

**Submission
No 143**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Name: Mr Paul Rappoport

Date Received: 25 June 2021

Review of NSW Heritage Legislation

Paul Rappoport – Conservation Architect and Heritage Planner

Submission 25 June 2021

Thank you for the opportunity of being able to make this submission. In answer to the heritage focus questions, I have set out the following 21 key points in response as follows.

1. **Heritage Council Composition (FQ1).** It is important to acknowledge a recent trend in society since the late 1970s/ early 1980s. That is that increasingly, the concern of cultural built heritage as an ideology, has shifted from government to the community. In line with this trend, we need to shift responsibility of heritage listing and decision-making into the community but maintain government legislation and regulation to support it. Also, there needs to be greater professional expertise comprised within the Heritage Council and fewer political agendas. CBH belongs to all of us no matter whether we are in government, in cultural professions or mere passers-by. There should never be undue political influence when it comes to CBH. The National Trust and Australia ICOMOS needs to have representation on the Heritage Council. Because of the fact that there are always a number of competing agendas when it comes to making decisions about CBH, non-heritage considerations need to be borne in mind such as economic and sustainability factors. Accordingly, I suggest that the Heritage Council should comprise; professional heritage architects, heritage landscape architects, social historians, land use managers, economists, sustainability professionals and a host of technical experts that could be drawn upon on an as-needs basis i.e. experts in rolling stock, railway history, heritage engineers etc. Currently, the Heritage Council lacks expertise and this problem requires urgent rectification.
2. **Does the Act Reflect the Expectations of the NSW community? (FQ4).** It is my opinion that as it stands, the Act is remote, flaccid and unintelligible to the general public, owners and many sectors of society that are affected by it. Currently, there is insufficient community engagement and political commitment to the Act and thereby; CBH in society. It needs to be made into a dynamic, user-friendly piece of legislation with much more promotion as to the benefits to society by having heritage idealised as a public good. We only have to look at the recent community campaigns for Sirius and Willow Grove to see where the sentiment lies. To correct this problem, I would suggest that the Act get re-written to include much more activation, promotion and political commitment to CBH as a public good in society. It needs to be much less political and there should be no switching off of the Act. If we use English Heritage as an example, we see much less political interference and much more community engagement in that arrangement. In terms of management i.e. the executive arm of the Act, there should be a separate trust set up as a charity (equivalent to English Heritage) that manages all the listed properties and not only promotes them but also is the listing and approval authority for any changes made to the listed properties. If we apply the English model, we remove political interference from the Act. Also, being a charity, the trust is beholden to scrupulous and open-book dealings insofar as the listed stock is concerned. The Heritage Council itself would be a separate entity from the trust. Each would have oversight of the other as a cross checking arrangement. If the council and the trust were to be so implemented, it is my belief that there would be much greater community engagement.

