

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Herbert Smith Freehills

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Submission on the review of *Heritage Act 1977 (NSW)*

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NSW Legislative Council Standing Committee on Social Issues

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Executive summary

Herbert Smith Freehills welcomes the opportunity to make a submission in response to the Review of NSW Heritage Legislation Discussion Paper (**Discussion Paper**) and Review of the *Heritage Act 1977* Terms of Reference.

About the authors

Herbert Smith Freehills is a leading commercial law firm with offices located in Brisbane, Sydney, Melbourne and Perth. We advise the majority of Australia's top 100 listed companies along with government organisations, major multinationals and large local corporations, who have trusted us to deliver on some of their most ambitious and complex projects.

Our Environment, Planning and Communities team collaborates with our property, projects and corporate experts to help government and major corporate clients deliver their most significant energy and resources, infrastructure and urban development projects in Australia.

Peter Briggs is a Partner in Sydney and heads the Australia Environment, Planning and Communities team. Peter advises clients on all aspects of environment and planning law, including heritage, pollution, biodiversity issues, incident response, crisis management, regulatory investigations and defence of environmental prosecutions. He conducts specialist litigation including environment and planning, real estate, compulsory acquisition and valuation disputes.

Rebecca Davie is a Senior Associate in Sydney specialising in environment and planning law. Rebecca has 15 years' experience acting on State-significant major projects including those with local, State and World heritage issues. She has advised on large transactions with material environment and planning issues and significant environment and planning litigation. She has extensive, experience in all aspects of environment and planning law, including approvals processes, strategic planning advice, Court appeals and enforcement actions. In addition to her legal qualifications, Rebecca has a Bachelor of Science and a Master of Project Management. She uses the learnings from these disciplines to make complex technical and legal advice simple and practical for clients.

With thanks to Brigitte Rheinberger (solicitor), Zhongwei Wang (solicitor) and Ganur Maynard (solicitor).

Summary of recommendations

- 1 The Heritage Act does not require wholesale repeal or revisiting. We suggest that the Committee should undertake a benchmarking exercise with the aim of developing a cohesive, national approach to heritage protection having regard to contemporary practice in other jurisdictions.
- 2 The Heritage Act should be amended to reform heritage listing requirements for items with State significant Aboriginal values to support self-determination and custodianship in the protection of Aboriginal cultural heritage.
- 3 The Heritage Act review should be undertaken simultaneously with the development of standalone Aboriginal cultural heritage legislation.
- 4 We recommend that the Committee should:
 - consider the listing of cultural landscapes with State significance;
 - undertake a benchmarking exercise against other jurisdictions and best practice approach to cultural landscape protection; and
 - develop guidelines which will enable the effective protection of cultural landscapes.
- 5 The Committee should give further consideration to amending the Heritage Act to facilitate a community-driven nomination process, which would:
 - involve a clear and concise explanation of the relationship between the Register and other modes of heritage protection in NSW, along with simple directions to assist the community with alternative or concurrent heritage protection applications;
 - be coordinated with local councils, State and federal Aboriginal heritage authorities and community organisations (including Aboriginal representative bodies);
 - consider the interaction between State heritage listing and the protection of Aboriginal cultural heritage under the Government's proposed standalone Aboriginal heritage legislation;

- facilitate access to the process to regional and remote NSW communities; and
 - be conducted in a manner that responds to the needs of different communities in NSW.
- 6 One- or two-page factsheets should be developed to explain the basics of heritage protection, in terms understandable by the general public.
- 7 It would be consistent with the approach in some other Australian jurisdictions for the Heritage Act to be amended to introduce provisions that set out a process allowing a heritage listing to be amended. Any such process:
- should require the Heritage Council to consult with the owners and occupiers of the heritage item before making a substantive amendment; and
 - should not involve a compulsory public submissions process, although the Heritage Council could be given a discretion to invite public submissions.
- 8 It would be consistent with the approach in other Australian jurisdictions for the Heritage Act to be amended to enable the Heritage Council to make non-substantive changes to the Register without needing to consult the community or the heritage property owner. The Standing Committee should consider the merits of requiring the Heritage Council to notify the owner of a heritage item of a decision to make a non-substantive amendment.
- 9 The general provisions on removing a heritage item in s 38 of the Heritage Act should be retained in their current form.
- 10 It would be consistent with the approach in some other Australian jurisdictions for the Heritage Act to be amended to allow the Heritage Council to remove an item from the Register if it has been destroyed, subject to consultation with the owner of the item.
- 11 It would be consistent with other environment and planning legislation for the Heritage Act to be amended to provide for intermediate enforcement mechanisms, such as:
- penalty notices;
 - audits; and
 - enforcement undertakings.
- 12 It would be consistent with other environment and planning legislation for the Heritage Act to be amended to provide the Heritage Council with investigative powers broadly equivalent to those available under other environmental legislation, such as the EP&A Act and POEO Act.
- 13 In deciding whether to implement a categorised listing system, we suggest the Committee considers:
- the use and effectiveness of categorised listing systems in other jurisdictions;
 - the distinction between having different listing categories and having item-specific management requirements; and
 - the risk that a categorised listing system will diminish the protection of listed items.

