

**Submission
No 75**

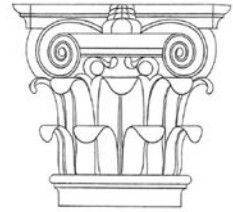
INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

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25th June 2021

Social Issues Standing Committee
NSW Legislative Council
Parliament of NSW

Dear Honourable Committee Members,

Re: Submission to the Review of the Heritage Act 1977

We are writing to make a submission to the NSW Legislative Council's Social Issues Standing Committee conducting a review of the *Heritage Act 1977*.

We, Lucas, Stapleton, Johnson & Partners Pty Ltd, are a Sydney based architectural firm which specialises in conservation, adaptation and restoration of historic buildings and heritage planning. Our firm possesses a broad first-hand conservation experience and knowledge of historic buildings and places in Australia and has completed numerous architectural projects on heritage listed properties including adaptation, restoration, reconstruction as well as alterations and additions. Our firm has also prepared many heritage studies for both public and private clients in relation to individual buildings and places as well as whole landscapes and areas. As such, we are well acquainted with the *Heritage Act 1977*, the functions of NSW Heritage and the Heritage Council and the expectations and needs of the community in relation to State heritage listed places.

In response to the Terms of References for the Review of the *Heritage Act 1977*, we make the following comments:

(a) the need for legislative change to deliver a heritage system that is modern, effective and reflects best practice heritage conservation, activation and celebration.

We disagree that the delivery of a modern and effective heritage system is reliant upon legislative changes.

The *Heritage Act 1977* is a robust piece of legislation that provides re-assurance to the broader community as to their legal obligations associated with owning, caring for and maintaining an item on the State Heritage Register.

The delivery of a heritage system to the community, including meeting the Objectives of the Act, is the responsibility of NSW Heritage and the Heritage Council. This is where changes in administration and resourcing can make the biggest difference in terms of a modern and effective system, that supports and celebrates conservation and heritage places, as well as activation. The NSW government has an important and necessary role as a leader in heritage conservation, best demonstrated by conserving, caring, maintaining and, where necessary, adapting their own heritage assets.

It is noted that the State government owns the majority of items included on the State Heritage Register, allowing for a range of approaches to conservation to be implemented and promoted by the State, that are modern, effective and demonstrate best practice, and should be celebrated.

Best practice in heritage conservation, including activation, is guided by the Australia ICOMOS *Burra Charter* (2013). The *Burra Charter* provides the principles by which heritage conservation in NSW (and Australia) is implemented and is well regarded internationally. The approvals process for State heritage items is already guided by the *Burra Charter* and should be continued. There is no need to reinvent the wheel in terms of best practice in heritage conservation.

(b) the adequacy of the Act in meeting the needs of customers and the community and the protection of heritage

The Objectives of the Act (Cl. 3) are appropriate and relevant to today and continue to meet the needs of customers and the community, whilst providing for the protection of places of heritage value. These objectives address the three main issues raised in these Terms of Reference; that is, best practice heritage conservation, activation and celebration.

Not only do the Objectives support the mechanisms by which the legal protection of places and items of the State's heritage can be implemented, they also provide for encouraging conservation, supporting education and tourism, assisting property owners in caring for and maintaining their property of State heritage significance, and encouraging the adaptive reuse (activation) of the State's heritage.

The Act itself is adequate in meeting the needs of the customers and the community, with some useful provisions of the Act, currently under-utilised, that could be promoted. These include Heritage Agreements (Cl. 40 of the Act), whereby a broad range of provisions can be agreed to with the Minister that benefits both the property owner and the broader community, by ensuring the continued conservation of the place.

Ensuring that the Act is adequate in meeting the needs of the community is an issue of administration, implementation and resourcing of the relevant government department, NSW Heritage.

(c) how the Act could more effectively intersect with related legislation, such as heritage elements of the *Environmental Planning and Assessment Act 1979* and the *National Parks and Wildlife Act 1974*

The *Heritage Act 1977* could most effectively intersect with other related legislation in the following ways:

1. Creation of a new, stand-alone piece of legislation that specifically addresses Aboriginal cultural values and archaeology. It is inappropriate that Aboriginal heritage should be dealt with under the *National Parks and Wildlife Act 1974*, an Act that relates to the protection of NSW's natural environment, including fauna and flora.
2. Repealing Clause 4.41 (1) (c) and (d) of the *Environmental Planning & Assessment Act 1979*, which exempts the requirement for approvals under the *Heritage Act 1977* and the *National Parks and Wildlife Act 1974* for State significant development. Not only is cultural heritage including historical and Aboriginal archaeology under immense risk from State significant development under the current process, the opinions of the community in relation to the protection of places of cultural value are also ignored. The legislated disinterest in meeting the Objectives of the *Heritage Act 1977* as part of the State significant development process is against what should be considered to be "State significant".

