

**Submission  
No 181**

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

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# Response to the Review of the NSW Heritage Legislation (27/6/21)

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# Response to the Review of the NSW Heritage Legislation (June 2021)

## Introduction

I am responding to this review because I am the owner of several heritage listed properties and I value the protection afforded under the NSW Heritage Act.

Consideration of the focus questions in the discussion paper and my own experience leads me to conclude that the main issue of concern is not the Heritage Act (NSW) (the Act) itself but the way it is being administered. Lack of skills and resources in the Heritage Office (Heritage NSW) result in holdups and impasses. This apparent “red tape” is not the result of the legislation but of its administration.

The *Reform Proposals*<sup>1</sup> made in the discussion paper are not based upon sound or internationally recognised heritage conservation principles.

## Response to the Terms of Reference

The Terms of Reference (ToR) of the Review ask for inquiry into and report on the Heritage Act 1977 (NSW) (the Act), with particular reference to:

*a) the need for legislative change to deliver a heritage system that is modern, effective and reflects best practice heritage conservation, activation and celebration (FQ 1-5, 14)*

The priority for legislative change should be the enactment of contemporary stand-alone though complementary legislation to protect and conserve Indigenous Heritage. New legislation should be developed in consultation with NSW Aboriginal communities with input from experts in Indigenous heritage. (FQ2)

The Heritage Act 1977 (NSW) (the Act) needs little change. Its Objects are still relevant and fit for purpose. It is capable of delivering strong and effective identification, protection, promotion and conservation of heritage in NSW provided it is funded adequately and administered in good faith. The Act appropriately allows

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<sup>1</sup> The Reform Proposals and Focus Questions (FQ) are those raised in the discussion paper.

for adaptive reuse and contains provisions for conservation agreements which are underutilised. Both these areas could work more effectively if they were adequately and expertly resourced (FQ3, 4, 5).

The Act could be strengthened in several (FQ1,3,4) areas:

- S170 should be strengthened so that all State-owned buildings of heritage significance are listed and subsequently managed in accordance with their significance (FQ4)
- Heritage protections bestowed by the Act should not be able to be overridden by the declarations of State Significant Developments (FQ14). In particular the legislation should ensure that heritage items deemed by the government to be of State Significance (and items with such potential) are treated as such, and that their protection should not be diminished in the service of state significant development objectives. Both elements of state significance should be treated equally
- Some adjustment to provisions of the Act and/or its administration should be made to facilitate an increase in the rate of nominations leading to heritage listing
- The Act should have the capacity to allow a proactive approach to heritage. The Act should have restored to it, powers to establish Conservation Schemes and to create Regional Heritage Plans which could act in concert with Environmental Planning instruments (see below ToR c, FQ14)
- The Act should stipulate and guarantee the independence of the Heritage Council. Heritage Councils work best when they are independent and vocal champions for Heritage. (FQ1)
- The Act should guarantee that the Heritage Council is made up of people who present an appropriate balance of skills, including community representation with the majority of positions to be filled by people with heritage expertise, skills and knowledge. The Heritage Council should be supported by a number of specialist Advisory groups. (FQ1)
- In order to fulfil Object (b) “encourage the conservation for the State’s heritage” provisions for identification and conservation of heritage at Local Government

level should be robust, be supported by Environmental Planning requirements, ensure input of expertise at the local level and guarantee adequate funding for ongoing identification and assessment at all levels.

***b) the adequacy of the Act in meeting the needs of customers and the community and the protection of heritage (FQ3-4)***

The primary focus of the Act should be to identify, protect, promote and conserve heritage in NSW rather than to “meet the needs of [unspecified] customers and the community”. The use of the term *customer* reinforces the idea of heritage as a commodity to be consumed rather than a cultural asset for all citizens. The Act has the capacity to meet the needs of the community provided it is administered in such a way as to guarantee sufficient numbers of adequately skilled and experienced staff, resourced to undertake the functions set out in the Act (for example Division 2. s21). Research into the nature of the social significance<sup>2</sup> of heritage should be an ongoing function of the Heritage Council and Heritage NSW. This would facilitate the promotion of an understanding of heritage and conservation, as well as ensuring the continued relevance of approaches to heritage. Focus should be on funding studies to understand local views of heritage, and to consult about and plan for its conservation and protection. If necessary, some of the language of the Functions section of the Act could be reviewed to take account of changes in communication technology. Strong and effective communication between the Heritage Council and local governments will support the meeting of community aspirations for heritage.