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Introduction

Although the *Heritage Act 1977* (NSW) (**Heritage Act**) has not been subject to review for nearly 20 years, its objectives and purpose remain relevant, and its mechanisms and processes are, for the most part, suitable for achieving those objectives.

The purpose of the review, as stated in the Minister's foreword to the Discussion Paper, is to assess the effectiveness of the Heritage Act and to consider "what sort of regulatory model would facilitate the preservation, activation, and celebration of our State's heritage?"

While there are parts of the Heritage Act which may benefit from review, we consider that wholesale repeal or revisiting of the Act is not necessary. Rather, we would encourage the NSW Legislation Council Standing Committee on Social Issues (**Committee**) to consider the Heritage Act in the broader context of all legislation, mechanisms and stakeholders which interact with heritage in New South Wales (**NSW**). This includes a consideration of how heritage protection is funded and resourced, in light of the finding in the *State of Environment: Heritage* Report that "public-sector resourcing at all levels [of government] does not reflect the value of heritage to the Australian community".¹

The relatively narrow Terms of Reference for the review also bypass an opportunity for benchmarking the approach to heritage in NSW against other jurisdictions (both within Australia and overseas), with the aim of developing a cohesive, national approach to heritage protection. This would facilitate greater consistency and certainty in relation to the regulation of heritage.

We appreciate that the breadth of such an exercise would be significant and a comprehensive attempt is beyond the scope of our submission. Nonetheless, by way of example, we have considered the Heritage Act against legislation in other jurisdictions and legal contexts in relation to landscape protection, compliance and enforcement and streamlining listing processes.

Recommendation 1

The Heritage Act does not require wholesale repeal or revisiting. We suggest that the Committee should undertake a benchmarking exercise with the aim of developing a cohesive, national approach to heritage protection having regard to contemporary practice in other jurisdictions.

¹ Mackay R (2016). *Heritage: Australia state of the environment 2016*, Australian Government Department of the Environment and Energy, vii.

Aboriginal cultural heritage

Focus question 1: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act?

Background

Consultation with Aboriginal stakeholders is currently underway to develop standalone Aboriginal cultural heritage legislation that prioritises self-determination and custodianship in the protection of Aboriginal cultural heritage. We support the development of this legislation, but the development and existence of standalone Aboriginal cultural heritage legislation should not diminish the protection of Aboriginal cultural heritage listed or eligible for listing on the State Heritage Register (**Register**), nor should the principles of free and prior informed consent be confined to standalone legislation when they are clearly also applicable to Aboriginal cultural heritage under the Heritage Act.

The *Final Report of the Independent Assessment of Cultural Landscape(s) extending from the Great Divide to Eden* (May 2021) (**Bundian Way Report**) prepared for Heritage NSW emphasised the issues caused by inadequate consultation with Aboriginal communities when listing a place on the Register. Similarly, the *Final Report of the Independent Review of the EPBC Act* (October 2020) recommended best-practice engagement with Aboriginal and Torres Strait Islander communities to embed Indigenous knowledge and views in the regulatory process (including reforms to ensure self-determination in decision making).

Submissions

We support the prioritisation of self-determination and custodianship in the protection of Aboriginal cultural heritage, and recommend that this approach should be extended to items or landscapes that are listed on the Register and are of significance to an Aboriginal group or Aboriginal and Torres Strait Islander peoples generally.

In order to ensure that items or landscapes that are listed on the Register and are of significance to Aboriginal peoples are approached in this way and not treated differently to items and landscapes that are protected under future standalone Aboriginal cultural heritage legislation, we recommend that any amendment to the Heritage Act should ensure self-determination and custodianship in relation to these items or landscapes and that the development of Aboriginal cultural heritage legislation be undertaken simultaneously with the review of the Heritage Act.

We adopt and support the recommendation in the Bundian Way Report that the Heritage Council, in collaboration with the Aboriginal Cultural Heritage Advisory Committee, should review and reform the heritage listing requirements for items with State significant Aboriginal values.

Recommendation 2

The Heritage Act should be amended to reform heritage listing requirements for items with State significant Aboriginal values to support self-determination and custodianship in the protection of Aboriginal cultural heritage.

