

**Submission  
No 96**

## **INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977**

**Organisation:** Extent Heritage Pty Ltd

**Date Received:** 4 July 2021

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Standing Committee on Social Issues

Parliament House

Macquarie Street

Sydney NSW 2000

4 July 2021

Dear Committee Chair,

**RE: Submission on the Review of NSW Heritage Legislation**

Thank you for the opportunity to make a submission into the Committee's review of NSW heritage legislation. I write to the Committee as a heritage practitioner with over 25 years of professional experience, and as Managing Director of Extent Heritage Pty Ltd, one of Australia's largest heritage advisory firms.

In my career I spent ten years in NSW government in various heritage roles – as a regulatory officer in the NSW Heritage Office, as a consultant advisor in the Department of Public Works and Services, and as a manager of heritage assets and corporate governance of those assets for Sydney Water Corporation. Since 2006, I have worked in private practice in firms I have founded or co-founded, as a heritage advisor to government, business and private clients across Australia. I have a PhD from the University of Sydney in a topic related to heritage law, and I served as the heritage Technical Advisor to the 2007 Review Committee of the NSW *Heritage Act*, the last comprehensive review of that legislation.

My experience gives me a unique perspective on the legislation and its operation, having worked as a regulator, an asset manager and as a consultant advisor. As a nationwide firm with offices in Sydney, Melbourne, Queensland, Hobart and Perth, Extent Heritage operates in all Australian jurisdictions and thus I have a broad understanding of heritage legislation across the country.

I am a firm believer that legislation should be reviewed regularly, and hope that this review will lead to positive change for both the NSW *Heritage Act* and will also spur action in the review of Aboriginal heritage protections under the NSW *National Parks and Wildlife Act*. Should the opportunity arise, I would be pleased to participate in any hearings the Committee may hold regarding these issues in the future.

**EXTENT HERITAGE PTY LTD**

ABN 24 608 666 306 ACN 608 666 306  
info@extent.com.au  
extent.com.au

**SYDNEY**

3/73 Union Street  
Pyrmont  
P 02 9555 4000

**MELBOURNE**

13/240 Sydney Road  
Coburg  
P 03 9388 0622

**BRISBANE**

Level 12, 344 Queen St  
Brisbane  
P 07 3051 0171

**PERTH**

Level 32/152 St Georges  
Terrace, Perth  
P 08 9381 5206

I have not attempted to address every element of the Discussion Paper, rather concentrating on either areas where I have particular insights or where the issues apply generally to multiple questions.

#### *Composition of the Heritage Council of NSW*

As the principal author of the chapter on the composition of the Heritage Council in the 2007 review of the Act, I undertook a benchmarking exercise on the NSW Heritage Council against all other heritage councils in Australia – state, territory and federal. I remain comfortable that the size of the NSW Heritage Council – 9 members – is in general alignment with practice across Australia. In addition, the recommendation at the time to remove certain direct appointments to the Council (e.g. the Government Architect, Unions NSW, etc.) I believe was the correct decision, as again this brought the NSW Heritage Council into general alignment with practice elsewhere in the country. As the Heritage Council is a regulatory and government advisory body – not principally an advocacy body – it remains appropriate for only one designated advocacy position on the Council, in the form of the National Trust. My strong view is the current number and composition of members does not need to change, however the skills and experience of those members does.

The skills mix of the Council was also slightly updated in 2007 and could do with slight amendment to include emerging areas such as “intangible heritage” - an obvious gap - and, potentially, “community engagement”. More importantly however is the need to ensure there is a balance of skills on the Council which is effective. That skills mix should be majority slanted towards heritage experts over non-heritage experts, and any non-heritage experts appointed should have at least a demonstrated good understanding of the issues for which the Council is responsible.