(d) the issues raised and focus questions posed in the Government's Discussion Paper, in particular:

(i) a category approach to heritage listing to allow for more nuanced and targeted recognition and protection of the diversity of State significant heritage items.

The suggested four heritage listing categories as outlined in the Discussion Paper make no sense. In particular, the fourth category “Items of local significance” are not currently protected under the *Heritage Act 1977* and have no need to be. Items of local significance are dealt with under the *Environmental Planning & Assessment Act 1979* and are accounted for within the Local Environmental Plans relevant for a local area.

The Discussion Paper raises as an issue the idea that every item listed on the State Heritage Register is treated in the same way, with one standard set of regulatory controls applied. The Discussion Paper suggests that the *Heritage Act* is “unable to respond to the often very distinct differences in item type or circumstance”.

We see no evidence of this suggestion. The Act does not regulate how a State heritage item is to be used, restored, reconstructed, interpreted, promoted, activated, adapted, or altered. The only requirement under the Act for an owner of a State heritage item is for the item to be maintained (i.e. protected from damage or deterioration).

Rather the Act puts into place the processes for seeking approval and defining when approval is needed. Indeed, there is not even one standard set of approval processes in place with the recent introduction of the “Fast-track S60” process and the Standard Exemptions (recently revised and updated), which allow for a good range of activities and uses to be undertaken without the need for the written approval of NSW Heritage. It is via the approval process that decisions are made based on the specific circumstances of both the owner and the item.

The *Heritage Act* also already has provisions for Site Specific Exemptions (Cl. 57(2)) which could be more widely applied. Site Specific Exemptions provide for certain activities and changes to be carried out without the need for formal approval that are specific to the heritage item. Recommendations for Site Specific Exemptions already form part of conservation management documents (such as conservation management plans) and are based on the very different circumstances that each individual heritage item presents.

Incorporating carefully considered and practical Site Specific Exemptions into the gazetted listing for a State heritage item provides clarity and reassurance that a property owner can care for and continue to use their property in a way that meets their specific needs whilst protecting the heritage values of the item, and also lessens the need for formal approval.

The process for the gazettal of Site Specific Exemptions would benefit from being less complicated and taking less time.

(ii) consideration of new supports to incentivise heritage ownership, conservation, adaptive reuse, activation and investment

This is not a matter for the *Heritage Act*, but rather an issue for the State government, in relation to resourcing of government departments, support of community-based conservation and heritage groups and organisations, taxation exemptions or deductions, and most particularly in demonstrating leadership in and the promotion of best practice heritage conservation of public heritage assets.

(iii) improvements to heritage compliance and enforcement provisions

Issues in relation to heritage compliance and enforcement, in our opinion, are as follows:

- The lack of a requirement for certification for works undertaken under S60 of the *Heritage Act 1979* can be problematic. Any certification that does occur only exists when there is an accompanying Development Application and therefore a requirement for a Construction Certificate and Occupation Certificate.

Expertise is needed, particularly during and post construction, in assessing whether or not approved works to a State heritage item actually meet the conditions of the S60 approval and principal certifying authorities (local councils or private certifiers) rarely have the appropriate level of expertise.

- The *Heritage Act 1979* already has adequate provisions for enforcement; however, in our experience, it appears that little resourcing is directed to implementing these provisions and the responsibility for enforcement most often falls on the local council, who is not responsible for the *Heritage Act 1979*.

(iv) streamlining heritage processes

In our opinion, aspects of the heritage processes that could be improved are as follows:

- The process for gazettal of Site Specific Exemptions;
- Delegating authority for the processing of “Fast-track S60” application to more local councils than just the City of Sydney Council;
- Making clear what kind of proposals can or cannot be approved under delegation to NSW Heritage assessment officers, and what kinds of proposals are required to go before the Approvals Committee;
- Introduce a formal and efficient process to undertake pre-lodgement meetings with NSW Heritage assessment officers and representatives of the Approvals Committee, the Technical Advisory Panel and the Heritage Advisory Panel;
- Reinstate the Fire, Access and Services Advisory Panel and make available updated information to assist the community and property owners;
- Review and update the Heritage Manual;
- Ensuring that persons with relevant, practical experience in conservation practice are involved in the approvals process, including the Approvals Committee. Expecting an expert in archaeology to make a decision on a proposal relating to an item that is significant for its architectural attributes is not good practice.

We thank you for this opportunity and trust the above opinions will assist the Committee in your deliberations. Please do not hesitate to contact the undersigned should you wish to discuss further.

Yours faithfully,

Kate Denny, Sean Johnson and Ian Stapleton
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