

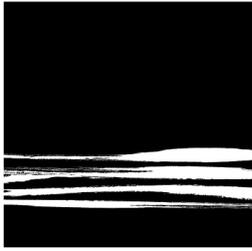
**Submission  
No 104**

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

**Organisation:** Australian Association of Consulting Archaeologists Inc

**Date Received:** 2 July 2021

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## 2021 Review of the NSW *Heritage Act 1977*

### Submission from the AACAI NSW/ACT Chapter

#### Introduction and Overview

This submission has been prepared by the AACAI NSW/ACT Chapter. The submission comprises three components:

1. Contextual background to what AACAI is (pages 1-2);
2. AACAI response to the Inquiry Terms of Reference (pages 2-6); and
3. AACAI responses to the 19 focus questions (Pages 6-9).

The AACAI NSW/ACT Chapter is grateful for this opportunity to provide feedback and contribute to the discussion of the proposed review of NSW Heritage Legislation. We would also welcome further opportunities to comment at later stages of the review through other phases of hearings, draft bills and/or draft white papers.

#### What is AACAI?

The Australian Association of Consulting Archaeologists Inc. (AACAI) is an organisation for professionals working in all fields of contract and public archaeology.

It aims to uphold and promote the discipline and to advance the welfare of members. AACAI has a Constitution, a Code of Ethics and a Consulting with Aboriginal Communities Policy Document.

It is affiliated with the Australian Archaeological Association Inc and is a Foundation Member of the Council for the Humanities, Arts and Social Sciences.

#### **AACAI Objectives**

1. To encourage the communication of knowledge and promote a spirit of co-operation amongst workers within the field of archaeology;
2. To support and encourage research into all forms of archaeology, particularly those with relevance to consultancy work within the discipline;
3. To promote the training of students in archaeology, especially in consulting work, by encouraging consultants to provide such training;
4. To establish, maintain and encourage adherence to professional standards and ethics by fellow consultants.

AACAI is a national organisation with local chapters in Queensland, New South Wales, Victoria, South Australia and Western Australia. The National Executive Committee deals with national issues, including membership applications, AACAI policy and general administration, while State Chapters deal with local matters. AACAI may also provide technical and professional advice, and dispute resolution. It runs an occasional Professional Development Workshop Series. It also publishes a

Newsletter, a Recommended Minimum Fee Scale and is preparing an Australian Archaeology Consultancy Monograph Series.

AACAI regularly updates a Register of Consultants for distribution to potential clients. This web based document:

1. advertises the availability and expertise of Full Members;
2. lists basic details of Associate Members and Affiliate Members;
3. and provides to potential clients (e.g. private and government planners and developers) a list of persons qualified to undertake archaeological work on their behalf.

AACAI response to the Inquiry Terms of Reference

Archaeological sites and archaeological evidence form part of the heritage of NSW. NSW has had legislation that is intended to enable the identification, protection and management of heritage places, including archaeological resources, and places valued by Indigenous and non-Indigenous Australians, since the 1970s and the current review is welcome. However, AACAI has three major concerns:

1. The review is nominally titled “Review of NSW Heritage Legislation”, but seems particularly focused on historic cultural heritage. In AACAI’s submission, the long-awaited review of Aboriginal heritage legislation in NSW is a far more pressing and overdue priority.
2. The Terms of Reference for the Review address legislation, but the Review would be more relevant and impactful if it also addressed the manner in which the NSW Government and its agencies and officers implement the *Heritage Act*; in AACAI’s opinion it is with respect to operational matters, rather than statutory provisions, that the main problems arise.
3. The Review should examine practices and legislation in other parts of Australia and internationally and follow good and successful examples from elsewhere.

This submission follows the Standing Committee Terms of Reference and responds to the questions posed in the April 2021 Discussion Paper.