3. **How can the Act better Incentivise Ownership of Heritage buildings? (FQ5 & 6).** Most people realise that private owners bear 100% of the cost required to maintain, protect and safeguard listed heritage properties in their care. To offset this burden, there should be many more heritage incentives to make the investment worthwhile. Currently, we only have two pieces of heritage incentive in the planning legislation at local and state level. These are the Section 57 arrangements under the Heritage Act and Clause 5.10 (3) in the EP&A Act. Additionally, we have Clause 5.10(10) of all LEPs in NSW. Clause 5.10(10) should be much more liberally applied than it currently is by both councils and the Court (LEC). I would like to see Clause 5.10(10) being capable of exceeding every LEP and zoning control if it results in a better economic, heritage and sustainability option for the heritage building. The entire mindset around heritage incentives needs to change so that it becomes much more worthwhile for private owners to invest in the listed heritage stock so long as the essential heritage values of the place are protected and conserved.
4. **Philanthropic Investment & Incentives – (FQ7).** Volunteerism and tax-deductible gifts is the key to philanthropy insofar as CBH is concerned. Following the American system up to 50 percent of one's adjusted gross income may be deducted if donating to a charity. This is the reason why the trust, as discussed above, must be set up as a charity so that it can accept donations in this manner. It is my opinion that NSW heritage could be greatly enhanced through its ability to become a charity. Not only would this provide far greater scrutiny for any member of the public who wants to know where the money comes from and where it is going, but also it facilitates the personal income tax deduction in return for private donations being channelled towards public goods such as heritage buildings and places. As an extension of this, I would suggest that investors in the listed heritage stock (LHS) should be exempt from land tax, receive GST rebates for repairs carried out on the properties and up to 50% rebate on personal income tax or company tax (depending on the ownership type) in return for the investment in the public good.
5. **Tailored Heritage Protections (FQ8) –** The 2006 Productivity Commission Report - Conservation of Historic Heritage Places, revealed that more than 90% of heritage listed places in NSW are in private ownership. Accordingly, the vast majority of listed buildings are owned and cared for entirely at the private owner's expense. Yet there is little in return for taking on the custodial role given that the subject items are also public goods at the same time as being privately owned. This dichotomy causes much friction because our legislation in NSW does not acknowledge the obvious imbalance. One way of addressing the imbalance is heritage incentives. Yet that is not of itself, a catchall. Enforcement and punishment forms part of the heritage management tools required to ensure that the listed heritage stock is well preserved. The Act needs to celebrate custodial stewardship and not simply ignore it. There is a lazy attitude in society which presumes that because an owner of a heritage building/place is wealthy enough to afford a heritage place, they can happily pay for the upkeep and maintenance of it. Such an attitude is both disingenuous and unkind. Tailored heritage protections need to be mindful of the private owner's burden relative to owners of non-heritage listed places. The Act needs to provide private owners with both technical and financial assistance for the upkeep and maintenance of listed heritage items. After all, owners are the self-appointed custodians of the stock and they need to know that they are being supported not only financially but psychologically too. In so doing, there would, in my estimation, be far less unauthorised work going on at listed heritage places than is currently ensuing. Commensurately, policing and punishment would fall away. But it will take years to rebuild the trust that has been lost over the last 30 years.

6. **Proposed Category Scheme (FQ9)** – Categorisation ought to be avoided because it would engender a race to the bottom. What I mean by this is that if all of the local heritage stock is listed as Category 4 and all of the State-listed stock is of a higher category, then, in the public mind, people would begin to think (for no justifiable reason) that the local stock is of less significance than the state-listed stock. That is clearly not the case. Equivalence is key to heritage listing. Valency is described as the combining power of an element. The element is the entire listed stock. Each separate item acts to support and combine with all the others so as to reinforce and support the whole list. The moment that you begin to assign higher and lower levels of significance to items, the more difficult it becomes to control the stock. The focus then becomes on Category 1 and in time, Category 4 becomes downgraded, neglected and possibly abandoned. That would not be a good outcome.
7. **Greater Community Engagement (FQ10)**. Community engagement in the Heritage Act is endemic but mute. That is to say that there is widespread interest and concern by the community in all things ‘heritage’ (Sirius and Willow Grove to name a few), but the Act itself does not facilitate participation in the process and procedure of the legislation. Heritage listing is simply announced. There is little public engagement in the process. Similarly, the LEC (single commissioner judgements) becomes an ineffective process if the community is not properly involved or taken seriously. It is my opinion that the Act should be re-written to facilitate heritage listing nominations in a pro-active fashion and not reactively. Decisions about change should be considered by a committee constituted by the Heritage Council which, as previously discussed above, should in essence be a trust vested as a charity following the English and the Scottish examples. It should be entirely separate from government. This is necessary because, in essence, the listed heritage stock belongs to the community and not the government - especially given that 90% of the listed stock is in private ownership (Productivity Commission Report, 2006). If such a hands-off approach were to be implemented, I foresee far greater community engagement facilitated by the Act.
8. **Approval Permit System (FQ 12)** - As discussed above, the Heritage Council ought to be the entity making decisions about change to the listed stock. Currently, applications are lodged either as S57s or S60s. I am not in favour of self-assessments under S57. On the one hand, self-assessment is expeditious and mindful of time constraints, but on the other hand, one cannot prevent poor decisions from being made by unqualified and unknown entities. Even with the S60 applications, far greater professional excellence needs to be implemented. To this end, I am very much in support of accreditation. Each and every decision maker (including commissioners in the LEC) needs to have undertaken a minimum 2-year part-time diploma in cultural built heritage (CBH). In the UK, there is an accredited course in which architects working in building conservation can acquire accreditation from the AABC – Accredited Architects working in Building Conservation. AABC is an independent accreditation body established for and by skilled conservation architects. The primary purpose of the AABC Register is to protect the historic built environment from damaging interventions devised by people not skilled in historic building conservation and adaptation. It does so by publishing, for the benefit of clients, a register of architects whose work and skills in building conservation have been established by peer assessment moderated by a lay assessor representing the client. There are no charges for clients to use the Register. The scheme is self-financing – all successful applicants pay an initial and annual registration fee which covers the costs of a part-time administrator, the website and the administration of the assessment processes. If the Heritage Council were to sponsor such a course and the Act

