

**Submission  
No 256**

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

**Organisation:** City of Newcastle

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Regulatory, Planning and Assessment.MBisson/SCross  
Phone: 02 4974 2000  
Reference: OT2021/02316

24 June 2021

The Director  
Standing Committee on Social Issues  
Parliament House  
Macquarie Street  
**SYDNEY NSW 2000**

Submitted by email: [Committee.SocialIssues@parliament.nsw.gov.au](mailto:Committee.SocialIssues@parliament.nsw.gov.au)

Dear Mr Sam Griffith

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

I refer to recent correspondence dated 18 May 2021, from Committee Chair the Hon Shayne Mallard MLC, inviting feedback to the NSW Legislative Council's Standing Committee on Social Issues inquiry into the *Heritage Act 1977* (NSW).

Thank you for the opportunity to be involved in the review process. Please find enclosed a copy of City of Newcastle's submission. It addresses the Terms of Reference and responds to the Discussion Paper prepared by the Standing Committee on Social Issues, dated April 2021.

Please be advised the submission can be published in full on the website, including reference to City of Newcastle as author.

City of Newcastle would like to contribute to more effective, relevant, and best-practice ways of recognising, conserving, re-using and celebrating the important heritage of NSW and commend the NSW Government and Committee for commencing with the review and providing opportunity to be involved.

Should you wish to discuss this submission further, I can be contacted directly

Yours faithfully

**Michelle Bisson**  
**MANGER REGULATORY, PLANNING AND ASSESSMENT**

## NSW Heritage Act Review

Prepared by City of Newcastle's Regulatory, Planning and Assessment Team -

June 2021

### Introduction

This is prepared by City of Newcastle (CN) Regulatory, Planning and Assessment Team, in response to an invitation dated 18 May 2021 by NSW Legislative Council's Standing Committee on Social Issues to make a submission to the inquiry on a review of the Heritage Act 1977. It addresses the Terms of Reference and responds to the Discussion Paper produced by the Standing Committee on Social Issues dated April 2021.

#### **(a) The need for legislative change to deliver a heritage system that is modern, effective and reflects best practice heritage conservation, activation, and celebration**

The objectives of the Heritage Act should be amended to include provisions to encourage sustainable development. Culture is increasingly promoted by best practice as a fourth dimension to complement the long established three pillars of social, economic, and environmental sustainability. The 2030 Agenda for Sustainable Development with its 17 Sustainable Development Goals (SDGs) was adopted by the United Nations in 2015. Many of these SDGs directly relate to heritage and culture. In November 2015, the World Heritage Convention adopted a policy to integrate a sustainable development perspective into their processes. Australia was one of 193 countries to commit to the SDGs and is a signatory of the World Heritage Convention. At a local level, CN incorporates the SDGs into its Community Strategic Plan (CSP) and Heritage Strategy. As such, with the concept now embedded into world heritage policy and principles, the Heritage Act should consider sustainable development.

Complementing the requirement to encourage sustainable development, the objectives of the Heritage Act should be amended to promote social equity, particularly with regards to protecting, knowing, supporting and promoting Aboriginal culture – their lore, beliefs and languages through connection to country. This will assist Aboriginal communities in NSW to protect, revitalise and re-engage with their culture.

Promoting social equity in the Act should also encourage heritage places to consider and support access for those with disabilities and so assist with making NSW an inclusive and accessible place for everyone. This is based on experience in assessing development applications with heritage significance and also ensuring access requirements are met.

#### **(b) The adequacy of the Act in meeting the needs of customers and the community and the protection of heritage**

Overall, the Heritage Act is generally considered adequate with no substantial changes needed, however the provision of sufficient resources for State Government to effectively implement the Act to meet the needs and expectations of customers, the community, and the protection of heritage is needed. Effective implementation of the Act will also assist CN in its obligations to implement our CSP and Heritage Strategy. This is most apparent with regards to ensuring the necessary heritage compliance and enforcement, and the provision of sufficient financial and other incentives for owners of heritage items. Sufficient State government resourcing is required to ensure costs are not shifted to Local Government. Instead, additional resources for heritage compliance and enforcement could be funded directly from changes to the Act to allow unlimited fines for breaches of the Act. Refer to (d)(iii) below for further details.