Recommendation 3

The Heritage Act review should be undertaken simultaneously with the development of standalone Aboriginal cultural heritage legislation.

Landscape heritage protection

Focus question 4: Does the Heritage Act adequately reflect the expectations of the contemporary NSW community?

Background

As experts have recognised since the 1970s, communities expect that heritage protection upholds the broader character of our landscapes, not just discrete items or sites within a locality. Merely protecting the façade of a historic building, or one part of a larger terrain, while allowing the rest of the landscape to be altered beyond recognition, can render the remaining items or sites absurd and irrelevant, especially when the significance of the area is derived from the community's relationship with that space generally. The Heritage Act should facilitate and encourage the protection not just of singular and atomised sites, but of environs and terrains generally and contextually. These environs and terrains might be, for example, a street, a town, a defined agricultural area or a place of Aboriginal cultural significance.

We support the use of the Heritage Act to protect cultural landscapes in NSW. The term 'cultural landscape' refers to the "physical areas with natural features modified by human activity resulting in patterns of evidence layered in the landscape".² In line with the guidance of the ICOMOS International Scientific Committee on Cultural Landscapes and Routes, there are three major categories of cultural landscapes:

- 1 **Designed landscapes** (intentionally created landscapes such as gardens, parks, garden suburbs, city landscapes, ornamental lakes, water storages or campuses).
- 2 **Organically evolved landscapes** (landscapes that display a system of evolved land use in their form and features, such as farms, vineyards, plantations or mines).
- 3 **Associative landscapes** (landscapes or landscape features that represent religious, artistic, sacred or other cultural associations to individuals or communities).

The concept of landscape protection is more likely to result in effective protection and celebration of heritage that is significant to NSW communities than a piecemeal approach that results from focusing merely on individual places or items within a landscape.

Although cultural landscapes can be listed on the Register in theory, we note that cultural landscapes have not been well protected under the current and previous approaches to heritage protection in NSW. To ensure heritage protection in NSW adequately reflects the expectations of the contemporary community, the Committee should review and consider cultural landscape protection in other jurisdictions, including internationally. In our submission below, we provide some recommendations based on the Victorian approach to cultural landscape protection, by way of example.

Submissions

The approach to cultural landscape protection adopted in Victoria provides a model that could be applied in NSW. The Heritage Council of Victoria's *Landscapes of Cultural Heritage Significance Assessment Guidelines* (February 2015) (**Victorian Cultural Landscape Guidelines**) provide a framework to assist the Victorian community in participating in heritage nomination, and the Victorian Heritage Council in its assessment of cultural landscapes for listing and protection under the *Heritage Act 2017* (Vic). The Victorian Cultural Landscape Guidelines supplement the *Victorian Heritage Register Criteria & Threshold Guidelines: Assessing the Cultural Heritage Significance of Places and Objects for Possible State Heritage Listing* (6 December 2012; reviewed and updated 3 December 2020).

The Victorian Cultural Heritage Guidelines suggest a two-stage approach to listing and protecting landscapes, as outlined below:

- 1 Understand the cultural heritage values of the landscape. This involves:
 - defining the objective of assessing a cultural landscape, including, if relevant, to inform the strategic planning of a council;
 - identifying a preliminary list of key stakeholders, which may include Aboriginal Traditional Owners, Registered Aboriginal Parties and other Aboriginal community groups, landowners, lessees or land

² J Lennon, 'Cultural Landscape Management Practice: Some Australian Case Studies' in K Taylor et al (eds), *Conserving Cultural Landscapes: Challenges and Directions* (Routledge 2015) at 219.

managers, local historical societies, other residents, State and Commonwealth government agencies and authorities and other public authorities and infrastructure owners;

- collating information and preparing a description of the area's physical characteristics;
- reviewing thematic maps in relation to the area;
- conducting a desktop survey using local planning schemes' overlays;
- identifying the major phases of human interaction with the area;
- correlating the physical evidence of heritage significance with documentation; and
- liaising with the communities interested in the area.

2 Assess the cultural heritage values of the landscape. This involves:

- defining what is important, and to whom, by setting out the cultural heritage values represented in the landscape, who holds these values and how important they are to the groups involved;
- considering the boundary of the cultural landscape by reference to how the landscape is experienced and understood, the broader context and surroundings of significant features, the origins of significant features and other factors;
- comparing the landscape with other places that possess similar features or values, in order to identify the type and level of significance of the cultural landscape;
- preparing a statement of significance that describes how and why the landscape is of cultural heritage significance and at what level; and
- identifying appropriate recognition and protection mechanisms.

The promulgation of similar guidelines in NSW would help the community and the Heritage Council identify and protect cultural landscapes of heritage significance. This in turn would help to protect places and items, by protecting the heritage fabric in which they exist.

