

**Submission
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INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

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Submission on the Review of NSW Heritage Legislation

Heritage is the things we value as communities, that enhance our life and reflect on our past. These things create a sense of community through their fabric and form and through interpretation of the story heritage relates to. Often, they are the simple places – such as human sized spaces to eat with friends. Often, they are grand like the Opera House. Often, they tell dark stories like Myall Creek.

There was a strong community movement that led to the passing of the Heritage Act and subsequent amendments. This was because the community felt that their heritage was being wiped away by endless and relentless development and looked to the Government to protect the communities' interests. My view is that we are in a similar situation at the moment: development seems to be relentless; planning, which was supposed to provide a balanced solution between development and other interests, seems compromised; heritage is seen as an obstruction and community involvement is a farce.

To argue that the "Heritage system" is broken and then to blame the legislation misses the point. The heritage system is broken because of the imbalance between the interests of development and those valuing heritages. This is coupled with an inability to propose developments that are responsive to an area's heritage and genuinely work towards a mutually satisfactory outcome for the community. Thus, from the start many developments create a conflict.

The discussion paper talks about heritage owners, developers and administrators facing uncertainty, expense, duplication, and delays in relation to heritage listing and approvals. This is often because the developments proposed ignore heritage listings, ignore the approval pathways in the legislation and do not consider making their developments compliant with heritage controls such as Development Control Plans or State Heritage listing requirements.

Heritage owners, developers and administrators often do not seek adequate advice at the commencement of a project and when they run into so called "heritage issues", often at the last minute in the development cycle, blame the heritage system rather than their own incompetence in not considering the issue earlier.

I note that the discussion paper does not really cover the question of Aboriginal heritage. There has been a process for developing new legislation protection Aboriginal cultural heritage for well over a decade. Surely this should have the highest priority for any heritage

reform especially since events in Western Australia demonstrate how easy it seems for Aboriginal heritage of great significance to be destroyed.

My view is that review of the Aboriginal Heritage legislation and system should have the highest priority, higher than this review, and be undertaken through a dialogue with the Aboriginal community and Government as well as the broader community.

The discussion paper also glosses over the role of Local Government in protecting heritage which, given that most heritage is listed through Local Environment Plans is a huge omission. “Locally significant” heritage items seem to be dumped onto Local Government to deal with little support from the State government.

Aims of the Act

In my view the aims of the act are clear and still relevant.

In terms of reflecting the expectations of the contemporary NSW community, I believe that many in the community would like to see the aims broadened to be more about NSW heritage generally rather than focused on “State” heritage.

Role of the Heritage Council and its composition

The discussion paper does not fully cover the role of the Heritage Council. The Heritage Council has had several roles – listing is clearly one; permitting is another, although this is managed via delegation to Heritage NSW and though its technical sub-committees dealing with specialist matters such as BCA compliance, history, and archaeology.

The Heritage Council needs to be an independent body that has its own views on listing and permitting separate to “the whole of Government approach”. The members of the Council need to be increased and have members from community organisations such as the National Trust and the Royal Australian Historical Society.

In contrast to the current situation I think there should be some process of selecting Heritage Council members which is open and transparent.

Nuanced Heritage listing

The reform proposed is that NSW adopts a more nuanced set of four heritage listing categories.

Firstly, the discussion paper is simply wrong about how State Heritage is managed.

State Heritage is managed through the same approval process, but it is absurd to suggest this is a blanket process, as the actual heritage management is according to the statement of heritage significance – the reasons why a place is listed on the State Heritage Register. Withing a listing it is recognised that some areas and items may have greater or lesser significance and so a grading process can be applied.

Secondly there is no discussion, except in general terms, as to what benefit have an Exceptional category and a State significant heritage landscapes category tacked onto the

State/Local would have. In my view, as a practicing heritage consultant if adopted it will be confusing.

I think there would be benefit in having an Exceptional category which would cover items on the National Heritage list and on the World Heritage list so that the management of these heritage items would be consistent across Government.

A State significant heritage landscapes category I think is largely irrelevant as it is not significantly different from State Heritage listing.

I think that there are many terms in the Heritage Act that need definition and clarification. For example – what is a work? Tidying these up would streamline the heritage process.

Listing process

Would greater community engagement deliver a more robust State Heritage Register? Yes, in my view it would deliver a less architectural focused less Sydney centric State Heritage Register.

The history of heritage listing from the Venice Charter onwards have been a move from the “connoisseur model” where an elderly male architect determines what is heritage to the “Burra Charter model where the determination process is open to all and able to be debated. Further tweaks to the Burra Charter model would allow for nominations from the community to be given greater weight.

Part of the role of the Heritage Council should be to encourage community-based nomination of heritage after all the community provides an important understanding of heritage based on their lived experience of a place. My experience with a community-based Heritage project in Ballarat (Vic) showed that the community has a different but overlapping view of heritage to that of the Heritage professionals.

One of the issues of course is that the listing process requires effort to turn a nomination into a listing as the management of a heritage item or landscape relies on clear, accurate definitions of significance, well defined curtilages and a precise location. Some applications require considerable work within Heritage NSW which has resource implications for that organisation.

