

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

**Organisation:** Liverpool City Council

**Date Received:** 4 July 2021

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The Hon. Peter Poulos. MP  
Chair  
Standing Committee on Social Issues

Dear Sir

## Re: Review of the Heritage Act 1977

I write in response to the call for submissions for the proposed inquiry into the Heritage Act 1977, referred to the Standing Committee on Social Issues for inquiry and report. The following submission has been prepared in response to the discussion paper and issues identified during the day-to-day practice of heritage conservation and management in New South Wales.

As a heritage professional of over 14 years in both local government and the private sector, I am currently employed as a full-time heritage officer at Liverpool City Council and holding both a Graduate Diploma of Cultural Heritage (Deakin) and a Master of Heritage Conservation (University of Sydney). I believe I have both the experience and qualifications to be able to provide the following submission.

### Focus Questions

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

The Heritage Council of NSW aims to provide detailed technical advice and guidance to the NSW Government and staff working for NSW Heritage. The Council should be beyond politics and feature experienced and knowledgeable members in research, conservation, adaptive reuse, and heritage management. The political considerations of a matter should be left to the respective department or ministerial advisor. As a result, it should be expected and encouraged for the Council to provide advice and present views that may not align with the NSW Government's opinion.

The current Heritage Council of NSW does not contain any members who have extensive experience in historical archaeology, heritage planning, or heritage conservation. There is no experience in considering heritage within the planning system or the technical issues apparent in heritage restoration projects. This lack of expertise within the Council is concerning considering the importance of the Council in guiding the direction of heritage management in NSW.

#### ◆ ***Focus Question 2: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act***

It is acknowledged that Aboriginal Cultural Heritage should be recognized within the preamble of the Act. However, to avoid confusion and intersecting layers of legislation, all Aboriginal Cultural Heritage at the Local and State level should be managed through an appropriate Aboriginal Cultural Heritage Act.



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

The Act's objectives are still seen to be relevant and reflect the true aspirations of heritage management. Inappropriate modifications should not undermine the objectives of the provisions of the Act or any other legislation.

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

The Act is a framework. The function and purpose of the framework do not differ as a community grows and changes. What should be changing is the application of the legislation and how the community's heritage is represented in the State Heritage Inventory. The heritage landscape of NSW is still reflective of the British origins of heritage management in the 1960s. The majority of the items on the register at Local and State reflect the pre-migration history of New South Wales and fail to address the post-migration or non-British history.

This lack of migrant representation cannot be changed through amendments to the Act. Still, it should be addressed through modifications to the state heritage criterion and better training and guidance through professional development, guidelines, and regulations.

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

It is not necessarily the function of legislation to provide incentives for ownership, activation, and adaptive reuse. Government policy and programs such as Heritage Near Me provide support and financial investment to drive activation and adaptation. Changes to the Heritage Act could improve approval pathways minimising the need for permits under Section 60 of the Act.

Any incentives should seek to enhance or improve heritage outcomes and not undermine the values of significance. Whether the values are local or state should not matter, and because the values may be of local significance does not mean that they are of lesser importance to the relevant community as state values.

Local Environmental Plans already have vital provisions that encourage minor works without approval and incentivize conservation, retention, and restoration (Clause 5.10). There is a local of direction and guidance in what is possible under these provisions or examples of where these provisions can be used to incentivize conservation, retention, and restoration. Heritage NSW should provide the necessary guidance and direction. However, there has been a reluctance of the last decade to provide clear guidance and advice which would assist property owners. There is also an unwillingness to advise due to a fear of it being used against them.

Heritage NSW needs to be more approachable and focus on technical advice and support more than the regulatory aspects of heritage. I will talk more about this in the general issues section of this submission.

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

Currently, the only incentive for heritage property owners within the tax system relates to a consideration of heritage by the Valuer-General when determining the land value for rates purposes. However, as a high proportion of heritage properties are used for commercial purposes, there is an opportunity to consider deductions under the land tax/property tax system.

The State Government should also advocate the Federal Government to offset the cost of conservation, maintenance, and adaptation with Income/Company Tax as applied in the United States.

It is acknowledged that the conservation of a heritage property may not be an actual cost of work or performing your duties. The owner is undertaking work for the community or the general public to conserve and maintain a heritage property.

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

Typically philanthropic investment requires the receiver to be able to receive tax-deductible gifts. A private owner or company is unlikely to be registered as a deductible gift recipient and may not tap into available philanthropic funds. A possible solution is establishing a Heritage Conservation Trust under the Heritage Council of New South Wales, similar to the Rural Fire Service Brigades DGR Trust. The trust would be established to receive tax-deductible gifts provided to all heritage properties as grants for conservation, restoration, and maintenance.

