

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

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VARRO VILLE

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Standing Committee on Social Issues – Review of the Heritage Act 1977

Chair, Peter Polson

Submission on Review of the Heritage Act 1977

I make this submission on behalf of my husband (Peter Gibbs) and myself, as home owners of state heritage listed properties. We currently own and live in Varro Ville Homestead in Campbelltown's Scenic Hills (SHR # 00737) and previously owned (and lived in) Englefield in East Maitland (SHR # 01772).

We support the identification and conservation of heritage via listing on the State Heritage Register ('SHR') and were actively involved in the listing of Englefield on the SHR and getting an extension of Varro Ville's SHR listing for the purpose above.

Despite the listings, our experience over the last twenty years relating to both properties has been negative, not *predominantly* because of the way in which the *NSW Heritage Act 1977* ('**the Act**') has been drafted, but because of the **inability and/or unwillingness of those who have primary carriage of the Act to implement it**: those responsible being the NSW Heritage Office ('HO') in its various guises, (currently 'Heritage NSW'), the NSW Heritage Council ('NSWHC') and successive NSW Heritage Ministers from both sides of the political divide. We have had a poor return for the time and money we invested in both listing processes, and have suffered financially from the subsequent loss of value in both properties, which we believe would not have happened had the Act been wholly upheld. The two listings have not achieved what they were supposed to have achieved – the state heritage values of both properties are now at risk.

The non-implementation of the Act over the last twenty years has been a deteriorating situation: Up to 2016 we observed successive Heritage Offices and successive Heritage Councils struggling to uphold the Act against the politics of the day and against the poor view of heritage held by successive Heritage Ministers and their governments. Since then we have observed two trends: we have observed a decline in the overall expertise of the Heritage Office and the Heritage Council, the removal of various levers that assisted the upholding of the Act (e.g. the *endorsing* of Conservation Management Plans) and the removal of Heritage from any position of influence within the planning system. At the same time there appears to have been an increasing acceptance by government of heritage reports supporting the destruction of state heritage to make way for development, favouring them - without justification - over reports that oppose this destruction. These two trends have been disastrous for heritage: if the HO and the NSWHC do not have the expertise, ability and willingness to vet and pass judgement on such proposals - and for their decisions to be final - heritage that has been identified as significant to NSW will continue to be lost along with community confidence in the system.

We have also observed successive Heritage Ministers breaching the Act, notwithstanding legal letters advising of their breach, and making other decisions that do not reflect the intention of the Act,

including seeking alternative advice that overturns the advice of the NSWHC. Professional advice to us was that, even where there was a breach of the Act, there was little the courts could do to ensure an outcome that the Act was designed to produce, and that it was not worth spending more money trying to achieve that outcome.

There seems little point in having legislation that cannot be effectively enforced, and that can be actively ignored by the government bodies responsible for implementing it with little redress for communities and individuals adversely affected by these actions.

Reliance on the integrity of government to achieve any outcome is clearly not a way forward. Legal enforceability of the Act, with sufficient incentives and disincentives to ensure compliance and redress is required.

Further, members of the NSWHC must have the appropriate heritage qualifications, work under enforceable codes of conduct and must be independent (to the greatest extent possible) of the Heritage Minister, similar to that operating in Victoria.

Finally the role of heritage conservation within the planning system must be strengthened. If heritage has been identified as **state significant** it should take precedence over other uses of land or context on which it relies for its significance.

The rest of this submission will illustrate our own loss of confidence in the current system.

Englefield, East Maitland

After a 20 year conservation/restoration process to recover this 1837 property from the ravages of division into flats, abandonment and vandalism, we decided to nominate the property to the SHR to ensure that this work was not destroyed. This coincided with our completing the purchase of Varro Ville at Campbelltown on 28 April 2006 and needing to sell Englefield to fund that purchase.

Knowing the property was being sold, the NSWHC recommended its listing on the SHR on 2 February 2007 within three months of receiving our nomination. The recommendation then sat on the Heritage Minister's desk for a year in breach of the Act. The Act requires a decision be made within 14 days. The Minister only approved the decision after I phoned, and then wrote, requesting he make the decision. Before approving it, the Minister's heritage advisor told me that the Minister wanted to know why any owner would want to put their property on the SHR - such was the poor regard the Minister had for the administration of the Act.