Guidelines similar to those in Victoria could be developed by adapting the NSW Government Department for Environment, Climate Change & Water's, *Cultural Landscapes: A Practical Guide for Park Management* (October 2010), which was designed to assist the department and park managers with the management of cultural landscapes under the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**).

The more holistic protection of cultural landscapes that is reflected in the Victorian Cultural Heritage Guidelines is likely to more adequately reflect the expectations of the contemporary NSW community. The emphasis of the two-stage approach on stakeholder identification and community consultation would also support greater community engagement (which is likely to deliver a more robust Register) (cf Focus Question 10) and enhance understanding of heritage and the consideration of heritage at the strategic level (cf Focus Questions 15 and 17).

Recommendation 4

We recommend that the Committee should:

- consider the listing of cultural landscapes with State significance;
 - undertake a benchmarking exercise against other jurisdictions and best practice approach to cultural landscape protection; and
 - develop guidelines which will enable the effective protection of cultural landscapes.
-

Community engagement

Focus question 10: Would greater community engagement deliver a more robust State Heritage Register?

Background

The key issue with community engagement under current processes is that the community is only engaged in heritage protection reactively, that is, when proposed development brings the matter to public attention. Greater community engagement in listing and management at an early stage would deliver a more robust Register and better, community-driven outcomes. This is consistent with the move towards requirements for greater community engagement very early in the development application process for major development, i.e. at project conception stage.

In NSW, like in all other Australian jurisdictions, items or places of potential State heritage significance can be nominated by anyone. Members of the public are instructed to confirm the eligibility of the item or place (including by considering whether the item or place would be more appropriately protected under a Local Environmental Plan or as an Aboriginal Place), to undertake research and complete the State Heritage Register nomination form, and then to submit the nomination form to Heritage NSW. The current *Guidelines for Nominations to the State Heritage Register* are designed to assist the public in these tasks. At 21 pages in length, the *Guidelines* are thorough and instructive. They are supplemented by a suite of publications and resources available on the Heritage NSW website, which build a detailed and very lengthy guide to assessing heritage significance.

The complexity of the current system may discourage members of the public who do not have the time or resources to commit to searching for, reviewing and referring to material to complete the nomination form. This may be exacerbated by recommendations in the guidance material to engage historians and other experts to support an application, which incurs expenses that many cannot afford. The consequence is that items and places that may be of a State level of heritage significance are not identified or effectively nominated by the community, and applications that would otherwise proceed to the full assessment stage are never made or falter at the Heritage Register Committee's first review.

We generally support the Government's reform proposal to introduce a community-driven nomination process. We make some general submissions in relation to this proposal below. We note that not all of our submissions require amendment to the Heritage Act.

Submissions

Development of simple heritage criteria

In order to engage the community in heritage protection, simple heritage criteria and explanations should be developed to supplement the lengthy guidelines on heritage protection.

Interaction with other heritage protection laws

A community-driven nomination process provides an opportunity to engage the community about the protection of heritage under other laws that operate in NSW.

The interaction of State heritage protection under the Heritage Act with heritage protection measures in other statutes is complex. The Heritage Act intersects with protection measures under the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**) (by reference to Environmental Planning Instruments), the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and Aboriginal cultural heritage protection measures under the NPW Act, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and the *Native Title Act 1993* (Cth).

Equity of community consultation

A community-driven nomination process provides an opportunity to engage parts of our community who might otherwise not have the opportunity to participate in heritage protection decisions.

An issue of particular concern in the current NSW heritage protection system is the trend that heritage is more likely to be protected if it is significant to well-resourced or well-informed sectors of our community. To

overcome or mitigate this trend, a community-driven nomination process must be sensitive to the differences between different sectors of NSW's community.

Recommendation 5

The Committee should give further consideration to amending the Heritage Act to facilitate a community-driven nomination process, which would:

- involve a clear and concise explanation of the relationship between the Register and other modes of heritage protection in NSW, along with simple directions to assist the community with alternative or concurrent heritage protection applications;
- be coordinated with local councils, State and federal Aboriginal heritage authorities and community organisations (including Aboriginal representative bodies);
- consider the interaction between State heritage listing and the protection of Aboriginal cultural heritage under the Government's proposed standalone Aboriginal heritage legislation;
- facilitate access to the process to regional and remote NSW communities; and
- be conducted in a manner that responds to the needs of different communities in NSW.

Recommendation 6

One- or two-page factsheets should be developed to explain the basics of heritage protection, in terms understandable by the general public.

Streamlining the listing process

Focus question 11: Would streamlining enhance the listing process?