In recent years, it appears the effectiveness of the Heritage Council has in part been hampered by appointment choices which have emphasised administrative and business skills, leading to a lack of effective heritage skills and knowledge among members of the Council. I note, for example, at the moment there is only one member of the Council who has a background as a heritage practitioner and expert. This represents a significant departure from past appointment practice and is likely limiting the effectiveness of the Council.

The changes I would suggest here are more in relation to the administrative and recruitment practices around filling the Council memberships, rather than anything that necessarily requires legislative amendment, although consideration could be given to enshrining the requirement for a majority of Council members to be heritage experts. The Heritage Council is a body to both advise government and provide leadership on heritage matters to the community. It is not doing the latter effectively at the moment, and I am not in a position to comment on the former. But in the past, the Heritage Council has been involved in outreach to other government agencies and the wider community (as well as specific sectors thereof, which I will return to below). The loss of these outreach efforts, in terms of publications, conferences, training and public events, has lessened the leadership role of the Council and the visibility of heritage issues within the community.

### *Aboriginal heritage*

While Aboriginal heritage has always been dealt with in a rather peripheral way under the *Heritage Act*, neither the Council nor the administering department have had the broad skills and resources to manage it effectively. In other Australian jurisdictions Aboriginal heritage has largely been managed through a separate Aboriginal Heritage Act, and the time has come for this approach to be adopted in NSW. The most effective recommendation the Committee could make in relation to Aboriginal heritage is for the Government to advance the preparation and debate of separate Aboriginal heritage legislation, which has been subject to many false starts over the past decades.

### *Objects of the Heritage Act*

One of the major issues with the current administration of the Act is an almost obsession with the *process* related to heritage management, rather than the *outcomes*. At a minimum, the objects could be amended to include the “appreciation and celebration of the state’s heritage” and replace words such as “encourage” with “facilitate” or “direct”. Basic functions such as identification and registration and the establishment of the Heritage Council remain relevant and should be retained. I would argue that the current administration of the Act does little or nothing in relation to object (g) “assisting owners”. If there is an intent to develop improved incentive schemes then that object could be replaced with an object to “provide incentives for the conservation, adaptation and promotion of the state’s heritage” and “to provide leadership on heritage matters within government and the community”..

As a side matter, at present Heritage NSW has a “shadow accreditation” process in relation to archaeological professionals, which I am strongly of the view is *ultra vires* and does not accord with the objects of the Act. I do NOT believe that the *Heritage Act* should be used to accredit heritage professionals of any type, and guidance to that effect from the Committee would be useful. There are other highly organised and well-structured accreditation bodies which are better placed to perform such functions, such as the Certified Environmental Practitioner scheme, which has a category for accrediting heritage professionals.

Fundamentally, the objects of the Act need to drive the outcomes desired from this legislation. At the moment those objects are primarily focused on the mechanics of the Act rather than the desired outcomes. Fundamentally the Act should be concerned with the identification, conservation and celebration of the state’s heritage and providing leadership on such matters.

### *Community Expectations*

While I am unaware of any broad-based recent community surveys on heritage, I wish to raise one particular issue and this is in relation to Australia’s heritage and our large migrant population. At present, 25% of Australian residents (including myself) were born overseas. In addition, there are now a greater number of migrants from Asia and India than from the UK and New Zealand. The challenge is how to ensure that NSW’s heritage at both a conceptual and actual level is relevant and engaging to those communities.

Arguments about Australia's heritage being "only" 200 years old are sometimes trotted out, particularly by the overseas born and tourists. Not only does this ignore Australia's long indigenous heritage, but it fails to recognise that Australia only has the heritage that it has. There is no point lamenting that our heritage is not as old as Europe's or Asia's – it is *ours* and its age is irrelevant. What I believe the current legislation and administrative practices do is fail to celebrate that past, and merely reduces it to an administrative process.

In the past, there has been engagement between migrant communities and heritage authorities, though I believe most of those efforts are more than a decade old. It is critical that the Heritage Council is seen as leading the engagement with the migrant community, to both ensure it is relevant to that community, but also so that migrants feel they have a part in the ongoing making of Australia's history.