This delay created a financial burden for us as we were carrying bridging finance on Englefield until its sale. By the time the listing was gazetted on 4 April 2008, the market had taken a downturn. Additionally some buyers were deterred by the poor perception people had of SHR listed properties i.e. that there would be unacceptable limitations and costs associated with managing such a property. We finally sold the property in December 2010 at a substantial loss on our investment.

Englefield was resold in January 2013. Last year we received information from a number of sources that the property had been left unoccupied and deteriorating. We finally notified the HO of this on 8 March 2021, requesting that it be investigated. As of the date of this submission, we are advised that it is 'in the

system’ but that no investigation has yet been made. We understand that there are limited resources available to ensure compliance.

As far as we know there is still no endorsed CMP for the property, and unless the recent decision of the HO to not mandate or endorse these, the state heritage values of the property are at risk.

As a footnote to this, we believe that as CMPs are a financial burden not carried by owners of other properties, these should be paid for by the state. Further, we believe that compliance by home-owners will be better achieved if the HO is able to offer positive assistance through free advisory services and consultancy, and that its advice is technically at the leading edge. Ownership of SHR listed properties should be a pleasure not a burden.

Varro Ville Homestead, Campbelltown

Varro Ville Homestead sits within a garden of 8 acres at the centre of the original 1810 estate within Campbelltown’s Scenic Hills Environmental Protection Area (E3, Environmental Management). Approximately 800 acres of the original 1000-acre grant remains as agricultural landscape, protected up until 2016 by its location. In 2016, despite objections from ourselves, the Heritage Council, Campbelltown Council and state heritage organisations, the South West Joint Regional Planning Panel (‘**SWJRPP**’) accepted the recommendation of the Department of Planning (‘**DoP**’) and approved the ‘spot’ rezoning of 280 acres surrounding the Homestead to allow the Catholic Metropolitan Cemeteries Trust (‘**CMCT**’) to build a 360,000-grave cemetery on land where cemeteries were previously prohibited. The cemetery is currently ‘on hold’ pending the amalgamation of NSW’s Crown Cemetery operators. Preliminary valuation advice to us estimates that the rezoning caused a drop in the Homestead’s value of between 35% and 100% - the latter figure representing the potential non-saleability of the property. It is no longer worth investing it.

The process that led to this outcome, and to the subsequent approval of the CMCT’s Development Application (‘**DA**’) permitting graves within 10 metres of our boundary fence, is littered with perversions of process, including non-compliance with the Heritage Act and non-compliance with how heritage is to be handled within the planning system. In this submission we will deal primarily with the heritage issues.

Phase 1: The CMCT’s ‘spot rezoning’ of 280 acres at Varroville for a cemetery.

At the time of our purchase in April 2006, the zoning was Scenic Protection 7(d1), (Escarpment Preservation Zone) and cemeteries, along with other intensive non-agricultural commercial activities, were prohibited within the zone¹. Only the Homestead lot of 8 acres was listed on the SHR, but there was correspondence over a number of years between Campbelltown Council and the Heritage Council concerning the need to extend Varro Ville’s curtilage to include the agricultural and estate features (outbuildings, agricultural terracing, dams attributed to explorer Charles Sturt’s ownership) and to protect the rest of the Homestead’s landscape setting by retaining the existing planning controls. A nomination to expand Varro Ville’s curtilage, to include most of the land now owned by the CMCT, had

¹ This was transferred to the Standard Template in 2015 as E3 Environmental Management with the same controls.

been ‘deferred’ by the NSWHC at its meeting of 20 June 2000 pending the finalisation of a study conducted for the National Trust². As at April 2006 a decision on the curtilage had still not been made.

We understand that the CMCT took out an option to buy the land surrounding Varro Ville in 2013, and received permission from the Minister for Primary Industries (Crown Lands) to finalise the land purchase subject to planning approvals being in place.

We met with the CMCT in late August 2013, after it had already presented its plans to Campbelltown Council in closed session and had launched its proposed cemetery at an invitation-only media event to which we and our local MP were not invited. We walked out of the meeting when it became clear that the CMCT was not prepared to accept the full heritage impact of its plans other than the conservation of the outbuildings.

