

**Submission
No 230**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Name: Ms Jane Alexander

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4 July 2021

The Hon Peter Poulos MLC
Chair - Standing Committee on Social Issues
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Poulos,

Re: Submission on the Inquiry into the Heritage Act, 1977

I make this submission in a personal capacity, in response to the Inquiry into the *Heritage Act, 1977* (the Act) which was referred to the Standing Committee on Social Issues (the Committee) for inquiry on 13 May 2021 (the Inquiry). Thank you for the opportunity to make this submission – in particular I look forward to the opportunity to discuss the Review in more detail and to comment on later stages of the Review, including the draft White Paper (or such) and any draft bill that may be tabled.

In addition to living in a heritage conservation area, I have more than 20 years' experience in heritage conservation, historical & indigenous archaeology, and built heritage. My expertise and industry recognition includes:

- ICOMOS (International Council for the Protection of Monuments and Sites) General Assembly 2023 Executive Committee;
- University of Queensland Professional Archaeology Advisory Group;
- Former ICOMOS Australia Executive Committee Member (two terms);
- Former Member and Chair, Industrial Heritage Committee National Trust of Australia (NSW);
- Former Australian Expert Member, ICOMOS International Scientific Committee for Military Heritage & Fortifications (IcoFort);
- Twenty years' experience as a Consultant and Advocate applying the Heritage Act to sites across NSW, preparing SHR nominations and applying for permits under the Heritage Act;
- Overseeing hundreds of cultural heritage projects across NSW;
- Winner of the Inaugural Judy Birmingham Award for Best Historical Archaeology Heritage Report (Australasian Society for Historical Archaeologist);
- Winner of multiple heritage project High Commendations in National Trust (NSW and QLD) Heritage Awards.

Cultural heritage places make a significant contribution to our identity; creating a sense of place and representing the State's story, its people and its shared connections. Cultural heritage places have an immensely important role in domestic and international tourism and they contribute to a vibrant state economy. ***Any proposed amendments should result in better heritage outcomes rather than a weakening of heritage protection.***

The following submission sets out some general observations and comments, and provides more detail on areas I identify as key concerns for the Committee's Review.

GENERAL COMMENTS

Aboriginal Heritage protection remains woefully under-prioritised

It is shameful that major amendment to the NSW Heritage Act, which is functional and well established, have been initiated in preference to developing and enacting Aboriginal heritage legislation.

Whilst I note the current trend for development proposals to include a plethora of connecting to/walking on/respecting Country frameworks and statements, there is no amount of frameworks that can make up for a lack in effective legislative or provided the level of protection needed for Aboriginal heritage places.

Co-designed Aboriginal Cultural Heritage Reform, and its adequate resourcing, should be a fundamental priority for the NSW government and Aboriginal heritage legislation needs to encompass a broad definition of heritage beyond the simplistic definition of 'Aboriginal Objects.' It should encompass 'Country', beliefs, shared heritage values, intangible values, storylines and connections.

The Heritage Act will require further amendments when standalone Aboriginal Heritage legislation is drafted to ensure consistency between the two pieces of legislation, especially with regard to shared heritage places (places with both historic and Aboriginal heritage values that could trigger both pieces of legislation).

Heritage Act Review Discussion Paper Issues

I note the Discussion Paper prepared as the first stage for the Review of the NSW Heritage Legislation (available on the Committee's webpage). The Discussion Paper states that it:

"...is intended to provoke community discussion around the purpose of heritage protection, the current operation of the heritage conservation system and the opportunities it can provide for cultural, economic and community growth. While some specific reform ideas are posed, these are not yet established policies but rather a starting point for community input and discussion. Focus questions are posed throughout the paper to help frame the discussion."