Background

The Discussion Paper observes that the Heritage Act delivers a static, point-in-time Register listing that may no longer fully reflect the actual significance of each site as time passes. Further, it notes that updating a listing requires the full listing process to be revisited. The Discussion Paper expresses a concern that heritage significance that becomes apparent over time could be left vulnerable to inappropriate change until the listing is updated.

The Discussion Paper proposes to introduce a streamlined process for updating heritage listings.

Submissions

Current provisions of the Heritage Act

The Heritage Act sets out a lengthy process for adding a listing to the Register. In summary, it entails the following steps:

- 1 The Heritage Council is to give a notice of intention to consider listing an item to affected owners and occupiers: s 33(1)(a).
- 2 The Heritage Council is to publish the notice of intention to consider listing and invite submissions for a period of at least 14 days: ss 33(1)(b)–(c).
- 3 The Heritage Council is to consider the submissions: s 33(1)(d).
- 4 The Heritage Council is to decide whether to recommend the listing within 30 days of the close of submissions: s 33(1)(d).
- 5 The Heritage Council is to give notice of its decision to affected owners and occupiers, the local council and persons whose submissions were considered: s 33(1)(e).
- 6 If the Heritage Council recommends listing, it must make that recommendation to the Minister within 14 days: s 33(1)(f).
- 7 Within 14 days, the Minister is to decide whether to direct that the item be listed, or request the Independent Planning Commission (**IPC**) to review the matter: s 34(1)(b).

If the Minister requests the IPC to review the matter, then:

- the IPC is to provide a report to the Minister within 3 months: s 34(1A), *Heritage Regulation 2012* (NSW) reg 21; and
- the Minister is to decide whether to direct that the item be listed within 14 days of receiving the IPC's report: s 34(2);

- 8 The Heritage Council updates the Register at the Minister's direction: s 31.

The Heritage Act does not set out a process for amending a listing on the Register. Therefore, as the Discussion Paper highlights, an entry on the Register can only be amended by going through the same process as making a new listing.

Likewise, the procedure for removing a listing from the Register is the same as the procedure for adding a listing on the Register: s 38(3).

Overview of the provisions in other Australian jurisdictions

The following table compares the Heritage Act with the heritage protection legislation other Australian states and territories in terms of whether they have:

- provisions for making substantive amendments to a heritage listing, which are separate from the provisions for making a new listing;
- special provisions to expedite the making of non-substantive amendments to a heritage listing;
- provisions for removing a heritage listing, which are separate from the provisions for making a new listing; and
- special provisions to expedite the removal of a heritage listing for an item that has been destroyed.

Provisions	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
Provisions for amending an entry separate from listing?	No	No: s 62.	<p>Yes — The chief executive may amend the register with the owner and the Heritage Council's written agreement:</p> <ul style="list-style-type: none"> to correct, update or otherwise vary the information that identifies the boundaries of the place: ss 34(1)(b); or otherwise to correct an error or update information: s 34(1)(c). 	<p>Yes — The Heritage Council is to amend land description in an entry in the register (s 46) after:</p> <ul style="list-style-type: none"> receiving a request from the owner: s 43(1); consulting with the owner: s 44(1)(b); making a recommendation to the Minister: s 44(2); and receiving a direction from the Minister: s 45. <p>The Heritage Council may amend a statement of cultural heritage significance (s 53(3)) if:</p> <ul style="list-style-type: none"> each owner has been notified; and no owner has objected, or the Heritage Council has undertaken public consultation and the Minister has directed making the proposed amendment. 	No	<p>Yes by the Heritage Council (s 94(1)):</p> <ul style="list-style-type: none"> to update the entry; to correct an error in or relating to the entry; to give effect to any decision of the Appeal Tribunal to reflect physical events or legal or planning changes relating to the entry; to accommodate changes in the form of the Heritage Register; or for any other reasonable cause. <p>On amending the entry, the Heritage Council is to notify each owner: s 94(2)(a).</p>	No	<p>Yes by the Heritage Council if satisfied that the change is in the interests of maintaining up-to-date, comprehensive and accurate information in the register: s 24(2)(b).</p> <p>However, changing the name, description and statement of heritage significance requires a further heritage decision in accordance with the listing process: s 24(2)(a).</p>
Provisions for expedited amendment for non-substantive changes?	No	Yes by the Heritage Council on Executive Director's recommendation for technical or other minor error (s 63(1)(a)) after giving notice to the owner (s 63(2)).	<p>Yes — The chief executive may amend the register without the owner or the Heritage Council's written agreement:</p> <ul style="list-style-type: none"> to add an informative note: s 34(1)(a); to correct, update or otherwise vary the information that identifies the location of the place, or the boundaries to the extent it is minor change: s 34(1)(b); or to change the statement in the register as to cultural heritage 	<p>Yes — The Heritage Council may update a statement of cultural heritage significance without prior notice to or consultation with the owners if this is to:</p> <ul style="list-style-type: none"> correct or update a name, title, designation or other description: s 53(2)(a); correct a clerical error or an error because of an accidental omission: s 53(2)(b); correct information that is factually erroneous: s 53(2)(c); or make any other change that are not materially relevant: s 53(2)(d). 	<p>Yes by the Heritage Council to correct any inaccuracies or errors: s 21(1).</p> <p>Written notice must be given to any person who has a direct interest in the matter: s 21(2), unless the correction is only of minor significance: s 21(3).</p>	<p>Yes — Same process as above, except the owners need not be notified if the amendment is of a minor clerical or purely technical kind, not affecting the substantive entries in the Heritage Register in a material way: s 94(3).</p>	No	<p>Yes — Heritage Council may correct a mistake or omission in the heritage register: s 24(1).</p>