In November 2013 the NSWHC wrote to Campbelltown Council objecting to the rezoning and asking Council to retain the planning controls.

Campbelltown Council subsequently rejected the rezoning application but this was overturned by the NSW government (DoP) in a Pre-Gateway Review.

In April 2014, while the CMCT’s rezoning application was being considered for a Gateway Determination, the CMCT’s heritage consultant, Stephen Davies was appointed to the NSWHC. Under its procedures, Mr Davies could not participate in any proceedings relating to Varro Ville due to a conflict of interest.

On 26 August 2014, under its Chair Professor Lawrence Neild, the NSWHC noted the potential impact of the proposed cemetery on Varro Ville’s state heritage values and recommended an Interim Heritage Order (*‘IHO’*) be placed on the surrounding 280 acres to allow 12 months to investigate an expanded curtilage, stating that the NSWHC considered *‘the land and outbuildings associated with and surrounding the SHR listed Varro Ville homestead are potentially of state heritage significance.’*

This was an appropriate application of the Act (s.24), however the Minister (Stokes) declined to sign the IHO, asking the NSWHC to instead *‘work with the landowners towards managing the Heritage values as part of development, including potentially a heritage listing nomination’* (note attached to returned IHO, 1 October 2014). This was not consistent with the intention of the Act or, in our view, with proper planning as it assumed development could proceed before the land had been assessed as required under the relevant legislation. We note that the Minister’s decision and comment was used by the DoP in its Submissions Report to the SWJRPP (21 July 2016, p. 20), to override the NSWHC’s objections to the rezoning.

In its rezoning application, and other documents sourced under the *Government Information (Public Access) Act 2009* (*‘GIPAA’*) the CMCT had acknowledged the long standing view of the NSWHC that Varro Ville’s SHR curtilage was inadequate, however, we could find no timeline for achieving it. Thus in 2015 we applied for and received a heritage grant to conduct a curtilage study of Varro Ville (due 15 May 2016) to ensure that the state heritage values of the property would be protected. We invested \$20,000 of our own time and money in the study. Before proceeding we sought assurance from the new Heritage

² *Colonial Landscapes of the Cumberland Plain and Camden, NSW*, Prepared by Colleen Morris and Geoffrey Britton for the National Trust of Australia (NSW), Final Report August 2000, Vol.2, included Varroville, pp. 96-99.

Minister (Speakman) that a curtilage would be considered under the Act. On 12 January 2016 the Minister responded to Question on Notice #2059, Answer 1(f)

‘If the Heritage Council makes a recommendation to the Minister to expand the curtilage of Varro Ville Homestead, the Minister must decide whether or not to direct the listing of the item (i.e. expanded curtilage) in accordance with the Heritage Act.’

Unknown to us, in late 2015 the CMCT received permission from the new Minister for Primary Industries to purchase the Varroville land before any planning controls had been approved. This took effect on 6 January 2016, but was not corrected in its rezoning application.

At the beginning of 2016, Mr Stephen Davies was promoted to Chair of the NSWHC.

When the rezoning application was sent to the SWJRPP in 2016, the NSWHC again lodged a submission of ‘non-support’ for the rezoning, noting that the owners of Varro Ville Homestead had received a grant to conduct a curtilage study that was yet to be completed. It also noted that Condition #3 of the Gateway Determination had required a CMP be prepared in consultation with the HO but that the CMCT had *not* consulted with the HO as required and that a request to endorse the Draft CMP under the Act had not progressed. Since the HO could not endorse a CMP for an item that was not on the SHR (s. 38A) and the CMCT’s land was not yet on the SHR, we feel that the rezoning should have been refused until such time as the land could be properly investigated. However, in its Submissions Report to the SWJRPP (21 July 2016) the DoP rejected the HO’s views on the CMCT’s compliance with the Gateway Determination by reinterpreting the meaning of ‘consultation’ to simply mean that it had complied with a checklist of issues to be covered. It further undertook to ‘endorse’ the CMP itself by incorporating it into the proposed amendment to the Campbelltown Local Environment Plan (‘LEP’).³ In doing so the DoP acted outside its remit since only the NSWHC could endorse CMPs under the Act.