***(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 NSW Heritage Act (the Act) is generally fit for purpose and does not require major change to deliver an effective heritage system. By contrast the reform process for Aboriginal heritage in NSW is long overdue and, while there will always be challenges and no legislation is perfect, AACAI submits that the primary priority of the NSW Government should be Aboriginal heritage legislation reform.

In relation to the *NSW Heritage Act*, the major need is for additional resources and a shift in approach to the manner in which the Act is actually implemented. In particular, there is an unhelpful high degree of hands-on regulatory intervention in matters which would be more properly left to the provisions for exemptions (under Section 57(2)) and exceptions (under Section 139) of the Act.

The existing provisions relating to archaeology, generally in sections 57–63 and sections 139–146 of the Act, are appropriate and do not require major revision. In particular, AACAI supports the distinction between archaeological ‘relics’ of ‘local’ and ‘State’ significance. AACAI also considers that it remains appropriate to require that archaeological features should be assessed as ‘significant’ before the protective provisions and associated statutory processes relating to ‘relics’ apply.

An option that AACAI would like to propose is that there be an increased capacity for archaeological ‘relics’ of local significance to be dealt with by local government/exemption/exception – based on the advice of competent archaeological practitioners (such as AACAI Full and Associate Members).

The manner in which archaeology is limited to ‘relics’ is restrictive and inappropriate to the broad range of archaeological places and objects and it would be appropriate for some minor (but significant) amendments to occur to enable other archaeological places and values to be better covered – such as for example landscapes, or archaeological sites with intangible, associative or other non-archaeological values.

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

AACAI submits that the Act already generally meets the needs of customers, the community and heritage protection. Areas for improvement include opportunities for more customised approaches that reflect the particular values and circumstances of archaeological sites, and the needs, resources and aspirations of owners. In this regard, greater reliance could be placed on expert archaeological consultant advice, rather than restrictive regulation and permit conditions.

The key areas for improvement, identified by AACAI, in terms of the needs of archaeologists as customers are:

1. Increased resourcing within government to implement the Act, process approvals, provide guidance and advice, as well as manage the SHR and nominations to the SHR; and
2. Streamlining of the approvals processes surrounding excavation permits, exemptions, and exceptions through greater recognition of the skills, experience, and expertise of qualified professional archaeologists.

***(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***

At present the NSW Heritage Act is predominantly used to apply to places of historic cultural significance, but the capacity to identify, protect, conserve and manage natural heritage places and places with Aboriginal values should be maintained – and expanded in practice; particularly with respect to places of State heritage significance. This linkage should be addressed as part of the implementation of the Aboriginal heritage reform process.

AACAI notes that the statutory arrangements in NSW artificially divide archaeological resources between ‘Aboriginal’ and ‘non-Aboriginal’ sites. This is culturally inappropriate, divisive, and requires amendment to take a more inclusive and all-encompassing approach. There are many Aboriginal historic sites which have a shared history. e.g. mission sites, and monuments acknowledging Aboriginal people such as Yuranigh's grave.

Aboriginal cultural heritage (including archaeology) should not be managed through the *NSW National Parks and Wildlife Act 1974*, but should have its own separate legislation – as an urgent priority for the NSW Government. NSW is currently the only legislature in Australia that does not have standalone legislation for Aboriginal cultural heritage.

There are considerable opportunities to reduce overlapping and inconsistency between the provisions in planning instruments and development control plans, established under the *Environmental Planning and Assessment Act 1979* (EP&A Act), and the *Heritage Act*, particularly with respect to archaeology. In light of the logical division between archaeological relics of ‘State’ and

'local' significance, it follows that it is also logical to facilitate the regulation and management of locally significant archaeological resources (as well as other local heritage) at the local level, by local government, within the provisions of the EP&A Act. There does not need to be duplication of statutory regulation of archaeological heritage by the NSW Heritage Council (or delegate). This system would be supported by the continued blanket protection of relics under the *Heritage Act*.

***(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***

AACAI does not support a category approach to listing. This does not mean that there should not be a strategic or theme-based approach to identification of places of State significance, so that the State Heritage Register is both representative and balanced.