**(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**

The existing Aboriginal cultural heritage provisions of the National Parks and Wildlife Act 1974 should be relocated in their entirety to the Heritage Act. This will provide clarity, remove duplication, and streamline the heritage assessment process, and enable a more comprehensive and cohesive knowledge, protection, support, and promotion of all of NSW's cultural heritage. By integrating Aboriginal cultural heritage into the Heritage Act, it could also assist with the need to broaden the remit and core focus of the Act to more than the tangible of building fabric and artefacts to consider more strongly the wider but equally important intangible values of landscape, spiritual and social.

The environmental sustainability requirements imposed on the NSW building sector to meet increased community expectations and the needs of the Building Code of Australia and certification processes such as BASIX and Green Star are growing exponentially. The implications of this and their effective intersect with the Heritage Act should be investigated. 'Embodied' carbon footprint of the building sector is carbon production associated with the manufacture, transport, and installation of construction materials. The greenest building is the one already built. Encouraging greater consideration of the embodied carbon footprint of the building sector to curtail climate change will by default result in more heritage buildings and places being retained and adaptively reused.

Additionally, the effective intersect between the heritage incentive provisions of the Heritage Act and the standard Local Environmental Plan (LEP) Conservation Incentives Clause 5.10(10) of the Environmental Planning and Assessment (EP&A) Act 1979 should be explored further to encourage the activation and adaptive reuse of heritage buildings and places.

**(d) The issues raised and focus questions posed in the Government's Discussion Paper, in particular:**

**(i) a category approach to heritage listing to allow for more nuanced and targeted recognition and protection of the diversity of State significant heritage items**

Agree, heritage listings on the State Heritage Register (SHR) could be more nuanced to encourage sensitive change to heritage items which are buildings or landscapes. The gradings suggested for heritage building and landscape items in the Discussion Paper appears sensible and reflects to some extent the gradings for heritage listed buildings in England. These gradings should also be tailored to help readily indicate the extent to which the building or landscape is in its original condition and therefore the extent to which change can occur without adversely affecting its heritage significance. It is notable that the listing protection in England for heritage listed buildings equally applies to the internal as well as external fabric of the building. The Heritage Act could be amended so that it is also the case in NSW for built heritage items. This would provide greater clarity as to when and what internal building fabric needs to be conserved and discourage its loss and inappropriate change. This explicit protection of internal building fabric by the Act should also assist in discouraging facadism.

It is noted that the suggested categories for NSW heritage listings in the Discussion Paper fails to consider archaeological sites. As there are some distinct and unique management needs and heritage conservation approaches to consider with archaeological sites, it is recommended that there should be an additional heritage listing category which could be similar in scope and character to Category 2 (State significant heritage landscapes).

Furthermore, the intersect between the Heritage Act and the EP&A Act and how these new listing categories are incorporated by State government into Schedule 5 and the heritage mapping layers of the LEP needs to be considered.

**(ii) consideration of new supports to incentivise heritage ownership, conservation, adaptive reuse, activation, and investment**

Agree, a heritage listing can be seen as a burden, with limited financial incentives and other support to encourage private investment in adaptive reuse and conservation efforts. The benefits or significant incentives to owning or managing a heritage item in NSW is difficult to understand and appreciate, and many heritage buildings lie vacant and derelict because of the high costs in conserving them. This issue also applies to local listings and conservation areas. The current State heritage grants program is only open to applications every two years, which is inadequate and unresponsive to the considerable needs of heritage owners in NSW. The significant range and scope of assistance and incentives suggested by the Discussion Paper such as the Heritage Enterprise Grants and the Endangered Houses Fund appear sensible and should be investigated further and engaged on more broadly with relevant stakeholders and groups. Heritage incentive programs in NSW need to be more generous and targeted to achieve the desired State heritage outcomes.