The DoP also acted outside its remit in its Submissions Report to the SWJRPP (21 July 2016, pp.18-19) when it adopted the CMCT’s heritage opinion over that of our study’s heritage consultant with reference to its consultant’s position on the NSWHC. This was an inappropriate use of Mr Davies position given the conflict of interest between his two roles and was in conflict with the NSWHC’s official position against the rezoning⁴.

Thus the DoP twice assumed roles in relation to heritage assessment that it did not have, and its actions were not consistent with the Act or with the relevant codes of conduct for members of the NSWHC.

On the 12 September 2016 the SWJRPP approved the spot rezoning (planning proposal) and it was gazetted on 20 February 2017.

³ The DoP later stated, ‘The CMP was endorsed by the Department and JRPP as part of the Planning Proposal [Rezoning Application] for the site.’ Macarthur Memorial Park, Varroville – Crown Development Assessment (3293/27/DA-C), State of NSW through its Department of Planning and Environment, December 2018, p. 3.

⁴ We note that in 2019, when an Independent Planning Commission (‘IPCN’) expert panel was asked to review the NSWHC’s 2017 recommendation to expand Varro Ville’s curtilage onto the land intended for the cemetery, both the NSWHC and the IPCN reversed this view and supported our consultant’s view over that of the CMCT’s.

Phase 1A: Process to expand the curtilage of Varro Ville on the SHR.

Concurrently with the process to rezone the land, on 15 May 2016 we submitted our curtilage study⁵ to the HO and on 23 May 2016 we sent a nomination to expand Varro Ville's SHR curtilage per the study's recommendations. In our nomination letter we asked that the study *'not be made public until such time as appropriate protection is in place for the land proposed...as an expanded curtilage for Varro Ville.'*

On 23 August 2016, after reviewing the CMCT's response to submissions on the rezoning of the Varroville land, and noting that it had dismissed or repudiated key heritage concerns raised by the NSWHC, by the authors of our curtilage study, and by other state heritage organisations, we wrote to the HO requesting an IHO be placed on the land identified as the 'minimum curtilage' in our study pending the resolution of the expanded curtilage for Varro Ville. The request was considered by the SHR Committee at its meeting of 7 September 2016. After concluding that the site *'was not under any immediate threat'* it resolved (as amended at its 2 November 2016 meeting) to advise the Minister for Heritage *'not to make an Interim Heritage Order over the land adjoining Varroville homestead, Campbelltown at this time.'*

The Act (s.24 (1)) does not require that there be any immediate threat to an item to make an IHO for it; it only requires that the Minister considers the item *'may, on further enquiry or investigation, be found to be of State or local heritage significance.'* The making of an IHO was appropriate in the circumstances as the NSWHC had already resolved, in the same meeting, that the HO should *'progress the nomination to extend the curtilage of Varroville'* and *'pursue further investigations of an appropriate curtilage for Varroville'* over land that was roughly equivalent to that which we had requested an IHO for.

Further, an IHO would have resolved our concerns about the public release of our study. Instead we found ourselves contesting numerous 'anonymous' GIPAA requests to release it, which became exhausting when we also had to appeal decisions both as Internal Reviews and in the NSW Civil and Administrative Tribunal ('NCAT'). Two final appeals, one Internal and one at NCAT, upheld our concerns that the heritage values identified in the report could be endangered while the item in question remained outside the protection of the Act, and that the early release of the report in such circumstances could prejudice the ability of a government agency (HO/NSWHC) to carry out its functions now, and in the future.

We also note that in the Internal Review decision of 24 May 2017, the reviewer questioned the NSWHC's resolution of 7 September 2016 to not recommend an IHO, stating with reference to the Act *'It is not clear to me, whether that also means the application for extending the curtilage is not supported. One could assume that to be so, when not familiar with this process.'* Since the application was supported, the IHO should have been recommended.