The Discussion Paper is concerning in that it expresses a wide range of views as the basis for its themes, focus questions and proposed Reform Proposals, however it presents no evidence of data to back up its key assumptions. For example, the Discussion Paper states "...the Act is now **widely considered** to be out-of-step with trends in heritage conservation and land use planning and development," that it is "**generally considered** onerous, procedurally complex and adversarial to adaptive reuse" and that there is "**a perception that** heritage listing can be a burden rather than a celebration of our history." These issues however are not underpinned by rigorous analysis, data or survey results to substantiate these claims or indicate how these assumptions have been identified.

Indeed, the NSW government's own study (NSW Community Attitudes to Heritage, Office of Environment and Heritage, 2016) clearly indicates that over 36% of people felt current heritage regulations are 'about right' and another 24% feel they are too weak, meaning 60% of people do not support an assumption that the heritage regulations are onerous or too strict (page 24). It also noted that only 13% of people think they are too strict. Additionally, the same report showed that having a heritage listing or conservation status was generally seen to be positive, with 83% of those who live in, and 61% of those who work in one of these properties, indicated that the listing was

somewhat or highly positive; only 10% of those who lived or worked in a heritage place felt that it was somewhat or highly negative for their property.

The Discussion Paper is fundamentally flawed and clearly pre-directed towards particular issues identified within Heritage NSW that are not based on qualitative or quantified data or research to support its key assumptions that impeded the ability of community to make open comment, review or suggestions relating to the efficacy of the Act and, most importantly, the way that it is resourced and implemented. Indeed, on close consideration it is clear that many of the issues raised in the Discussion Paper are a result not of the Heritage Act itself, but in its (under)resourcing and its implementation (this is discussed in more detail later in the submission).

Purpose and Relevance of the Heritage Act

The Heritage Act, since its enactment in 1977, has fundamental importance of the role to identify, protect, promote and conserve cultural heritage places in NSW. While the Heritage Act and its regulations may benefit from small updates and amendments, its objectives and principles remain appropriate and relevant. ***Indeed, a strong criticism of the Act could argue that its implementation is not robust or useful enough to truly achieve the admirable objects it seeks to fulfil.***

The Objects of the Heritage Act, as outlined below, are worthy and relevant. Should any amendments be seen as necessary, they should provide more (not less) clarity, as indicated in orange text below:

- (a) to promote an understanding of the State's heritage,
- (b) to ~~encourage~~ **ensure** the conservation of the State's heritage,
- (c) to provide for the **timely** identification and registration of items of State heritage significance **and ensure the register is representative and regularly updated,**
- (d) to provide for the interim protection of items of State heritage significance,
- (e) to ~~encourage~~ **ensure** the adaptive reuse of items **based on the their recognised** State heritage significance **and retains their heritage values,**
- (f) to constitute the Heritage Council of New South Wales **as an independent body of heritage experts** and confer on it functions relating to the **promotion, protection and conservation of the** State's heritage,
- (g) to ~~assist owners with~~ provide robust incentives **and useful guidelines and advice** that assist owners with the conservation of items of State heritage significance.

OTHER KEY AREAS FOR CONSIDERATION

This submission does not seek address each of other Discussion Paper Themes, Focus Questions or Reform Proposals, for reasons noted in the above section "*Heritage Act Review Discussion Paper Issues.*" Rather, this submission seeks to identify the core issues associated with the Heritage Act and offer suggestions for how this could be overcome.

The Minister's Forward in the Discussion Paper states that "This paper, developed in consultation with the Heritage Council of NSW, poses the question: '**what sort of regulatory model would facilitate the preservation, activation, and celebration of our State's heritage?**' An initial observation on this purpose should note that any review of the legislation should focus on how the Act, its mechanisms and its operation enable and assist the identification, promotion and conservation of the state's heritage, as distinct from its "activation."

To this end, my submission focuses on ensuring the Act (and its implementation) results in better outcomes for heritage places.

Resourcing

As noted above, the NSW government's study (NSW Community Attitudes to Heritage, Office of Environment and Heritage, 2016) clearly shows that the community's stance that it is our government's responsibility to protect our state's heritage. To fulfil this responsibility, there needs to be adequate resourcing to meet the Objects of the Act and carry out its regulatory functions.