were to support it, there would be far greater consistency in decision-making by independent bodies and professional practitioners insofar as the change to the listed stock is concerned. Thus, the steps would be as follows (a) establish an independent Heritage Council as a trust, set up as a charity (b) fill the Heritage Council with adequate professional expertise and experience commensurate with the nature and type of decisions requiring to be made regarding proposed physical change to the listed stock (c) ensure that all decision makers are accredited – see above (d) publish all applications and decisions on the Heritage Council website (e) promote the independence of the Heritage Council and facilitate community participation

9. **Heritage within Land Use Planning (FQ14)**. Currently, our system in NSW has a number of obvious clashes insofar as the listed heritage stock of buildings and places is concerned. Mainly with zoning and especially with up-zoning, there tend to be obvious conflicts. Hypothetically, when an area becomes up-zoned say from R2 to R4, if the up-zoned area includes a listed heritage item – immediately, there is an expectation by the owner that they too (along with their non-heritage listed neighbours) can participate in the windfall potential of the up-zoning. However, this should not be the case because it promotes false hope for the owner of the listed property caught up in the up-zoning. I believe that when areas are up-zoned, it should be clearly stated that listed properties are not included. Too many bizarre and perverse outcomes result in such situations – often disastrous for the listed items. In my thirty years of experience as a heritage architect in NSW, I do not see any other conflicts between the interaction of the EP&A Act and the NSW Heritage Act except for integrated development where one is required to make two separate applications (DA and S60). This is both cumbersome and unnecessary. The S60 application should be deleted from the process. I am of the opinion that all CBH (cultural built heritage) whether State or local, should be treated under a separate Act i.e. isolated from other types of heritage such as Aboriginal, archaeological, maritime, natural, movable etc. The reason is that CBH is fully tied into land use planning whereas those other types of heritage are less tied in.
10. **Heritage at the Strategic Level (FQ15)**. Heritage needs a vision. Heritage as a public good. It needs to be promoted. It needs to be incentivised. It can change from being seen as a burden with too much red tape to something extremely positive and dynamic both financially rewarding (for the owner) and economically rewarding (for the community – tourism). I am of the opinion that CBH needs to be repositioned to the top of the priority list. Its position since the mid-1990s when heritage was at its peak, has continuously faded. I believe that the reason for this is twofold. Firstly, councils and public institutions that deal with CBH (cultural built heritage) have become progressively underfunded and de-expertised. This may be because heritage is no longer the hot political topic that it was in the mid-1970s (Whitlam, Hope, Uren, Wran etc.). Secondly, management has not followed the socio-political trend which is that CBH has moved away from the government domain into the community domain and that is where it belongs – to the community. With government support (legislatively and gubernatorially), it ought to be the community that sets the strategic vision and priority for CBH in society. The Heritage Council needs to be a community body and not a government body. Its members need to be drawn from the professions, industry and owners' groups including independent precinct committees with representation by the National Trust, Australia ICOMOS etc. The Heritage Council needs to be regionalised into the ten separate DPIE regions that we have in NSW (Greater Sydney, Central Coast, Hunter, Illawarra Shoalhaven, North Coast, New England North-West, Central West and Orana, South-East and Tablelands, Riverina-Murray and Far West). Accordingly,

there would need to be ten separate Heritage Councils in NSW. Each would have the requisite local knowledge and expertise of the area. The Act should make provision for this as well as facilitating the constitution for the Heritage Councils. Naturally, there would need to be an overarching Board that would look after and manage the separate heritage councils. Local knowledge is key – hence the suggested regional approach. I am very much in favour of decentralisation and keeping things local.