AACAI recommends preparation of additional guidelines and other resources that can support well-informed significance assessment, and conservation and management decisions for classes of place – including archaeological sites.

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

AACAI is strongly supportive of additional incentives, particularly for private owners of listed heritage items.

As with other aspects of the statutory review, many current challenges do not arise from the legislation itself (which includes provisions in Part 3B for heritage agreements and financial assistance, for example) but rather in the limited resources allocated for grants and other incentives.

AACAI is particularly supportive of additional financial incentives, such as rate relief, tax deductibility for approved projects, as well as 'heritage agreements', appropriate development concessions (such as variation of development standards) and direct support through grant funding and other conservation and interpretation activities.

***(iii) improvements to heritage compliance and enforcement provisions***

AACAI recognises that there is relatively little monitoring of compliance with archaeological permit consent conditions, other than by post-event reading of excavation reports, except for major archaeological projects. This is particularly difficult for development projects where the requirement for an Approval or Permit under the Heritage Act is sidestepped, such as State Significant Development and State Significant Infrastructure. AACAI would support placing greater reliance on competent practitioners – for example through membership of AACAI and compliance with the AACAI Code of Ethics, or similarly membership of Australia ICOMOS and adherence to the ICOMOS Ethical Principles.

***(iv) streamlining heritage processes***

As noted above, with respect to archaeology, the operations of the Act could be significantly streamlined through wider and less-restrictive application of the existing provisions for exemptions and exceptions. In particular, AACAI submits that there should be no need to apply for the exceptions available under Section 139 of the Act.

As also noted above, opportunities exist to manage heritage places (including archaeological sites) of local significance at a local level through the EP&A Act – and through appropriate provisions within local planning instruments and guidelines.

**(e) any other related matter.**

NSW requires better arrangements for long-term/permanent curation, storage and management of archaeological records and excavated collections. Neither the *Heritage Act* nor the *National Parks and Wildlife Act* contain adequate provisions to support appropriate investigation, reporting and long-term conservation and management of artefacts. Attention is drawn to the “conservation bond” arrangements that appear to work very effectively actively with respect to historical archaeology in Victoria.

We also recommend the creation of a central database for mandatory deposition of archaeological reports, together with mapping of areas addressed in the reports so that future investigations can readily search for, identify and access relevant previous reporting.

**Discussion Paper Focus Questions**

**1: What should be the composition, skills and qualities of the Heritage Council of NSW?**

The NSW Heritage Council should be primarily comprised of experts who can provide independent advice to government and make listing decisions based on heritage values. This expertise should include archaeology. Decisions about protection and listing should be the prerogative of the expert State Heritage Council and decisions about approvals management would be more appropriately made by government officers and/or the Minister (or delegate). The expertise on the Heritage Council should also be appropriately supported by advisory committees, including the Archaeological Advisory Panel.

**2: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act**

As noted above, the process for Aboriginal heritage reform in NSW is long overdue. Fundamentally there is the need for a ‘rights-based’ approach in which Aboriginal people are primarily responsible for decision-making with respect to their heritage. AACAI submits that the current process has been going on for far too long and it is time for the NSW Government to show leadership and to pass new legislation.

AACAI would like to emphasise that, while Aboriginal cultural heritage should be handled under a separate Act, the current provisions allowing Aboriginal heritage to be managed under the *Heritage Act* should also remain, modified as required to work in tandem with the new Aboriginal heritage legislation.

**3: Are the objectives of the Heritage Act still relevant?**

There is no need to change the current objectives of the Heritage Act, as they remain relevant and appropriate.

**4: Does the Act adequately reflect the expectations of the contemporary NSW community?**

Yes; the Act does reflect the expectations of the contemporary NSW community. However, in application, there is an unfortunate focus on regulation, rather than positive outcomes for heritage, including archaeological sites. AACAI considers that additional capacity could appropriately be introduced (through implementation of the Act rather than statutory change) which recognises the value in realising the research potential of archaeological sites. AACAI submits that the Australia ICOMOS *Burra Charter* is a particularly helpful guideline in this regard.