Inadequate resourcing results in less certainty for property owners, longer approval times for applications under the Act and generally weakens the perception of heritage across all levels of society. Adequate resourcing needs to cover:

- **The identification of heritage places in a timely manner** to ensure that the State Heritage Register (SHR) is up-to-date, representative, and reflective of the broader community's evolving views of what has value or what may have value to future generations. Due to evolving understating and appreciation for different types of heritage, no heritage register will ever be "complete." However, if property owners are to have any level of certainty regarding the potential heritage value of their property, we must ensure our heritage registers are as up to date as possible. Under-resourcing results in less certainty for all involved and results in the overuse of mechanisms such as Interim Heritage Orders to "buy time" for assessment that should have already occurred and is a PR nightmare for heritage.
A recent example is the MLC Building in North Sydney. Initially identified by Heritage NSW in 2013 as thresholding for state heritage listing, under-resourcing of Heritage NSW resulted in a 'triage' system to process a backlog of SHR nominations and manage new nominations. The triage system, understandable given the resourcing constraints, resulted in places protected on other heritage lists (in this case the North Sydney Heritage Schedule) and those not under immediate threat being classed not having their nomination progressed, despite their heritage values being identified as state significant. In the case of the MLC Buildings, this resulted five years later in the owner proceeding with broad scale redevelopment applications that triggered an Interim Heritage Order issued for the site. Countless hours, resources and expense were then spent to "battle" this issue and bring certainty to an owner that could have been provided years earlier if the building was listed when identified by Heritage NSW.
This scenario is regularly repeated across the state and results in poor outcomes for property owners, poor outcomes for the perception of heritage and poor outcomes for the heritage place that often languishes unmaintained while time consulting and costly battles are waged over its future.
A switch of attitude for government to ensure good "outcomes" for heritage owners and for heritage places, creates a situation where resourcing up-to-date and comprehensive heritage registers is an investment in owner certainty, an identification of places that can be sympathetically adapted and a reduction in costly appeals and tribunals.

- **The promotion of good heritage practice** so that the government is seen as “the curator, not the liquidator” of the state’s heritage and so that they can properly assist owners of heritage places with useful, best practice guidance and advice.

The community expects government to set the standard for heritage and they expect this standard to be robust and effective.

The Discussion Paper seeks to amend the Heritage Act, however, the bulk of issues it raises do not relate to the Act itself, but to the way in which it is implemented. Heritage NSW should be the source of up-to-date, useful advice, manual and guidelines for the identification, management and promotion of our heritage.

Sadly, it has not played this role in more than a decade, evidenced by the “last amended” date on most of its publications.

Owners of heritage places should be able to access useful and comprehensive advice from the State’s heritage department – to ensure certainty, to reduce permit approval times, to minimise the need for enforcing repair works or policing non-approved works. This requires a commitment to ensuring there are adequate amounts of skilled, experienced practitioners within their department to assist heritage owners navigate the heritage system and sympathetically allow change to heritage places in accordance with the recognised heritage values.

The current frustration encountered by heritage owners such as the Millers Point community does not stem from an inadequate or overly draconian Heritage Act; it stems from the inability of those heritage owners to access timely, consistent, reasonable advice from the relevant government department on how to balance the heritage values of their homes with the pragmatic need to manage change in order to keep these properties maintained and lived in.