Would streamlining enhance the listing process?

Yes particularly if a listing has to be amended.

An example may help – SHR listed the Tank stream is mapped in the wrong location at the corner of Pitt and Alfred Street. This has been known for over seven years. Advice from Heritage NSW was that it would be too difficult to amend the listing to correctly map the Tanks stream because the process was the same as to list it. So, the wrong location has been set in stone. Admittedly it is only a few meters but legally that is a critical issue especially in an area abutting Circular Quay.

Surely a simpler mechanism can be set in place to correct errors of description, location, historical fact and curtilage.

How could heritage compliance and enforcement be improved?

Well actually acting against non-compliance would help. Testing the legislation in the Courts is often the best way for exposing weaknesses and holes in the legislation.

In Victoria, the agency I worked for began, enforcing the provisions of the Historic Shipwrecks Act which involved having an enforcement officer, staff undergoing enforcement training and developing liaison with the Police and with the DPP. This resulted in several successful prosecutions as well as amendments of regulations and legislation to improve the ability to enforce the legislation. The enforcement program complemented our education program around the protection of historical shipwrecks.

Amending legislation and guidelines to incorporate investigative powers allowing Heritage NSW the ability to gather sufficient evidence to prove an offence, along with the ability to issue penalty or infringement notices for minor offences would be a positive step.

I also think that an independent heritage auditing scheme for major projects to ensure compliance with permit conditions would be a positive step. This could be undertaken by external accredited auditors along the lines of the EPA's site auditors for contamination. Currently projects are completed and many promised heritage actions are not completed.

Heritage within the planning system

I have always thought that Heritage NSW should be part of planning and that staff with heritage experience should be embedded in Planning to evaluate major projects and EIS's so that the project consents reflect good heritage practice and are sensible. DIPE has no internal heritage capability which means that they are reliant on EIS reports and comments from Government agencies. The current system where heritage is mediated between the developers and Heritage NSW via DIPE is inefficient and does not offer good outcomes.

Certainly, there is a need to consider heritage at a strategic level and again having Heritage more tightly aligned with Planning would help.

These matters are really for the Government to determine and cannot be legislated for but are matters for the administration of Government.

Adaptive reuse or activation

This is the key tool in heritage management. Unfortunately, it is often implemented without consideration of why an item is significant. In my experience in industrial heritage often the building is preserved and the machinery which did the work that made the building significant is removed. I have been looking at adaptive reuse techniques for industrial heritage since 2009 by visiting sites and participating in professional forums across the world and my view is that in Australia, we have a limited palette of adaptive reuse techniques in comparison with the situation overseas.

In Germany for example, specific redevelopment of redundant industrial sites such as a Brown coal mine or the ironworks at Duisburg North, was undertaken via a sort of Regional Planning Authority that used a number of techniques to "activate" an industrial area

including adaptive reuse of buildings, new construction and the development of environmental zones via a process called industrial nature. The closest example in Australia would be the Olympic Park Authority.

The key elements in this process are the balanced approach to development, the utilisation of heritage to provide a key driver for the urban form and to create a unique identity of an area.

I have some experience with incentives. The bureaucracy associated with the incentives is partly there because of the need for outcomes to be positive for conservation of heritage as well as the need to audit public money. There are examples of the use of such incentives in the planning system where there has been minimal conservation proposed and maximum benefit claimed.

Further consideration of schemes should be part of the mission of Heritage NSW possibly via a sub-committee of the Heritage Council.

Support for Heritage

In reading the review and considering the questions it is apparent that most of the answers lie in administration of the Act by Government and provision of resources rather than legislation. The resourcing of Heritage NSW has dropped away over the years, and this has been compounded by poor leadership, constant reviews and administrative changes that has sapped morale of the staff working there.

The government should commit funding to Heritage NSW and in particular resource items that this review points to such as providing better heritage input into Planning, engaging with the community, processing applications and activation.

About the author

Dr Stuart comes from Melbourne and has over thirty years' professional experience, commencing with the Victoria Archaeological Survey. After moving to NSW in 1993 to undertake his Doctorate, Dr Stuart worked with HLA-Envirosciences, where he established and developed a successful consulting practice in Aboriginal and historical archaeology, as well as the broader areas of industrial archaeology, heritage assessment and management and cultural landscape assessment. In 2005, he moved to Godden Mackay Logan heritage consultants, as a Senior Consultant, then in 2006 established JCIS Consultants in partnership with his wife, Jane Cummins Stuart. In 2018 Dr Stuart joined Artefact Heritage to manage large-scale and State Significant Archaeological Excavations.

He is a member of ICOMOS, a board member TICCIH and a councillor of the Royal Australian Historical Society.

Conclusion

I would be happy to provide the committee with further information or make a presentation if public hearings are to be held.

The views expressed in this response are the authors and do not reflect those of his employers or the professional associations he is a member of.

If you want to discuss this matter further, please do not hesitate to contact Dr Iain Stuart

Yours faithfully,

Dr Iain Stuart