At a general level, I would also point out that heritage requirements are nothing new – they have been around for nearly 50 years in NSW and they should now be embedded in the community's thinking. The fact this may still not be the case is again a failure of leadership than necessarily a failure of legislation.

### *Incentives*

While there have been various incentive schemes in place for heritage conservation, my understanding is there has been limited use or uptake of those incentives. Locally based incentives such as rate reduction, for example, have not been widely employed (if at all). Land tax rebates are relevant only to a small few and grants programs are again generally very small scale. Transferable floorspace schemes have been limited to very small areas of Sydney only. Some solutions which could be considered include:

- Mandating the requirement for rate relief for locally listed heritage properties within the Standard LEP template;
- Reducing stamp duty on transfers of heritage listed properties;
- Establishing a conservation bond scheme which could be used as a mechanism to hold money in trust against future promised conservation works;
- Increasing the applicability and scale of heritage grant monies available, perhaps indexed to the number of sites listed on the State Heritage Register and/or EPIs;
- Expanding the applicability of transferable heritage **floorspace** schemes beyond the Sydney CBD;
- Allow greater scope for non-compliant uses for certain types of heritage properties (i.e. commercial use of a heritage property with a residential zoning), with the presumption being in favour of a non-compliant use unless a significant negative impact can be demonstrated in relation to other planning matters.

### *The use of heritage properties*

While the Discussion Paper implies that there are currently problems with the usability of heritage properties, writing from the perspective of a heritage practitioner I rarely see this as an intractable problem. Analysis of the State Heritage Register by the National Trust has demonstrated that more than half of all SHR properties are owned by the NSW government, while around 6% are in private ownership, and the balance being owned by businesses. Heritage requirements are not new, and government and

business particularly should by now have integrated heritage considerations into routine business operation.

While heritage listing presents challenges and limitations on what can be done at a site, it rarely completely stops activity, save when that activity is fundamentally incompatible with the site. More often than not, any such failure represents a disconnect between an owner's *ambitions* for a site than an actual block on activity. Those owners who approach the challenges honestly and creatively can generally find a solution for the use of a place.

I present a few examples from my own practice:

Substation No 15, Johnston St Annandale – this is the second oldest electricity substation in NSW, is listed on the State Heritage Register and was successfully conserved and refurbished for ongoing use as an electrical substation. While there were challenges during the conservation works, working with AusGrid we were able to keep this asset in service for its intended purpose for perhaps another 100 years. We were able to successfully demonstrate that undertaking works in a conservation-appropriate manner represented a greater return on the investment than a short-term repair solution or an asset replacement.

Australian Technology Park, Redfern – this complex, listed on the State Heritage Register, was long regarded as a “problem” site, however over a period of a decade, we worked with the previous site owners (prior to the sale of the site to Mirvac) to demonstrate that the required conservation works were not excessive, were no more onerous than any other routine maintenance and the heritage characteristics of the site were part of what enabled the site managers to charge A-grade office rents for suites – heritage provided a desirable point of difference. When fitout works were required, we worked with the tenants to develop “light touch” approaches which achieved their aims for office accommodation while preserving the heritage characteristics of the place.

Sydney Water assets – Sydney Water has dozens of State Heritage Register listed operational water and wastewater assets. While there were concerns early on (circa 2000) that this would impede operations, it did not and, in most cases, compromises were able to be achieved which met both heritage and operational requirements. Efforts were made to keep assets in service where possible, as it was clear that redundant assets would become a burden in terms of maintenance and finances. We were also able to successfully argue in the pricing submission to IPART that dedicated **heritage** maintenance funds were appropriate and IPART granted additional funds within the operational budget. This has been successfully **operating** for over 15 years. Flexibility and creativity within the organisation and by the regulators have achieved an exemplary set of heritage outcomes for that agency.

