Submission
No 76

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Australian Archaeological Association

Date Received: 28 June 2021

AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED

ABN 13 110 628 970

Hon Shayne Mallard MLC
The Director
Standing Committee on Social Issues
Parliament House
Macquarie Street
Sydney NSW 2000

25 June 2021

Dear Mr Mallard

Submission for Review of the NSW *Heritage Act 1977*

Thank you for the opportunity to make a Submission to the Review of the *NSW Heritage Act 1977* (the Act), released in April of this year. Attached is the submission from the Australian Archaeological Association Inc. (AAA) providing feedback on the Standing Committee's Terms of Reference.

AAA is the largest archaeological organisation in Australia, representing a diverse membership of professionals, researchers, Aboriginal Traditional Owners, students and others with an interest in archaeology. AAA National Executive Committee has worked closely with a range of stakeholders and colleagues, including private consultants and university academics, and strongly endorses the constructive work on the Bill by our members.

The Act dates from 1977 and was subject to significant amendments in 1999, in addition to various other minor changes and regulatory reforms. The review of the Act is timely. However, it is disappointing that the Terms of Reference for the review are narrowly focused, with particular emphasis on the legislation, rather than the totality of the system for heritage conservation and management in NSW. It is also unhelpful that the Terms of Reference do not include benchmarking against best practice in other Australian or international jurisdictions.

The AAA National Executive Committee therefore strongly urges the Standing Committee to take a more holistic approach in this invaluable opportunity to help protect, conserve and manage our national cultural heritage. To attain this goal, it is recommended that the Standing Committee review and consider existing national and international examples of best-practice statutory regulation and management of cultural heritage.

Sincerely,

Dr Tiina Manne
President of the *Australian Archaeological Association*
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Inquiry into the Heritage Act 1977

Archaeological places and objects are an essential part of the cultural heritage of NSW, and it is important that they are identified, protected, and appropriately managed.

In relation to the Standing Committee Terms of Reference:

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

The major need in relation to historic cultural heritage regulation in NSW is not legislative change, but rather a more outcomes-focused application of existing legislation. The provisions of the current *Heritage Act* are generally appropriate but are sometimes applied in ways which focus on 'preventing change', rather than seeking to 'protect heritage values' and 'provide value-adding practical outcomes'. For example, private owners of residential properties should not be required to undertake archaeological assessments based on putative expectations that 'relics' may be present.

The Objectives of the Act remain appropriate and fit for purpose and it would be inappropriate for any legislative change to weaken the focus on identification and protection of significant cultural heritage places and objects, and the intent to provide support to those responsible for their conservation.

NSW Heritage Council membership should have a greater skills focus and scope; preferably covering a broad spectrum of different types of heritage – including archaeology. Insofar as there is a legitimate need to consider the interests of different community sectors, such consideration should be separated from expert evaluation and deliberation.

The role of the NSW Heritage Council as expert 'heritage' assessor and adviser should be separated from the role as consent authority. For example, heritage listing should occur on the basis of cultural values, whereas decisions about harm or consent should – separately – take other factors (such as financial considerations) into account.

The archaeological 'relics' provisions in Sections 139–146 of the Act are not of themselves problematic but are sometimes applied in a manner that is too literal or too heavy handed. For example, it is not appropriate to require application processes for types of archaeological sites/objects, or for activities, which are subject to a legal 'exception'.

There is an inherent logic firstly in requiring archaeological 'relics' which are to be protected and regulated to have a level of 'significance' and to distinguish between 'state' and 'local' significance. It is also logical to vest decisions about 'state significant' relics with the NSW Heritage Council and 'locally significant' relics with local authorities – either directly or through delegation. However, the level of significance of archaeological features should not be used to prescribe predetermined management outcomes – as is currently the case. For example, the presumption that all State significant 'relics' should be retained and conserved. Consistent with the *Burra Charter* of Australia ICOMOS, specific consent or management decisions about individual sites and their archaeological resources should have regard to a range of factors and be directed at appropriate conservation outcomes. In the case of archaeological sites, there are circumstances where the realisation of research potential through investigation may be the appropriate action.

The restriction of archaeological features to the narrow definition of 'relic' is problematic and it would be appropriate for the *Heritage Act* to recognise broader range of archaeological sites and values – including

cultural landscapes, places with intangible and tangible attributes, industrial features and values related to matters other than history and research potential.

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

The current interface between those responsible for regulatory roles in relation to the *Heritage Act* and users, including owners, development proponents and archaeologists, has over the years become inappropriately focused on formulaic application of controls, rather than pro-active engagement with owners, applicants and consultants with a view to achieving agreed conservation outcomes. For example, it is not always necessary for some kind of on-site 'interpretation' to result from historical archaeological salvage excavations, particularly in the case of sites of marginal significance, yet such a requirement is often included as a default position.