**(iii) improvements to heritage compliance and enforcement provisions**

There are insufficient resources provided to State Government to enforce the Heritage Act, and insufficient penalties to ensure compliance and discourage unauthorised works.

As such, it is recommended the Heritage Act should be amended to penalise offenders more strictly when works have been carried out which require heritage consent or breach conditions on a heritage consent (such as demolition of a heritage item or knowingly destroying an archaeological or Aboriginal site). The offence would apply to those who carried out the works and by anyone who caused them to be carried out. In determining a fine the Court should have regard to any financial benefit which has accrued or appears likely to accrue to the wrongdoer so as to deny any benefits. In such cases, it is a defence to proceedings to show that works to the building were urgently necessary in the interests of health and safety or for the preservation of the building, they were the minimum necessary and temporary works or repairs, support or shelter were not practicable.

It is acknowledged a prosecution may be ineffective in restoring a heritage building or place to its previous state, but it may deter future harm and ensure those who comply with the law are not disadvantaged. It is imperative that State government be adequately resourced to ensure the laws are enforced. Experience suggests that Heritage NSW could be better resourced to effectively enforce the provisions of the Heritage Act. Any cost-shifting to local government is unacceptable. However, with the Heritage Act amended to include penalties of unlimited fines, the receipts from these prosecutions could provide the opportunity for State government to self-support more work to enforce the law and deter future heritage offences.

### **(iv) streamlining heritage processes**

Agree, a new streamlined process should be introduced to allow existing SHR listings to be more readily updated to better reflect any changes that have occurred to the heritage significance of items. Not only would this new process allow consideration of any recent changes to the building fabric and use of an item but also account for any changes to the social value of an item. Social value is a criterion of heritage significance particularly prone to changes over time as to continue to meet this criterion, the heritage item needs to continue to have a strong association with a community that exists today. Furthermore, many of the older SHR listings often neglect to include due consideration of their value within the context of Aboriginal culture and heritage. A new streamlined process to update existing SHR listings will therefore allow these glaring omissions to be readily corrected. However, it is imperative that such a new streamlined SHR listing update process carried out by State government be supported by sufficient resourcing as a more effective and responsive heritage listing process is likely to be more resource intensive.

The recent introduction of the self-assessment process for owners of SHR items exempting certain activities and works from heritage approval is welcomed as it has streamlined the minor works and maintenance approval process for owners. However, this new process must be supported by adequate State government resourcing. The new process needs to be backed-up with significant compliance and enforcement action from State government to identify and discourage those owners who are, intentionally or unintentionally, damaging NSW's heritage items.

A significant strategic planning housekeeping issue for local government is that there is no process currently in place which enables Schedule 5 and related heritage mapping layer in the LEP to be amended when a heritage item has been listed on the SHR. Currently the onus is on local government to separately apply to the NSW Department for Planning, Industry and Environment (DPIE) via the planning proposal process to update the heritage schedule and ensure consistency with the listings in the SHR. This is an inefficient process and an unreasonable administrative burden for local government. Instead, to ensure the SHR is consistent with the various heritage listings in the LEP, the Heritage Act should be amended to enable the applicable LEP to be automatically updated by the State government as part of the NSW Government Gazettal process to list the heritage item on the SHR.

### **(e) Any other related matter**

Overall, the Heritage Act should be amended to sufficiently penalise those who knowingly harm NSW's cultural heritage and provide a streamlined regulatory process and sufficient financial and other incentives to support those who are the owners and custodians of NSW's heritage. Again, it should be reemphasised that the fundamental issue is not the effectiveness

of the Heritage Act itself but the adequate resourcing of State Government to effectively implement the Act, and any related cost shifting implications for local government.

**Michelle Bisson**  
**MANAGER REGULATORY, PLANNING AND ASSESSMENT**