AACAI also draws attention to the fact that there is, at present, limited access for the broader community to the operation of the assessment and approval system, due to time constraints and proponent preferences for confidentiality. A public notification process for Approval applications could be an option to consider.

***5: How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?***

As noted above, additional incentives can be provided through direct means such as rate relief, tax deductibility and grants, as well as through indirect encouragement through heritage agreements, reduction in bureaucracy, showcasing of exemplar case studies and recognition of the achievements of private owners. Potential also exists for provision of subsidised expertise and assistance to owners when it comes to heritage management. Within the context of archaeological examples, this could take the form of funded repositories for collections/assemblages and records, as mentioned above.

***6: How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?***

AACAI supports tax-deductibility for approved conservation and management projects, including archaeological investigations.

***7: What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?***

If resourced adequately, Heritage NSW could play a leadership role in identifying appropriate conservation projects which warrant philanthropic support, and in facilitating connections between philanthropists and project proponents. Another avenue for initiatives might be through promotion of heritage tourism.

***8: How could tailored heritage protections enhance heritage conservation?***

As noted above, AACAI does not support a category approach to heritage listing, but urges resourcing and commitment to preparation of guidelines and other resources that can support well-informed significance assessment and conservation and management decisions for classes of place – including archaeological sites.

The proposed category approach to heritage listing runs the risk of creating confusion through unnecessary complexity. There is also the danger that management of items in categories 2-4 might suffer through misunderstanding about the relative importance of these items, and the requirements and obligations surrounding appropriate management.

AACAI suggests that a better approach to tailoring heritage protection could be achieved through options for managing exemptions and exceptions and the associated processes for approval and implementation.

***9: How should heritage items that are residential properties be accommodated under a proposed category scheme?***

As noted above AACAI does not support a category approach to heritage listing.

***10: Would greater community engagement deliver a more robust State Heritage Register?***

AACAI is strongly committed to greater community engagement and consultation and supports a more inclusive process whereby community members participate through greater opportunities for nomination and consultation to expand the State Heritage Register. AACAI encourages a strategic or theme-based approach to identification of places of state significance, so that the State Heritage Register becomes more representative and balanced.

AACAI also emphasises that there is a need for better engagement with Aboriginal communities and Traditional Owners, which could also be addressed through the abovementioned approach to strategic theme-based expansion of the SHR.

**11: Would streamlining enhance the listing process?**

AACAI submits that in circumstances where the owner of a potential SHR item does not object to listing (or is the nominator), the statutory process and level of required background information could be curtailed.

**12: How could we improve the current approval permit system?**

An option that could be considered is a simple improvement achieved through facilitating greater use of the exemption and exception provisions, without the need for application. Greater delegation could be provided to appropriately-skilled local government officials, and local archaeological resources of local heritage significance could be more extensively managed through the provisions of the EP&A Act and local planning instruments and guidelines.

AACAI again draws attention to the fact that members of professional organisations such as AACAI and ICOMOS have already undergone processes of formally demonstrating their experience and expertise through peer review and they are bound by the relevant codes of ethics for those organisations. Consultants that have such membership of a professional organisation should be appropriately recognised (e.g. on a State managed list of approved practitioners similar to what exists in Victoria), especially when it comes to implementing work under exemptions and exceptions. It is suggested that such work could be undertaken through a notification process rather than through application for approval (e.g. in a similar way to the system similar that is currently used for test excavation under the *Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW*).

**13: Are the current determination criteria for heritage permits still appropriate?**

AACAI is supportive of the current practice of accrediting appropriately-skilled archaeologist to be responsible as 'Excavation Directors' of State Heritage Register items and State significant relics. However, as a general principle, the experience of some AACAI members is that the conditions imposed on excavation permits can give the impression that their level of skills and experience has been disregarded. We would submit with respect that if the nominated Excavation Director has been assessed as appropriate to the site, then there is a lesser need for overly-prescriptive consent conditions.