The Trust board would be the Heritage Council of New South Wales, which would approve the allocation of funds based on submissions by property owners. The Trust should be open for local and state significance properties and be in addition to funds offered by the NSW Government through their current grant program.

The creation of trust would also allow commercial enterprises to invest in the state's heritage and people bequeathing estates or willing to make monthly donations.

**◆ Focus Question 8: How could tailored heritage protections enhance heritage conservation?**

The application of heritage protections should be taken on a site-by-site or case-by-case basis. Through the application of the Burra Charter, you cannot and should not have a generic approach to each item, but consider the specific needs of each item when determining a response. This should be done through the listing process and incorporated into the inventory sheet. Better use should be made of these inventories, particularly at the local level, where there should be a greater discussion on the physical elements of the item and its significance. Significance should be identified not just through the assessment of significance and statement of significance but also through identifying elements, materials, and architectural features that contribute to the significance.

The more detailed analysis of the item during the listing process could allow for the development of specific conditions and policies relating to current and future work, maintenance, restoration, and adaptive reuse in a similar form as a conservation management plan which could provide a greater level of guidance for protection as well as the application of the Act.

The inventory should be the mechanism for listing and protection and be referred to and used as the basis for assessments of proposed works. For example, if works are proposed to an element, material, or feature identified as low to moderate significance within the inventory or referenced conservation management plan, no approval should be required. This would place a greater value on conservation management plans, which are developed specifically for the site, and allow for flexibility in management.

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

No, all heritage items should be treated the same under the category scheme. It could differ for a residential or private property through the specific or customised protections as identified in the previous question.

Creating different categories for private or public, or residential property would only create confusion.

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

**◆ Focus Question 11: Would streamlining enhance the listing process?**

For this submission, questions 10 and 11 are going to be answered concurrently.

Academically, heritage is seen as a phenomenon created by the community. It is not an object or a place but a set of values embodied into something by the community. Therefore, for something to be heritage, it must be recognized and identified by the community, meaning that extensive community engagement is critical to the longevity of heritage, the places & objects identified as being of heritage, and the use of heritage places. This may mean that places identified as heritage today may not be heritage in the future.

This greater community engagement is not evident within the current listing process as the expert primarily leads it.

A potential solution could be through a simplification of the listing process. Whether a site is heritage or not should be a community's decision and not necessarily an expert in an Office in Parramatta disconnected from the community in question.

A new approach could be:

1. Heritage NSW develops a template significance assessment report that replaces the nomination form and clearly outlines the information needed to submit an item for state listing and the community's process to prepare the nomination report.
2. Any nomination within the community for a potential state item should be submitted to the Local Heritage Advisory Committee for review and endorsement for submission to Heritage NSW. These local communities tend to include representatives from the community and reflect the local interest in history and heritage.
3. On submission, the purpose of the review of the submission by Heritage NSW should be to ensure all the key questions are answered, there is sufficient information provided, the resources or references are included, and the future management guidelines have been developed.
4. This report would then go on public exhibition, and Heritage NSW would also hold community engagement sessions to query aspects of the report.
5. This would be compiled and submitted to the Heritage Council for review and recommendation to list or not.

The simplified approach gives the community the power to determine heritage or not and remove double handling. A listing is currently submitted through a nomination form that is researched and filled out by the community. This is further investigated and assessed by Heritage NSW before it

is sent to the Heritage Council. If the document is referenced and detailed, the research and assessment by Heritage NSW should not be required. The nomination should be tabled with the Heritage Council after consultation for determination.

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

The three biggest frustrations with the current approval permit system are the unwillingness to provide advice or clear direction, the inconsistency in decision-making, and the time taken to get a decision. These frustrations make it difficult for consultants to guide property owners and property owners to understand the system and therefore develop confidence in whether they will get consent to undertake works they require.

In most cases, works requiring a Section 60 permit also need a development application under the Environmental Planning and Assessment Act 1979. These applications would require internal referrals to a Council's heritage advisor or officer who would inform the determination. A solution to processing a heritage permit could be the delegation of Section 60 and 57 permits to Local Councils with permanent heritage staff who undertake regular professional development programs run by Heritage NSW.