Provisions	NSW	Vic	Qld	WA	SA	Tas	NT	ACT
			<p>significance, otherwise to correct an error or update information, to the extent that it is a minor change: s 34(2)(b),</p> <p>where a minor change is a "change that is only to correct a minor error or make another change that is not a change of substance": s 34(3).</p>					
Provisions for removing an entry separate from listing?	No: s 38(3)	No: s 62.	No: Pt 4 generally.	<p>Yes — by the Heritage Council (s 51(1)) after:</p> <ul style="list-style-type: none"> receiving a request from an owner: s 48(1); consulting the public and each owner: ss 49(1)(b), (3)(b); making a recommendation to the Minister: ss 49(4), (5); and receiving a direction from the Minister: s 50(1); and approved by a resolution of each House of Parliament: s 50(5). 	<p>Yes by the Heritage Council for the purpose of excluding a part of a place from a listing (s 23(3)) after:</p> <ul style="list-style-type: none"> notifying the owner and local council (ss 23(1)(a), (c)) and advertising in a State-wide newspaper (s 23(1)(b)); and considering representations (s 23(2)). 	<p>Yes by the Heritage Council if the place has been destroyed or no longer meets the registration criteria, the entry duplicates another entry, or the removal is required by law: ss 22(1), (1A).</p> <p>The Heritage Council may invite written submissions from persons with special knowledge of the place or special interest with Tasmania's heritage (s 22(3)) and may remove the entry (s 25) after:</p> <ul style="list-style-type: none"> considering any such submissions: s 22(4); giving notice to the owner and publish a local public notice: s 22(5); considering any objections and submissions from the public: s 25. 	<p>Yes by the Minister (s 62) after:</p> <ul style="list-style-type: none"> the Minister or owner has asked the Heritage Council to assess whether to revoke the listing, or the Council has decided to assess this on its own initiative (ss 56–57); the Heritage Council has: <ul style="list-style-type: none"> notified the Minister: s 58; conducted public consultation: s 59; and made a recommendation to the Minister: s 61. <p>The Minister must give written notice of the decision to each person interested in the place or object and each person who made a submission: ss 65–6.</p>	<p>Yes by the Heritage Council (s 49(1)) after:</p> <ul style="list-style-type: none"> the Council or a person has proposed to deregister an item: s 43(1); the Council has given notice of the proposal to the public and each interested person: s 44; the Council has conducted consultation: ss 45–6; the Council has made a report to the Minister: s 47.
Provisions for expedited removal of destroyed item?	No	Yes by the Heritage Council on Executive Director's recommendation (s 63(1)(b)) after giving notice to the owner (s 63(2)).	Yes by the Heritage Council (s 56A) at the chief executive's recommendation after consultation with the owner (s 46A).	No	No		No	No

Process for making substantive amendments to a listing

As noted above, the Heritage Act does not set out a process for amending a listing on the Register. The effect of this is that a listing can only be amended by going through the same process as making a new listing.

The Discussion Paper proposes a more flexible and streamlined process for amending a listing. We support this proposal, as it will allow the Register to be updated in a more timely manner and assist heritage item owners and occupiers, developers and the public to access the most up-to-date information.

Before making any substantive amendment to a listing on the Register, it is important for the Heritage Council to consult with the owners and occupiers of an item, as they are the most directly affected by the change. While public consultation might be appropriate in some cases, it will not always be necessary, particular if the proposed changes are relatively minor. We recommend that public consultation should not be held unless the Heritage Council forms the view that public consultation is warranted in the circumstances.

Recommendation 7

It would be consistent with the approach in some other Australian jurisdictions for the Heritage Act to be amended to introduce provisions that set out a process allowing a heritage listing to be amended. Any such process:

- should require the Heritage Council to consult with the owners and occupiers of the heritage item before making a substantive amendment; and
- should not involve a compulsory public submissions process, although the Heritage Council could be given a discretion to invite public submissions.