- **The establishment of effective and useful heritage incentives and grants** so that there is shared responsibility of the state’s heritage assets between government and owners. The Discussion ironically notes incentives for heritage owners as a key issue. Ironic because heritage owners, heritage advocacy organisations and heritage professionals have for decades been calling for this to no avail. Indeed, Heritage NSW and its predecessors have many times commissioned their own studies into effective incentive/grant models – ***none of which have been implemented by any government.***

Effective options could include:

- Land tax incentives supplemented by the state government, so that smaller local government areas are not harmed by smaller rates;
- Minimisation/removal of stamp duty for purchasing of heritage listed properties;
- Minimisation/removal of capital gains tax for heritage listed properties;
- No interest loans for preventative maintenance and conservation to heritage listed properties;
- Tax deductibility of expenses involved relating to the preventative maintenance or conservation of heritage listed properties;
- Government grants that prioritise (for long term owners) preventative maintenance over large-scale catch up conservation projects, to ensure that owners are not rewarded for the wilful neglect of their property in order to be eligible for grants.
- Gold star heritage rating for best practice adaptive reuse of heritage properties to minimise developer contribution fees (excluding broad scale redevelopment of the site within its heritage setting as a justification for funding conservation of the heritage item – it should incentives reuse within the parameters of the place’s heritage values, not in spite of them).

- **Ensuring Resourcing flows beyond Heritage NSW. Increasingly, other levels or areas of government are playing key roles in identifying, conserving and managing heritage places.** reflect the growing number of identified heritage places and the scale of development occurring in NSW.

There are currently more than 1700 places listed on the SHR, another 20,000 plus listed on S.170 (government agency) heritage registers and more than 40,000 local heritage items across NSW. Multiple players are responsible for the identification, protection and conservation of these places and adequate resources need to be provided beyond Heritage NSW for these players. For all areas of heritage management to be effective, timely and focused on best practice heritage outcomes, Government at all levels need to ensure that:

- Local governments are effectively resourced, trained and supported;
- State agencies with heritage assets are effectively resourced, trained and supported;
- Heritage NSW can adequately direct and support these other players in their obligations under the Heritage Act.

For example, the recent (December 2022) delegation of Heritage Act responsibilities to Sydney City Council effectively confers all applications (bar archaeological permits) under the Heritage Act from Heritage NSW to Sydney City Council.

This is a significant passing of responsibility and duties from state to local government – the Sydney City Council area contains 429 state heritage listed items, a massive 24% of items listed on the State Heritage Register that Sydney City Council is now responsible for managing. In passing state government responsibilities to local government, it would be reasonable to expect that the State will ensure Sydney City Council can adequately resource this responsibility. If not, the Objects of the Act will not be met and good heritage outcomes will not result from this passing of responsibility.

Another example is the Heritage Act's Section 170 requirement that all state government agencies develop and maintain a register of heritage assets (known as S.170 Registers) for places they own or manage. It is extraordinarily hard to estimate how many heritage assets this encompasses, as only half of NSW's government's agencies are fulfilling this legislative requirement by preparing a S.170 Register (although estimates sit at 20,000 + items) and of those that have, not all are available via Heritage NSW's online State Heritage Inventory. State government is the largest owner and manager of state heritage places – government owns 60% of all state heritage listed items in NSW, in addition to those of local significance identified in S.170 registers. There are example of responsible state government agencies that adequately resource a heritage program, such as the Department of Transport and Sydney Water, however they are rare exceptions to the rule.

The Community expects government to abide by the same rules as the community is expected to abide by, yet the under-resourcing and sidelining of government heritage programs has resulted in a situation where the largest heritage asset owner is the most woefully negligent of its responsibilities under the Heritage Act.

Heritage Council Composition

Since its implementation in 1977, the composition of the NSW Heritage Council has changed several times and is now largely comprised of political appointments with very little (to no) heritage expertise.

In order to fulfil the Objects of the Heritage Act and, more importantly, its own legislated functions, the composition of the Heritage Council needs significant review and change.