Notwithstanding our concerns, we agreed to every HO request to publish those parts of our study essential to the community and landowner consultation process. Notably the study's assessment of significance against the state listing criteria was published in detail. The Notice of Intention ('NOI') to consider a SHR curtilage expansion for Varro Ville went on public exhibition in 12 July to 9 August 2017.

⁵ *Curtilage Study Varro Ville* by Orwell & Peter Phillips Heritage Conservation Architecture, May 2016..

In its submission to the NOI the CMCT agreed to the curtilage expansion providing it could have site specific exemptions to accommodate its cemetery.

The listing process then became fraught with difficulty. We had cause to write to the HO and NSWHC on a number of occasions regarding compliance with the Act and other legislation (GIPAA). Two are notable:

- We discovered that the HO was drafting site specific exemptions as part of the listing recommendation to the Minister. We objected to this on the basis that the DA for the Varroville Cemetery had yet to be determined and had not been part of the public exhibition of the NOI. The NSWHC agreed it could only provide these exemptions for an approved DA.
- On legal advice from the Environmental Defenders Office ('EDO'), we wrote to the NSWHC that it was in breach of the Act when it failed to consider, within 30 days after the closing date for NOI submissions, whether or not to recommend the listing (s.33 (1) (d)). We had previously been advised by the HO that since it had missed the deadline under the Act it would have to repeat the NOI public exhibition. This was not correct. The NSWHC subsequently convened an out-of-session meeting on 28 September 2017 and resolved to recommend the curtilage extension as exhibited.

The CMCT lodged its DA for a cemetery at Varroville (Macarthur Memorial Park) with Campbelltown Council on 17 October 2017.

On 27 October 2017, the NSWHC made a recommendation to the Minister to list a curtilage extension to Varro Ville on the SHR, *without* site specific exemptions for the cemetery.

The Heritage Minister (Upton) failed to make the decision as required under the Act within 14 days of receiving the recommendation (s.34 (1)).

On 5 April 2018, the EDO wrote to the Minister on our behalf advising that she was in breach of the Act and asking that she determine the issue in accordance with the Act. No reply was received.

On 12 October 2018 we were advised that the Minister had referred the matter to the Independent Planning Commission ('IPCN'). This was outside the timeframe specified under the Act. We understand that this referral was prompted by the CMCT withdrawing its support for a curtilage expansion over its land and writing to the Premier regarding its concerns.

On 22 February 2019, the IPCN determined that the NSWHC's recommendation to extend Varro Ville's curtilage on the SHR was '*appropriate*'. Under the Act (s.34 (2)), the Minister had to decide whether or not to direct the listing within 14 days of the IPCN providing its report. The Minister did not make the decision as required by the Act.

On 3 June 2019 the EDO wrote to the Minister (Harwin) on our behalf to advise that he was in breach of the Act and to ask when a decision would be made, stating:

*'Our client also notes that Crown Cemetery Development Application (DA 3293/2017/DA-C) (**Development Application**), which imposes on the land subject to the proposed curtilage expansion, is currently under assessment by the IPC, and is likely to be determined in the near*

future. The listing of the curtilage expansion on the SHR will change the procedural requirements of the assessment of the Development Application, which will see greater protection afforded to Varro Ville vis-à-vis the heritage impacts of the Development Application. Accordingly, our client is concerned that the Minister's continued failure to comply with the time limits imposed by the Heritage Act, by not making a decision in regard to the Heritage Council and IPC's recommendations to list the curtilage expansion on the SHR, puts the heritage significance of Varro Ville at immediate risk'.

No reply was received.

On 19 July 2019 the Sydney Western City Planning Panel ('SWCPP') approved the CMCT's cemetery at Varroville (Macarthur Memorial Park).

On 4 November 2019 the Heritage Minister (Harwin) finally approved the curtilage expansion for Varro Ville, *two years after the date required under the Act*, and with site specific exemptions for the CMCT's cemetery. It was gazetted on 8 November 2019. These exemptions authorise the destruction of heritage landscape elements identified in our study and confirmed as significant to the state by both the NSWHC and the IPCN panel that reviewed the curtilage extension recommendation - making a mockery of the process to extend Varro Ville's curtilage on the SHR.

Phase 2: The CMCT Development Application for a cemetery at Varroville – Macarthur Memorial Park

As stated previously the CMCT lodged its DA for a cemetery at Varroville on 17 October 2017.