11. **Compliance and Enforcement (FQ16)**. Unfortunately, our heritage policing in NSW has not been good over the last thirty years. We tend to be reactive rather than pro-active i.e punishing perpetrators after the fact rather than being proactive. Unless the Act has teeth, it will be a toothless tiger. Metaphorically speaking, there needs to be a dedicated heritage police force whose role it will be to carry out regular inspections on listed properties and actively report to a publicly available register on the physical condition of the heritage stock. The Act needs to make provision for this and facilitate its administration and funding. Owners who take matters into their own hands, need to understand that there will be consequences (jail terms and fines). CBH is irreplaceable. It is unique. Policing needs to work in conjunction with the promotion of CBH as a public good. Promotion and policing work hand-in-hand. The more promotion and celebration of heritage in the public domain, the less policing will be required. The Act needs to provide the heritage police with a right of entry. The Act needs to facilitate warrants of arrest and writs of mandamus etc. for police officers carrying out inspections. The police officers need to be suitably trained to understand heritage fabric and be able to perceive where unauthorised work has taken place. Separately, there is the issue of compliance. In this respect, building code compliance (BCA/ NCC) can have significant impacts upon a building's setting and heritage fabric. It is my opinion that the Act should facilitate the waiving of code compliance where the impact is deemed to generate a negative heritage impact for the building or its setting. At present, this is a very grey area. It needs addressing in the new Act.
12. **Heritage Tourism (FQ18)**. Heritage tourism can be good and bad. For many years, various ICOMOS charters have strongly advocated tourism as a way of activating heritage place (historic towns and places). Venice is an example of where this has been overdone. So negative has tourism in Venice and many other places been, that locals have been driven out of their own places due to owners converting the existing housing stock into Airbnb for financial gain. Unfortunately, despite increased commerce and taxation by State governments, very few tourist dollars have been directed into the conservation of the physical building fabric that contributes so directly to the attraction by tourists of such places. This is a failure of State governance. Hence, my suggestion that the Act should not be silent about tourist taxation. It should not be silent about declaring a designated tourist destination's necessary schedule of conservation works, maintenance and interpretation and it should not be silent about driving a certain percentage of those tourist dollars towards the physical repair and maintenance of such places.

ADDITIONAL RECOMMENDATIONS

13. **A Single Heritage List**. We should have a single heritage list for all of Australia. This would be akin to the UK system wherein, there is a single heritage list. The reason for this is that it would be easier for communities to connect with a single system as opposed to an atomised disconnected bunch of artificially separate heritage lists. Within that list, one could have distinctions or categories as long as those categories connect to the main themes. It would be rather like branches of a single tree rather than separate trees. If this would be the case,

then communities would have an easier time in understanding how listing processes work in respect of cultural built heritage (CBH). It ought to be noted that historically, we did start off with a single Australian heritage list in the 1970s – the RNE. The Register of the National Estate was shut down in 2012. At its peak, it contained 13,200 items. Not all of those have been absorbed into state and local registers. Notwithstanding, a single heritage list would regularise and systematise all heritage listings. The amount and type of information relating to a property would be germane throughout. To undertake such a task would be daunting but it is necessary and with the right kind of resources could be done by a relatively small team. In addition, listing needs to be proactive. As discussed above, the task of nomination ought to be entirely community based and not government activated. At no time at all should any part of the Act be switched off. It must remain on continuously and for every kind of application. A single list would have the effect of bolstering and celebrating CBH as a public good in society especially if all the information is available on a dedicated website with multiple search and cross referencing tools. Our present system with hundreds of separate heritage lists at local, state, Federal and world levels in addition to the non-statutory lists (DOCOMOMO, AIA etc.) makes it all too confusing not only for heritage professionals but the general public and owners too. Hence the suggestion to bring back the RNE (Register of the National Estate) as originally conceived by the 1975 Heritage Act Commission (Cth).