The Heritage Act specifies that the Heritage Council function is to:

- (a) to make recommendations to the Minister for or with respect to the exercise by the Minister of any functions conferred or imposed on the Minister by or under this Act or the regulations,*
- (b) to make recommendations to the Minister relating to the taking of measures for or with respect to--
 - (i) the conservation of,*
 - (ii) the exhibition or display of,*
 - (iii) the provision of access to, and*
 - (iv) the publication of information concerning,*items of the environmental heritage,*
- (c) to carry out investigations, research and inquiries relating to the matters referred to in paragraph (b),*
- (d) to arrange and co-ordinate consultations, discussions, seminars and conferences relating to the matters referred to in paragraph (b), and*
- (e) to maintain a database (to be called the State Heritage Inventory) listing items of State and local heritage significance, and*
- (f) to conduct community education concerning the State's environmental heritage, and*
- (g) to exercise such other functions as are conferred or imposed on it by or under this or any other Act or the regulations.*

It is abundantly obvious that in order to fulfil the functions noted above, the Heritage Council will require its members to be at best, be experts in heritage and at worst, have an in depth understanding of best practice heritage and its application.

At present, only one of the nine Heritage Council members has a professional heritage background. It is absurd to assume that the Heritage Council can fulfil its statutory obligations without having expertise related to heritage.

Without a requirement for a minimum number of members to have heritage backgrounds and without stipulating a balance of skills and backgrounds across the Council, we cannot expect our Heritage Council to be leaders of heritage, to make well informed decisions and recommendations, and to adequately champion issues that need focused attention.

Balance is desperately needed on the Heritage Council and changes to the Act could assist this, including increasing the total number of members and requirements for a balance of skills – below is the current Heritage Act requirements with recommended amendments noted in orange:

Heritage Act Section 8 Members of Heritage Council

- (1) The Heritage Council is to consist of 9 **12** members. Of the members, 8 **11** are to be appointed by the Minister (the "appointed members").
- (2) The other member is to be the Secretary of the Department of Planning, Industry and Environment.
- (3) Seven of the appointed members are to be persons who, in the opinion of the Minister, possess qualifications, knowledge and skills relating to any of the following areas **with at least four of seven having their primary skills and expertise related to b, c, e, f, g, I and o:**
 - (b) **NSW/Australian historical** archaeology,

- (c) heritage architecture,
- (d) the building, development and property industries,
- (e) conservation of the environmental and natural heritage,
- (f) heritage engineering,
- (g) New South Wales or Australian history,
- (h) local government heritage,
- (i) moveable heritage,
- ~~(j) natural heritage,~~
- (k) heritage planning,
- (l) property, planning or environmental law,
- (m) property economics,
- (n) rural interests,
- (o) cultural landscapes,
- (p) NSW Aboriginal heritage (mandatory for every iteration of the Heritage Council)
- (q) state agency heritage

~~(3A) One of the other appointed members is to be a person who, in the opinion of the Minister, possesses qualifications, knowledge and skills relating to Aboriginal heritage.~~

(4) One of the other appointed members is to be a person appointed from a panel of 3 persons nominated by the National Trust of Australia (New South Wales).

(5) The other appointed member is to be appointed as Chairperson by the member's instrument of appointment or a subsequent instrument executed by the Minister.

(6) One member appointed under subsection (3), (3A) or (4) is to be appointed as Deputy he member's instrument of appointment or a subsequent instrument executed by the Minister.

(7) One member appointed as a community representative for private owners of heritage places.

Enforcement Vs Incentives

The Discussion Paper proposes a tiered enforcement regime to improve compliance with the Heritage Act. This does however, seem like putting the cart before the horse.

Heritage places are finite – once gone, or once significant elements are removed, they cannot be ‘fixed’ and those values will forever be degraded. The focus, at all times, should not be on “fixing” infringements on the Heritage Act and enforcing penalties, but rather creating an environment in which they do not occur.

It is counter intuitive, and unfair on owners of heritage places, to put resources into penalising infringements when there are not adequate resources to fund the support of owners of heritage places through incentives, advice and assistance. Of course there will always be rouge owners who will not do the correct thing – and the current Heritage Act enforcement mechanisms adequately deal with this.

However, creating better heritage outcomes, and funding pathways to achieve this, should always come before resourcing the policing of the Act (or punishing a crime that cannot be fixed). If an environment existed where heritage registers were representative and robust, owners of heritage assets had more certainty in what changes they could make and access to timely and pragmatic advice along with incentives to do the right thing, enforcement resources would automatically be reduced.