Conflicts of use generally occur when ambition does not match site limitations, be they planning controls or heritage significance. If a development proposal calls for the demolition of a State-listed heritage item, it is not a flaw in the heritage listing or the significance assessment, it is an inappropriate level of ambition for the site. But even the presence of a State listed item does not prevent large scale development; a case in point in that respect is the former Sydney General Post Office, or the major extension which has occurred to Central Station.

Where issues do arise is again in the administration of the approvals. In some cases, and increasingly so in recent years, we have seen an increase in conditions of approval which are overly **bureaucratic**, concerned with strict compliance and, in some instances, have seemed punitive. On several of our projects we have seen large amount **of** effort and funds expended to meet these conditions, with little positive heritage effect. Again this goes to my earlier point about a greater concern with process than with outcomes. This does go more to how the Act is administered however than to limitations with the legislation itself, and a general lack of leadership on these issues from the Heritage Council and associated administrative bodies in recent years.

### *The listing process*

The current listing process is robust, and should be so, due to the significant obligations that come from a heritage listing, particularly at **State** level. The process is however very **slow**, and should be streamlined to ensure that where assessments of significance are sound and meet the criteria for listing, items should be added to the State Heritage Register. In circumstances where the listing proposal is not robust, or appears to be driven by other issues (such as opposition to a particular development, rather than on heritage merits) then the proposed listing should go through a more rigorous screening and review process. Outsourcing reviews of proposed nominations to senior practitioners may be one option, in circumstances where the administrative bodies lack the staff or expertise, or the State Heritage Register Committee has insufficient time and resources.

The requirements around local heritage listing should also be improved, and a requirement be put in place for local governments to review their lists regularly and to a high minimum standard. There are still many local government heritage lists which are deficient, with properties having only one line assessments, e.g. “This place is of historic significance” or where certain types of properties are inadequately represented due to political considerations (e.g. no private properties being listed).

Review and delisting should also be undertaken during this process, and it needs to be expedited. When the SHR was created in 1998 there was an intent, never realised, to review the 600-odd properties with Permanent Conservation Orders over them to see if those properties met the modern criteria for heritage listing. No such comprehensive review has been undertaken. Similarly, **State** agencies which prepared Section 170 Heritage and Conservation Registers previously had access to an expedited “bulk” listing and delisting process – this should be reinstated, and the Section 170 requirements themselves **should** be revisited, to require a comprehensive assessment of asset portfolios, rather than the current very poor requirements to only include assets listed elsewhere.

The heritage listing process is the heart of the heritage system. Those items which are listed should only be listed where they meet the criteria and have sufficient integrity to merit this highest level of protection. Items which are marginal, or which no longer meet the criteria based on a reassessment, should be able to be removed in a much simpler fashion.



Further to this, the current system of local, State, Commonwealth, National and World heritage appropriately reflects both the administrative divisions and assessment processes around heritage significance. The proposed addition of additional subcategories would add little and would simply confuse the requirements and the recommendation to create new heritage subcategories should be rejected.

*Final observations*

As a final set of observations, I would ask the Committee consider the enforcement provisions of the Act and the requirements for compliance monitoring. This has never been done well or comprehensively in terms of heritage approvals. Introducing strict liability offences and fines similar to environmental fine should be considered. The process of remitting all disputes to the court is too slow to react to real threats to heritage places. Similarly a greater level of emphasis and resourcing needs to be put into compliance monitoring and enforcement, which is haphazard at best.

Finally, the NSW Government once had a set of exemplary set of heritage guidelines, publications and reference materials. These are all woefully out of date and require comprehensive reworking to meet current standards and expectations. In the absence of clear documentation it is difficult for those using the system, particularly non-professional owners and managers of heritage assets, to work through the requirements.

Thank you for taking the time to consider my submission. I would be happy to make myself available to discuss any of the points raised. I can be contacted

Yours sincerely,

**Dr MacLaren North**  
**Managing Director | Extent Heritage**