Concurrently with the listing process, on 21 March 2018, we lodged our submission on the DA with Campbelltown Council. Our submission included a copy of our study together with a professional opinion from one of the study's authors concerning the heritage impact of the cemetery on the heritage values identified in our study. Although we remained concerned about the publication of this study before protections under the Act were available, we had no choice given the Heritage Ministers' delay in deciding the matter. Campbelltown Council subsequently made the study available on a 'view only' basis at its premises. On 22 November 2018, the CMCT's legal representative accessed the study and we later became aware (at the IPCN's public hearing into the curtilage extension) that copies were distributed to the CMCT and its consultants. The study had also been made available with our permission for viewing at the IPCN's premises during its review of the curtilage and again during its consideration of the CMCT's DA (see below).

Before the SWCPP could decide the DA, on 18 May 2018 the CMCT referred it to the Planning Minister under s.4.33(5) of the Environmental Planning & Assessment Act 1979 for a decision. On 4 June 2018, the Planning Minister delegated his powers to the IPCN. The DoP then took over the preparation of the assessment from Campbelltown Council. In its Assessment Report⁶ the DoP dismissed the consideration of our study saying *'the document was not made available to the Applicant [CMCT] upon request.'* As previously stated we had made our study available as required under the relevant processes for the curtilage review and the DA assessment. Further, during the IPCN curtilage review the CMCT had

⁶ Macarthur Memorial Park, Varroville – Crown Development Assessment (3293/27/DA-C), State of NSW through its Department of Planning and Environment, December 2018, p. 20..

admitted that it had had access to it. The CMCT had never contacted us directly about access to the study, but in any case this was not relevant. The DoP had no basis to reject it.

Most disturbing in the processing of the DA, however, is that while the NSWHC had no statutory role in approving the DA for as long as the CMCT's land remained outside the Act, it nevertheless was asked to comment. Documents sourced under the GIPAA reveal that after the SWJRPP approved the land rezoning and before the DA had been determined, the NSWHC had decided to work with the CMCT on its cemetery at Varroville and had stated that it would provide site specific exemptions for it. This decision was apparently made *before* the HO and NSWHC had assessed the DA for its heritage impact. This was a reversal of the NSWHC's prior position in objecting to the cemetery as a whole and was not justified by the findings in our study which the NSWHC had adopted in recommending a curtilage expansion on the SHR. We could find little evidence that the HO used our study to guide its commentary and we note that the map showing view lines to and from Varro Ville Homestead, used by the HO in its assessment of the DA, was taken from the CMCT's DA, not our study⁷. The HO commentary on the DA - on behalf of and approved by the NSWHC - was building-centric at the expense of landscape. This was the only way the cemetery could be accommodated. Yet the curtilage expansion relied on the interdependency of the landscape elements and the Homestead, which will now be largely lost if the cemetery proceeds. We consider this to be a monumental failure of the NSWHC to uphold the intention of the Act and its obligations under the Act. Rumours in the community that the 'decision had already been made' prior to assessment under the relevant legislation⁸ have been difficult to verify...except in this context.

The need to elevate landscape within the Act

We feel that the poor treatment of landscape within the Act contributed to this outcome. The authors of our study commented to us that the landscape surrounding Varro Ville is of such a quality (potentially of national significance) that it could be listed on the SHR in its own right. For as long as 'landscape' is considered only as 'context' much of NSW's state heritage will continue to be lost, especially within the Sydney Basin. The Varro Ville landscape was one that could have been easily saved given its location within the Scenic Hills Environmental Protection Area, with its added layer of Escarpment Preservation, and given that the Scenic Hills are highly valued within the Campbelltown Local Government Area and beyond. There are plenty more suitable places for cemetery development within the Sydney Basin.

Yours sincerely

Jacqui Kirkby and Peter Gibbs

⁷ Heritage Council of NSW Minutes – 459, Out of Session Meeting, 21 November 2018.

⁸ Macarthur Advertiser, 24 July 2019, <http://scenic hills.org.au/doc/Editorial - Scenic Hills Betrayed 240719.pdf>