14. **Education and training (Accreditation)** – one of the most pressing deficiencies in the NSW heritage management system today, is the lack of training, courseware and accreditation for heritage professionals working both privately and for councils. Today, we have very unequal backgrounds for those entering the profession. Practitioners emerge from a variety of disciplines including architecture, engineering, town planning, history, archaeology, museum studies etc. Some universities offer heritage courses but not all. The profession itself (heritage consultancy) is naturally different to the university environment. As an employer in the heritage space over the last thirty years, I have come to realise that more than 80% of the training is done on the job. That means that graduates coming out of a heritage studies post graduate university course, are not job-ready. The employer therefore takes on the role of training. Fair enough. While there is no specific issue with this, it simply highlights the necessity for much more training and accreditation in the field. The Act should stipulate that only those practitioners who have completed a cultural built heritage course (usually a 2-year part-time on-the-job training) will be allowed to work in the field, The Act should make provision for base training and ongoing annual CPD points. The regulations should monitor new traineeships, standards and accreditation. The point of training would be to regularise, systematise and structure the core content of cultural built heritage consultancy in NSW. Such a course would assist consultants in recognising our priceless cultural built heritage for what it is. If dealt with too heavy-handedly, the historic building fabric will be lost forever. In order to reduce erroneous or disingenuous treatment of heritage fabric, training needs to be radically ramped up and the Act needs to make provision for this by way of annual CPD qualification and ongoing professional training. This is the model in the UK and the standards are commensurately high compared to ours in NSW and Australia generally. Consistent with this line of thinking, there needs to be accreditation for cultural built heritage consultancy in NSW. Following the UK model, accreditation needs to be organised by a board whose role it would be to set the standards, courseware, practice notes, examinations etc. The Act itself and the regulations should stipulate that practitioners will not be allowed to practice as consultants without being registered. The accreditation would be industry run and organised and would assist in developing much higher standards due to heightened awareness of

methodologies associated with heritage fabric, best conservation approaches and familiarity with heritage trades such as carpentry, masonry, metalwork, paint, waterproofing, stonework, roofing etc.

15. **Separate CBH Act (local and state items together)** – I have come to realise that NSW needs a separate Act just for cultural built heritage (CBH) separate to other kinds of heritage such as maritime, natural, Aboriginal, movable, intangible etc. The reason for this is that CBH is fully integrated into the NSW planning system, whereas those other kinds of heritage are less integrated or not integrated at all. An Act dedicated to all NSW heritage listings would include all individually listed buildings at state and local level as well conservation areas – also at both the state and local levels. I see no reason to separate local items from state items. I believe that the distinction is irrelevant because all state items also have local significance but not necessarily vice versa. Conceivably, the entire list would contain all necessary inventories associated with both levels. Even the term ‘level’ is artificial because state items are not necessarily more important or of a higher status than local items. The new Act could collapse the various lists into one single list inclusive of the S170 items. Like the LEPs, the new Act would list all the items and HCAs in a schedule as part of the Act. This means that the inventory would expand in size from its current, approximate 1,800 items to approximately 40,000 items – a twentyfold increase. It would also mean that much of the administration associated with the NSW heritage management system, would function at the local level. This is already happening. If once takes the Millers Point listed stock, it is being administered by the City of Sydney and not the NSW Heritage Office. It is my strong belief that this should be happening with all councils that contain state listed items in their LGAs. The local councils simply need to be resourced in order to deal with state listed items as well as the local items within their LGA.
16. **Listing should be community based but supported by Government legislation and regulation.** I have noticed recently that the real passion for heritage, functions at the community level. I mention Willow Grove and Sirius as recent examples in which strong community support for heritage was expressed in the form of demonstrations, media hype and social media as well. There is no reason not to run with this sentiment by progressively shifting the management of heritage away from government and into community hands. Naturally, there would be professional representation from the National Trust and Australia ICOMOS as well as other specialist professional inputs from the PHA (Professional Historians Association, Engineering Heritage Australia, The Garden History Society, Australian Institute of Architects, DOCOMOMO etc. Such professional bodies would provide invaluable support to the heritage listing authority (HLA) which would become vested in a community setting. The HLA would be set up as a trust and registered as a charity in the same fashion that English Heritage is constituted. The hands-off approach would greatly depoliticise heritage listings and encourage proactive listing as part of the HLA’s constitution. Like Scottish Heritage, the HLA would also assess all applications for buildings that are either individually listed or in conservation areas. All nominations and decisions would be publicly accessible and subject to the highest level of scrutiny. If tied into heritage incentives as discussed above, it is entirely possible that a community managed HLA with government support (legislation and regulation), nominal government funding (in the same fashion as the National Trust) and active, transparent nomination decisions, would lift NSW heritage out of its present doldrums into a dynamic and vibrant part of our society.
17. **No switching off of the Act** – At no time must the Heritage Act ever get switched off. This is where fatal errors are made. All government applications for change must be equal under the law – equal to private applications affecting listed heritage. There must be no special