(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

It is vital that the *NSW Heritage Act* continues to apply to heritage places that are important to Aboriginal people and recognises that many significant places have multiple values that transcend polarising Aboriginal / non-Aboriginal designations. The perceived division between 'Aboriginal' and 'non-Aboriginal' places and values is itself a cultural construct and any change to the *Heritage Act* should take a more holistic and inclusive approach. Removal of this artificial division would contribute considerably to the long-term decolonisation of heritage management and heritage protection in NSW.

Aboriginal heritage legislation reform should have much higher priority for NSW than any change to the *Heritage Act*.

It is unfortunate that the current process for reform of Aboriginal heritage legislation and management arrangements in NSW has taken so long – resulting in badly outdated legislation, loss of some sites and their heritage values and disconnection of some associated people. The *National Parks and Wildlife Act 1974* is not an appropriate statutory vehicle for conservation and management of the Aboriginal heritage of NSW and has not been so for many years. It is entirely appropriate – and important – that extensive and inclusive consultative processes have occurred. The rights of Aboriginal people to determine their own heritage are a vital aspect of any change. However, the NSW statutory review has taken an inordinately long time. It is unacceptable that Aboriginal heritage in NSW in 2021 is still managed using the same statutes as flora and fauna. There is a long-overdue need for statutory mechanisms which enable clear identification of the appropriate Traditional Custodians who speak for Country and to recognise intangible as well as tangible values and Aboriginal heritage at a landscape scale. These principles should also be embodied in and align with any changes to the *NSW Heritage Act*.

There is a need for greater coherence and clarity in roles and responsibilities for cultural heritage (and especially archaeology) between the *NSW Heritage Act* and the *Environmental Planning and Assessment Act 1979*. At present there is duplication and inconsistency, especially in relation to archaeology. An opportunity exists to use standard archaeological provisions in the *Environmental Planning and Assessment* Act to facilitate statutory management of 'relics' of local significance by local authorities, rather than the state heritage agency.

Conversely (and perversely) the statutory provisions relating to State Significant Development in the Environmental Planning and Assessment Act mitigate against appropriate conservation and management of

some of the State's most important heritage by excluding the statutory protections and provisions of the NSW Heritage Council. It would be appropriate for these arrangements to be amended such that the views of the NSW Heritage Council (or delegate) must be accommodated through general terms of approval / refusal – or similar – as is the case for other Integrated Development in NSW.

(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 potential benefits in protection, conservation, management and regulation of heritage through use of a 'category approach' are acknowledged, but it would be most appropriate to accommodate a 'category approach' through regulation, rather than in the *Heritage Act* itself. Specifically, it is suggested that the Heritage Council or Minister might be empowered to define classes of State and local heritage item and to promulgate appropriate regulatory arrangements.

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

Recognising that the overwhelming majority of listed heritage items are in private ownership, there is a long-standing need to provide improved opportunities and better incentives for owners to recognise heritage. Without limitation, these might include:

- More, better and updated online resources and general guidance.
- Greater access to site-specific and issue-specific expert heritage advice.
- Greater recognition by consent authorities that change (including archaeological investigation and realisation of research potential) may be needed to facilitate good conservation outcomes.
- Financial assistance through rate and/or tax relief, a wider spectrum of grant opportunities, or funded programs for particular conservation and interpretation activities.

(iii) improvements to heritage compliance and enforcement provisions

By and large, there is little monitoring of compliance with the *Heritage Act*, especially in relation to archaeology – other than review of excavation reports. Recognising that this is a question of resourcing and priorities, it would nevertheless be appropriate for dedicated staff within State Government (or local government under delegation or through changes to the *Environmental Planning and Assessment Act*) to be responsible for compliance monitoring with respect to the NSW Heritage Act.

(iv) streamlining heritage processes

In relation to archaeology, processes could be significantly improved by removing the current requirements to apply to undertake actions that are subject to the 'exception' provisions in Section 139 of the *Heritage Act*.

The NSW Heritage Council already delegates some functions, but further delegations for matters that do not affect State significant 'relics' would be appropriate. If additional capacity and skills in archaeological heritage management were available to local government, functions related to permits for archaeological 'relics' of local significance could be delegated (or accommodated through changes to the *Environmental Planning and Assessment Act*).

(e) any other related matter.

A longstanding issue in NSW has been arrangements for post-excavation conservation, analysis, curation and storage of excavated archaeological relics. It would be helpful and appropriate to provide a better statutory basis for proponents to fund and ensure these essential post-excavation activities, as part of the statutory permit system. The 'conservation bond' model used in Victoria offers one example of a best-practice Australian Benchmark.

A serious gap in the specific Terms of Reference of the review is the lack of benchmarking against other jurisdictions; both within Australia and internationally. There are good examples of improved practice for statutory regulation and management of cultural heritage and archaeology, and it would be appropriate for the Review to take the experience elsewhere into account. A good commencement point would be the work already done through the 2016 Commonwealth State of Environment reporting in the heritage sector and the forthcoming in the 2021 Commonwealth State of the Environment Report.