Process for making non-substantive amendments to a listing

NSW is the only jurisdiction apart from the Northern Territory not to have a provision that provides an expedited mechanism to make minor amendments to its heritage register for matters such as errors, misdescriptions and other non-substantive issues. In each other jurisdiction, the relevant heritage council may simply make a non-substantive amendment to the heritage register without consulting the community or the heritage property.

We submit that there are obvious advantages to allowing the Heritage Council to amend the Register to correct non-substantive errors without having to go through any consultation process. In particular, this will help keep the Register accurate while minimising undue delays and costs.

In the other jurisdictions, there is generally no requirement for the Heritage Council to notify the owner or occupier of a heritage item of a decision to make a non-substantive amendment. However, we submit that the Standing Committee should at least consider the merits of requiring the owner or occupier to be notified, even if this is after the amendment has been made. This will put the owner or occupier in a position to take action in the event that power has been improperly exercised (for example, to make a change that is substantive), which can help ensure that the power is properly exercised.

Recommendation 8

It would be consistent with the approach in other Australian jurisdictions for the Heritage Act to be amended to enable the Heritage Council to make non-substantive changes to the Register without needing to consult the community or the heritage property owner. The Standing Committee should consider the merits of requiring the Heritage Council to notify the owner of a heritage item of a decision to make a non-substantive amendment.

General process for removing a listing for an item

In NSW, the process for removing a listing from the Register is the same as the process for adding a listing: s 38(3). This is also the position in Victoria and Queensland. In the jurisdictions that have separate provisions for removing an item from the heritage register, the process for removing an item is an extensive process that involves public submissions and is broadly similar to the process for listing an item.

The process mechanism in NSW for removing an item from the Register is therefore in line with those in all other Australian jurisdictions. We submit that the current provisions in s 38(3) are appropriate and there is no reason to depart from them.

Recommendation 9

The general provisions on removing a heritage item in s 38 of the Heritage Act should be retained in their current form.

Process for removing a listing for an item that has been destroyed

Each of the two other jurisdictions that do not separate processes for listing and removing an entry from the heritage register (being Victoria and Queensland) has a provision that allows the heritage council to remove a heritage item from the heritage register if it has been destroyed, after giving notice or consulting with the owner of the heritage item.

We submit that there are obvious advantages to allowing the Heritage Council to remove an item from the Register if it has been destroyed, subject to consultation with the owner of the item. This will ensure that places that no longer have any heritage value are not burdened by constraints that no longer serve any purpose.

Recommendation 10

It would be consistent with the approach in some other Australian jurisdictions for the Heritage Act to be amended to allow the Heritage Council to remove an item from the Register if it has been destroyed, subject to consultation with the owner of the item.

Compliance and enforcement

Focus question 16: How could heritage compliance and enforcement be improved?

Background

The Discussion Paper observes that the Heritage Act establishes strong enforcement mechanisms (such as prosecution) and weaker mechanism (such as warning letters) but lack intermediation options (such as infringement notices).

The Discussion Paper proposes to introduce intermediate enforcement powers to allow heritage regulators to take a graduated and proportionate response to noncompliance, including heritage powers allowing Heritage NSW to gather sufficient evidence to prove an offence.

Submissions

The following table compares the enforcement mechanisms and investigate powers available under the Heritage Act and the following pieces of key NSW environmental legislation:

- EP&A Act;
- *Protection of the Environment Operations Act 1997* (NSW) (**POEO Act**); and
- *Contaminated Land Management Act 1997* (NSW) (**CLM Act**).

Item	Heritage Act	EP&A Act	POEO Act	CLM Act
Enforcement mechanism				
Advisory letter and formal warning / caution				
No express provision				
Improvement program	No	No	Yes (condition requiring pollution reduction program: ss 58, 68–9)	Yes (management order requiring remediation or other works: ss 14, 16)
Variation of conditions	No except on application by the applicant (s 65A)	Yes but limited to for consents not granted by the Minister (s 4.57), or on application by the applicant (s 4.55)	Yes (s 58)	Yes (of management order or ongoing maintenance order: s 44)