Managing Change at Heritage Places

The Discussion Paper suggest a “tiered” approach to heritage listing based on the level of the item’s significance. This is the opposite of “simplifying” the system. There are currently six statutory registers in NSW (local, state, state agency, commonwealth, national and world) plus a number of non-statutory registers. Creating 5 tiers within one of these registers creates more complexity and demands more resources to even roll out such a program.

The process of listing a place on a heritage should be based on one thing only – its heritage values. This should remain distinct from its ongoing management. Following its listing, the process of caring for the place and ***managing its inevitable change while retaining its recognised values*** is a separate process.

The Heritage Act is not responsible for inconsistent, ill thought or unreliable heritage decisions – the implementation of the Act is at fault for these outcomes. Consistent and long-term devaluing of heritage and decreasing of resources has created heritage department desperately lacking direction, expertise and robust guidelines. Worse, it has created a situation where heritage asset owners cannot rely on the Heritage department to provide them with proper advice on managing their heritage place.

There is a fundamental need to invest in establishing “operational guidelines” for the implementation of the Heritage Act as it pertains to the management of listed places. There are good comparative examples of this system, such as the Operational Guidelines to the World Heritage Convention, or Historic Environment Scotland’s Managing Change Guidance Notes. The latter in particular is relevant as it contains a suite of “Managing Change” documents related to the type of place in questions. That is, listing is still only based on values, but managing the heritage place is based either on the needs of that specific type of place, be it a cultural landscape, and ecclesiastical site, an engineering structure or a garden, or on the type of change required be it fire safety modifications, interiors, roofs etc. This is a pragmatic, nuanced approach that provides well researched guidelines to assist owners and consent authorities.

Ensuring the Heritage Act protects ALL heritage places

Changes to the Environmental Planning and Assessment Act (EP&A Act) with regard to State Significant Development (SSD) and State Significant Infrastructure (SSI) has had a devastating effect on heritage places and the retention of their heritage values.

It is scandalous that SSD and SSI proposals effectively “turn off” the Heritage Act. Regardless of the whether a place is of local or state heritage significance, if the development is designated SSD or SSI it bypasses the provisions of the Heritage Act and negates the need for the Heritage Council to be alerted or consulted (and on occasions when a project’s SEARs do actually require consultation, it is in an advisory capacity only and does not have to be complied with).

Recent statistics compiled by the National Trust of Australia (NSW) illustrated how alarming this trend has become – from 2006 – 2015 there were less than 70 notifications per year for SSDs. This figure jumped to 125 in 2016, 226 in 2017 and 229 in 2018.

To put that in context, that means in a 12 month period there were 229 applications that “turned off” the Heritage Act for state heritage listed properties. This figure is more alarming when remembering that SSD are large scale, high impact projects. It seems the bigger the impact, the less accountable for it a proponent needs to be.

The NSW Heritage Act is designed to protect NSW's heritage places yet the ability to turn it off in favour of high impact development is a failure at all levels of government.

Urgent reforms are needed to ensure that heritage places are protected and appropriately as intended by the Heritage Act. Progress is inevitable and investment is needed, but to what end? The government is the custodian of these places and their ongoing value to our society yet a situation has been created in which the custodian is expecting others to comply with all manner of regulation and not making the same requirement of itself or of large development proponents.

Summary

To fulfil the Objects of the Heritage Act, we require strong leadership, comprehensive and effective legislation and appropriate funding, backed by local and state-agency initiatives.

I strongly encourage the Committee to take heed of the submissions made by the public, to ensure transparency by making them publicly available, to provide adequate opportunity for community representation to the Committee and for comment on latter stages of the Review, and to ensure that the Heritage Act review results in better outcomes for heritage places and for future custodians of these places.

Should you wish to discuss this submission, I would welcome the opportunity.

Yours sincerely,

Jane Alexander