favours of any sort. There will only ever be full community support for heritage if a 'what is good for the goose, is good for the gander' approach is taken. The Act needs to stay on 24/7 and burning bright.

18. **Better enforcement required** – Insofar as cultural built heritage in NSW is concerned, policing of unauthorised work is poorly coordinated and managed. Whether this has to do with under-resourcing or lack of political commitment, is unclear. Demolished heritage can never be brought back. CBH is unique and irreplaceable. It is one of a few public goods left in society. The Burra Charter strongly encourages a custodial approach. It is all our roles to treat with respect what belongs to the past and pass it on to future generations as it will the role of future generations to do the same. These are not new concepts. However, given that all of it is irreplaceable, the Act needs to rejoice, honour and support cultural built heritage of all varieties.
19. **Avoid listing categories** – Listings should not be limited by category. In the eyes of the public, a Class 4 (local listings) would be seen as a much lower status than say a Class 1 or 2 listing. This type of grading should be avoided. Otherwise, it will become a race to the bottom. All listings are equivalent in their status even though their significance may differ. Categorization implies that some items are more important than others which is never the case.
20. **Adaptive-re-use potential ought not be a factor of listing** – Heritage significance is assessed differently to the adaptive-re-use potential of a place. Adaptive reusability should not interfere with a significance assessment of a place. Adaptive reusability is based upon a specific scheme to adapt a place according to a certain use, extent and accommodation brief. This cannot be assessed without a specific design and in the absence of a specific design, reusability cannot be anticipated. If a place presents as having a low-reusability factor, it should not be penalised for such.
21. **Self-assessment is not a good idea** – recently, the NSW Heritage Office has introduces self-assessment for S57 applications. I understand from experience that this change has been introduced due to the clogging up of the approval system and that to make it easier, applicants carry out their own documentation and record keeping. Part of this idea can streamline applications but another part may end up being mismanaged. My instinct ids that all approvals need to be authority based. Unless there is a stipulation that only accredited CBH consultants can undertake the S57 documentation and retain the records. Otherwise, there will be no control on the extent of work carried out or the quality of it. The wrong materials and inappropriate methods might be applied. There would be no control over this either. Therefore, on balance, I believe that a self-approval system is seriously flawed and likely to result in negative heritage impacts notwithstanding a smoother approval process. The benefits of approvals will be outweighed by the lack of control.

Paul Rappoport – Conservation Architect & Heritage Town Planner

Director Heritage 21 Heritage Consultancy

Previous Acting Commissioner in the Land & Environment Court (NSW)

B. Arch., AIA, MURP, M. ICOMOS

Registered Architect No. 5741 - NSW Architects Registration Board

Master of Urban & Regional Planning (Hons) - MURP

Member of Society of Architectural Historians - SAHANZ

Member of Australia ICOMOS – M. Australia ICOMOS

Member of The Institute of Historic Building & Conservation - IHBC

Member of International Planning History Society - IPHS

Member of The Twentieth Century Heritage Society of NSW Inc