If the listing process was based on the following structure:

Grade I – World/National Heritage

Grade II+ – State Heritage – exceptional significance

Grade II -State Heritage

Grade III+ – Local Heritage – exceptional significance

Grade III – Local Heritage

Grade IV – Heritage Conservation Area

The Council could determine all items grade IV to III+ through their Local Heritage Advisory Committee or Local Planning Panel, which would have a heritage expert sitting on the panel. For items Grade II and II+, these would be assessed by Council, endorsed by the Local Heritage Advisory Committee or Local Planning Panel, and submitted to the Heritage Council of NSW for approval (similar to Joint Regional Planning Panels).

This approach would increase the resources available to heritage management, reduce assessment times, and enable a local focus to impact assessment (currently, Heritage NSW staff do not visit sites when determining applications). It would also incentivize Councils to hire full-time heritage expertise. Reducing reliance on a once-a-month consultant, providing a greater local commitment to heritage management.

This would also allow Heritage NSW to focus on the bigger picture for heritage, including professional development, technical guidelines, advice, and other elements currently lacking in heritage management in NSW.

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

There are currently no known determining criteria for applications submitted under Section 60, with works considered on a case-by-case basis. In terms of Section 56 minor works, it is acknowledged that the recent attempt for minor works has resulted in a more flexible schedule.

The new schedule encourages more works under Section 57 and requires the owner to only document the works being undertaken rather than writing to the heritage council.

It is noted, however, that more work should be undertaken concerning Section 57. The schedule of works permitted under this clause should be simple as well as flexible. It is considered that any works which do not result in the loss of any elements assessed as being of moderate to exceptional significance or the addition of new structures and additions should be permitted under Section 57. This should be the guiding principle for Section 57 and would ensure owners can undertake works as required.

**◆ Focus Question 14: How could we improve heritage consideration within land-use planning systems?**

Under Part 4 of the Environmental Planning and Assessment Act 1979, heritage assessed as a part of a development application by the Council already achieves a high level of scrutiny. It can be argued that the scrutiny of assessment to applications on heritage properties at the local level is higher than that of items at the state level.

The current NSW Planning system lets down heritage through applications assessment under Part 5 of the Act. The NSW Government agencies or organizations' ability to approve works under Part 5 of the Environmental Planning and Assessment Act 1979, a section of the Act which turns off the provisions of the Heritage Act 1977, undermines the consideration of heritage within NSW.

Part 5 also enables the Government to disregard or undervalue local heritage. The loss of items through the WestConnex project is an example of where local heritage was seen as being of lesser value to the project.

This undermining of heritage creates an unfair system whereby State Government is getting a perceived benefit or easy run. At the same time, private property owners and developers need to manage heritage and develop their projects around any heritage affectations.

The Heritage Act 1977 should have precedent over the Environmental Planning and Assessment Act 1979. Rather than changing the rules, so the State Government does not need to comply, it should be working within the constraints to show developers and private owners how they can still develop properties that may be affected by heritage.

Further, suppose Heritage NSW was refocused on providing strategic management, advice, guidance, and support instead of regulation. In that case, greater advice could be provided to property owners, providing them with the information needed to develop, use, or reuse their property.

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

The regulatory functions of the Heritage Act 1977 should be delegated to the Local Government, who have the experience and capability to undertake compliance investigations and enforcement. There should be a greater focus on the spot fines and enforcement undertakings, which minimizes the need for court action except for the most significant infringements. The value of on-the-spot penalties should be set as a percentage of the value of works or the property's value and not just a set figure. There should be a greater focus on ensuring all parties to an infringement are penalised just the main party.

## ***General Issues***

### ***Local Heritage***

Liverpool City Council believes that all built or non-Aboriginal heritage should be managed under one legislation. Currently, local heritage is under the Environmental Planning and Assessment Act 1979, and state heritage is under the Heritage Act 1977. For consistency and simplicity, this is the opportune time to bring all heritage under the one legislation.

Having local and state heritage under the one Act would enable local heritage registers to be managed similarly to state heritage. Currently, local heritage registers require an amendment to the Local Environmental Plan, which can take up to 2 years, with a standard Local Heritage Study costing more than \$250,000. The ability to assess each potential item as they come up and then add the item as needed instead of amending the Local Environmental Plan would improve the flexibility of local heritage registers. This flexibility would allow Councils to regularly update and amend their heritage registers to ensure accuracy and relevance.

This would also reduce the cost of local heritage to private property owners. Rather than engaging a town planner and heritage consultant to prepare a planning proposal to deregister a heritage property, they would only need to make a formal submission to Council for consideration under the listing process.

If you have any questions concerning this submission, please do not hesitate to contact me

Yours Faithfully

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Thomas Wheeler  
**Heritage Officer**



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