A proactive approach to nominations and listing including community engagement should be a priority. (See below: *streamlining heritage processes (Reform Proposal 2, FQ10)*). The objectives of the Act can only be fulfilled if those charged with its administration are adequately resourced. Consultation with the community about heritage, one of the Burra Charter Principles requires adequate funding,

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<sup>2</sup> See Byrne, Brayshaw and Ireland. *Social Significance, A discussion paper*. NSW National Parks and Wildlife Service, June 2001 Second edition June 2003

***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 (FQ14,15)***

The Act should have the capacity to allow a proactive approach to heritage by integration with strategic land use planning provisions at regional and local levels. Restoration of such mechanisms would allow integration of issues concerning heritage and heritage landscapes into the planning system. As stated above the Act should have restored to it, powers to establish Conservation Schemes and to allow Regional Heritage Plans which could act in concert with Environmental Planning instruments.

Planning instruments should promote strategic planning for managing change into the future. We need to plan for change in ways that will protect the values identified in heritage places. We want to preserve our heritage to ensure its relevance for future generations.

Environmental Planning provisions should ensure that Heritage is considered in all aspects of planning and assessment. The Environmental Planning Act and the Heritage Act should work in concert to meet the objectives of the Heritage Act. Land Use Planning and Local Environmental plans should be used to protect heritage at regional and local levels.

As stated above (in response to ToR *a*) heritage protections bestowed by the Act should not be able to be overridden by the declarations of State Significant Developments.

The term '*more effectively intersect with*' should not equate to a reduction in resources provided for the administration of the various Acts.

The need for stand-alone Indigenous heritage legislation has been noted at the head of this submission. The National Parks and Wildlife Act 1974 (NPW Act) as it relates to Aboriginal heritage has never been substantially revised to recognise Aboriginal traditional rights and custodianship of Aboriginal cultural heritage in NSW by Aboriginal people or to give them an official voice in these matters. The

NPW Act is now grotesquely and embarrassingly out of line with other state legislation in this regard (eg. Victoria and SA). In considering a new version of the Heritage Act, it would be a backward step to attempt to make the Act intersect with or to take cognisance of the present inadequate and insulting language and processes of the NPW Act with regard to Aboriginal heritage.

***d) the issues raised and focus questions posed in the Government's Discussion Paper, (i-iv)***

Most of the questions posed in the discussion paper are trying to address questions about the administration of the Act. Answers to these questions immediately raise a question about whether the Heritage Office (Heritage NSW) is adequately resourced with expertise (including skills, experience and knowledge) and finances to administer the Act and meet the needs of the community. It is clearly important that the strengths of the Act are not obscured by its poor administration. The present powers and reach of the Heritage Act should not be reduced to match administrative and funding deficits.

***i. category approach to heritage listing to allow for more nuanced and targeted recognition and protection of the diversity of State significant heritage items (Reform Proposal 1, FQ 8,9)***

It is very disturbing that this proposal seems to be advanced in ignorance of the principles of the Burra Charter of Australia ICOMOS, the basic document on which heritage conservation and practice in Australia is built, including Federal and all state government legislation and practice. The principles of the Charter are now universally accepted and form the basis of values based management, as practised by UNESCO, ICOMOS International and the World Heritage Committee.

The approach outlined in *Reform Proposal 1* demonstrates a misunderstanding of modern heritage conservation principles. The proposal creates a collision between significance assessment, listing and management decisions. These should be three separate decisions. Significance assessment should come first, listing second and management decisions third. The proposal (and the examples given) makes the mistake of treating heritage items as mere “property”, classifying properties not

according to their significance but according to some unspecified criteria which sometimes seems to be “size” sometimes to be “type” of property sometimes type of management. The proposal confuses “listing” with management. The scheme assumes that the higher the level of listing the higher the protection and its application to some items marginalises the values of other items. It treats items of local significance as some kind of residual category demonstrating no understanding of the concept of local significance. All items of heritage are significant at the local level and all local heritage is collectively important to the nation.