**14: How could we improve heritage consideration within land use planning systems?**

AACAI notes that the current system enables built heritage of State significance to be dealt with at a State level and buildings of local significance to be dealt with at a local level. Why could this not be the case when it comes to archaeological sites and relics?

As noted above, there are considerable opportunities to reduce overlapping and inconsistency between the provisions in planning instruments and development control plans, established under the EP&A Act, and the *Heritage Act*, particularly with respect to archaeology. In light of the logical division between archaeological relics of 'State' and 'local' significance, it follows that it is also logical to facilitate the regulation and management of local archaeological resources (as well as other local heritage) at the local level, by local government, within the provisions of the EP&A Act. There does not need to be duplication of statutory regulation of archaeological heritage by the NSW Heritage Council (or delegate).

**15: Are there opportunities to enhance consideration of heritage at the strategic level?**

Archaeological resources are often documented and only identified in reaction to proposed developments. There is a need for more pro-active strategic and regional archaeological assessments, which identify resources, requirements, and conservation and research goals – thereby benefiting owners, potential developers, Traditional Owners, other community stakeholders and regulators. The strategic plans that have been undertaken in Parramatta, such as the ‘Parramatta Historical Archaeological Landscape Management Study’ (2000), provide best-practice benchmarks of this approach. We note that some local councils, such as Hornsby, are presently undertaking LGA-wide historical archaeology studies to inform strategic planning, and suggest that this approach should be encouraged.

Targeted listing programs have previously been undertaken to address identified gaps in the State Heritage Register. We suggest that similar programs, for both State and locally significant places and sites, would be beneficial.

**16: How could heritage compliance and enforcement be improved?**

Improving compliance and enforcement requires additional resources for Heritage NSW, so that there is capacity for site visits, monitoring and greater engagement with proponents, practitioners and the broader community. This could be achieved, at least in part, through the delegation of authority for relics of local significance to the relevant local government authority.

**17: How could understanding of state heritage be enhanced?**

State heritage is generally well understood, but as noted above, additional resources that relate to identification, conservation and management of particular classes of place would improve outcomes for the places themselves, and their owners and managers.

**18: How could we improve heritage tourism or help activate heritage places for tourism?**

As has occurred in other jurisdictions (such as Victoria for example), there are opportunities for greater operational links between the State Heritage Agency and the State Tourism Agency. AACAI would strongly support such engagement between Heritage NSW and Destination NSW – resulting, for example in apps which facilitate cultural heritage tourism.

AACAI members have been long time instigators and supporters of community engagement activities, such as open days, websites, social media engagement, and publications relating to major archaeological investigations. AACAI also strongly supports the development of opportunities for Aboriginal community led and focussed tourism.

**19: How could public heritage buildings be activated to meet the needs of communities?**

There are two components to AACAI’s response to this question:

1. AACAI recognises that the NSW Government is the owner, manager and steward of much of the State’s most-important heritage. This heritage includes many archaeological places within the public realm, as well as historic buildings.
2. AACAI notes that paradoxically, NSW Government agencies are not always leaders, or best practice exemplars in heritage management. AACAI suggests a simple statutory change to the *Heritage Act*, strengthening the provisions of Sections 170 and 17A requiring NSW Government agencies which care, control or manage State heritage places to lead by example in their conservation, and interpretation.

Thank you again for the opportunity to provide a submission for consideration in the review of the Heritage Act. We trust that the opportunity for public comment will also be incorporated into all

subsequent stages of the review, and that submissions will be made accessible, and we look forward with interest to the process. Please do not hesitate to contact us with any questions.

Yours sincerely

Dr Rebecca Parkes

Chair

AACAI NSW/ACT Chapter