heritage Act and Regulation, and with the NSW Environmental Planning and Assessment Act 1979 requirements.*

5. Reform Proposal 5: Compliance and enforcement

This reform proposes a new category of intermediate enforcement powers between court proceedings and warning letters, such as a fine system.

Recommendation: *The existing 'Offences' clauses in the Heritage Act seem to cover the various scenarios of warnings, penalties/fines and court proceedings, so it is not clear why this reform is necessary. Penalties are already set out in Clause 157 of the Heritage Act. It is also not clear how*

additional penalties will be enforced without a commitment for additional resourcing for staff to investigate and follow up.