The proposal appears to try to use listing categories to tackle management issues.  
The proposal will not deliver better protection for heritage

*ii. consideration of new supports to incentivise heritage ownership, conservation, adaptive reuse, activation and investment (FQ 5-7)*

Incentives for heritage conservation can be a very powerful tool as demonstrated in many jurisdictions including progressive Local Councils in NSW. Incentives should not necessarily focus on monetary values. A varied and innovative suite of such incentives, targeted at ordinary citizens as well as investors and developers would be a valuable tool for heritage conservation and for encouraging community engagement.

However it should be noted that existing incentive provisions in the Act such as conservation agreements are very underutilised. This is largely a resourcing issue. Adequately resourcing the Heritage Office (Heritage NSW) to operationalise existing mechanisms would appear to be a simple initial step. Any new incentives will obviously not be effective if they are funded at a similar level to the existing incentives.

*iii. improvements to heritage compliance and enforcement provisions (Reform Proposal 5, FQ16)*

Providing the measures proposed do not weaken the Act and the ability of the Heritage Council to enforce provisions such improvements are supported. However consideration should be given as to whether having intermediate enforcement powers may mean that developers or others doing the wrong thing may be less worried by the likely consequences of their actions.

*iv. streamlining heritage processes (Reform Proposal 2, FQ10,)*

A proactive approach to listing is supported, however any process must include an appropriate level of objective expert input. With appropriate resourcing, a series of regional or themed studies based upon facilitated community engagement could deliver appropriate shortlists of candidates for listing. Such studies formed the basis of the original heritage listings in NSW. Byrne, Brayshaw and Ireland has discussed the importance of heritage in community building:

“Communities do not just happen, they are built. The involvement of local people in efforts to record and conserve their heritage may be seen as a factor in building and maintaining strong, functional communities. The devolvement of heritage management responsibilities to local communities should be viewed as a means to facilitate the work of building community identity.

The way people in communities acquire knowledge of ‘heritage’ and express heritage values is part of the way individuals and social groups construct their identity. An argument has been presented (Section 7) that communities are participants in the heritage discourse rather than passive subjects of it (i.e., passive subjects of investigations by heritage practitioners)<sup>3</sup>.

It is critical to get the right balance of community and expert input.

*iv. streamlining heritage processes (Reform Proposal 3, FQ11)*

Any amendments aimed at changing existing heritage listings would need to have significant safeguards in place. The only factor that should affect an item’s listing is its heritage significance (its social and cultural values) and only an objective and transparent reassessment of heritage significance should be able to influence a change in listing status. An abridged delisting process is not supported.

*iv. streamlining heritage processes (Reform Proposal 4, FQ12,13)*

Fast tracking of exemptions and applications under the Act is not supported. The outcomes of “making it easier for heritage owners to maintain and conserve their

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<sup>3</sup> Byrne, Brayshaw and Ireland. *Social Significance, A discussion paper*. P143 NSW National Parks and Wildlife Service, June 2001 Second edition June 2003

properties” which is the intention of the proposal can be achieved by a better resourced heritage office (Heritage NSW) with more qualified experts and administrative support to provide advice and support in a timely manner

iv. *streamlining heritage processes* (Reform Proposal 4, FQ14-15)

See above ToR c)

**e) *Any other Related Matter***

There are three additional matters which require comment:

*1. The quality of the analysis presented in the discussion paper and the need for further analysis of the operation of the Act*

The quality of the analysis presented in the discussion paper left a lot to be desired. It is hoped that no changes to the Heritage Act will be proposed without more thorough analysis of the operation of the Act and particularly an exploration of the impact of under-resourcing on the effectiveness of the Act. It is particularly important to understand how under-resourcing has contributed to the dissatisfaction of property owners and developers and their perception of the operation of the Act

*2. Opportunity for community and professional input into any changes to the legislation proposed as a result of this review.*

Any changes proposed as a result of this review must be presented for public consultation with a real opportunity for contribution and amendment.

*3. Heritage protection at the local level.*

The operation of heritage protection at the local level deserves detailed assessment including an inquiry into the resourcing of heritage identification assessment and conservation at this level. The Government’s previous devolution of responsibility for ‘local heritage’ to local government, without the provision of adequate training, staffing and resources for conservation and community involvement has been another significant factor in the cited dissatisfaction of clients with the operation of the Act.

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