Item	Heritage Act	EP&A Act	POEO Act	CLM Act
Notice, direction or order	Yes (stop work order: s 79C; order to remedy failure to maintain or repair: s 120; order restricting development following conviction: ss 160–1)	Yes (s 9.34, Sch 5)	Yes (Ch 4)	Yes (management order: s 14; ongoing maintenance order: s 28)
Penalty notice	No	Yes (s 9.58)	Yes (s 224)	Yes (s 92A)
Audit	No	Yes but limited to for SSD, SSI and Part 3 projects (ss 9.38, 9.40)	Yes (ss 58, 67, 174)	Yes (management order requiring site audit: ss 14, 16, Part 4)
Enforceable undertaking	No	Yes (s 9.5)	Yes (s 253A)	Yes (s 96A)
Civil proceedings	Yes (s 153)	Yes (s 9.45)	Yes (s 252)	Yes (s 96)
Prosecution	Yes (ss 156–8)	Yes (s 9.57)	Yes (ss 214–5)	Yes (ss 91–2, 95)
Investigative powers				
Require information or records	No	Yes (s 9.22)	Yes (ss 191–2)	Yes (POEO Act s 186(b4))
Enter premises	Yes (s 148)	Yes (s 9.16)	Yes (s 196)	Yes (POEO Act s 186(b4))
Search premises	No but can inspect buildings, works, relics, moveable objects and places (s 148)	Yes (s 9.16)	Yes (s 196)	Yes (POEO Act s 186(b4))
Take samples, making recordings, copying records etc	No	Yes (s 9.18)	Yes (s 198)	Yes (POEO Act s 186(b4))
Question persons	No	Yes (s 9.23)	Yes (s 203)	Yes (POEO Act s 186(b4))
Inspect and testing articles (or require inspection or testing)	Yes but limited to inspecting buildings, works, relics, moveable objects and places (s 148)	No	Yes (ss 206–7)	Yes (POEO Act s 186(b4))

The table confirms that the Heritage Act does not have many of the intermediate enforcement options or investigative powers available under other pieces of environmental legislation.

It would benefit both Heritage NSW and owners and developers of heritage-listed properties to introduce intermediate enforcement options, as this would:

- avoid the costs of prosecutions in cases of non-compliances that require more than a warning; and
 - enable allegations of non-compliance to be resolved in a timely manner, which allows all parties to focus on the future solution instead of focusing on events of the past.
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Recommendation 11

It would be consistent with other environment and planning legislation for the Heritage Act to be amended to provide for intermediate enforcement mechanisms, such as:

- penalty notices;
 - audits; and
 - enforcement undertakings.
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It would also be pragmatic for Heritage NSW to be given investigative powers similar to those under the other environmental legislation. This recognises that, if Heritage NSW's investigation is hindered by a lack of powers, it can often find practical ways around this in any event (for example, by seeking assistance from the NSW Police). If Heritage NSW had those powers to begin with, this would minimise delay and administrative inefficiencies for all parties involved.

Recommendation 12

It would be consistent with other environment and planning legislation for the Heritage Act to be amended to provide the Heritage Council with investigative powers broadly equivalent to those available under other environmental legislation, such as the EP&A Act and POEO Act.

Tiered system for heritage listings

Focus question 8: How could tailored heritage protections enhance heritage conservation?

Background

The Discussion Paper proposes to introduce a four-tier system for heritage listings, creating different categories for:

- 1 heritage of exceptional and iconic value;
- 2 state significant heritage landscapes;
- 3 state significant heritage; and
- 4 local heritage.

Different categories would be afforded different levels of protection.

Submissions

In considering whether a categorised system for heritage listing is desirable or appropriate, we encourage the Committee to consider (amongst other things):

- 1 **The use and effectiveness of categorised listing systems in other jurisdictions:** the need for a categorised listing system in NSW is not immediately evident on the face of the Discussion Paper. No other jurisdictions in Australia currently have such a system. The proposal for different listing categories would benefit from an examination of how such a system has been implemented in other jurisdictions and whether it has been effective in protecting heritage or facilitating adaptive reuse.
- 2 **The distinction between having different listing categories and having item-specific management requirements:** while we support having a tailored approach to heritage protection, this should be considered as a separate issue to the listing of an item. Linking the level of protection afforded to a heritage item or place to its listing category risks some items being afforded less protection than others. This also has the effect of removing discretion to implement protection measures which are bespoke to the circumstances of the particular item or place. The protection measures afforded to a heritage item or place should respond to the heritage values inherent in the object or place, rather than by reference to the category in which it is listed.
- 3 **The risk that a categorised listing system will diminish the protection of listed items:** following on from (2) above, associating the protections afforded to a listed item with a particular category has the potential to mean that some types of heritage items or places are afforded greater protection than others. Greater funding may be contributed towards more highly ranked objects and places without due consideration for the needs of that object or place.

Recommendation 13

In deciding whether to implement a categorised listing system, we suggest the Committee considers:

- the use and effectiveness of categorised listing systems in other jurisdictions;
 - the distinction between having different listing categories and having item-specific management requirements; and
 - the risk that a categorised listing system will diminish the protection of listed items.
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