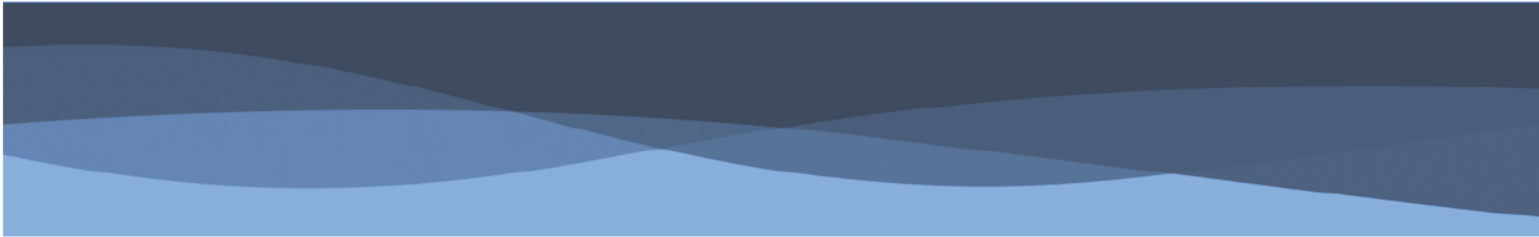


INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Far South Coast Environment & Heritage Conservation Inc.
Date Received: 9 July 2021



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FSCEHC Inc

Submission to Heritage Council Review, July 2021

We write on behalf of Far South Coast Environment and Heritage Conservation Inc. We believe our recent experience in trying to protect threatened heritage items in the area of the Far South Coast of NSW has identified issues that are particularly pertinent to this review.

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1. A summary of our general response to the Review of the Heritage Act.

Replacement of the Act is premature

We do not believe that the Heritage Act requires a major legislative overhaul. The Act is generally fit for purpose as a vehicle to identify, assess and protect heritage. In any case, we are troubled by the idea that the NSW government would be considering a wholesale replacement of an Act which has generally done a good job of preserving heritage, without first undertaking an 'opportunities analysis' of strengths and weaknesses, based on a national and international legislative benchmarking exercise. The NSW government should look closely at what is working well in other jurisdictions, and then seek feedback from the public about a proposed model, based on the benchmarking exercise.



Landscape level heritage should be better protected, not just “buildings”

Using the current Heritage Act, it is already possible for councils and other levels of government to give greater recognition and protection the landscape and social history, not merely buildings or objects. The bias of the current approach, and the narrowing of the current Act, is evident in the specific focus question:

How could public heritage buildings be activated to meet the needs of communities?

Our case study identifies an understanding within the community that heritage does not just apply to built objects but includes the landscape and its social history, both indigenous and non-indigenous. This aspect of the Heritage Act should be strengthened.

Integration with Planning Law

We have serious concerns about the way that local heritage is managed under current planning and development law. The case study outlined below is an example of how local councils are able to “self assess” their own impacts on heritage items, such as bridges, and prejudice a decision about demolition of a heritage item by seeking funding to do so, with no community consultation or public assessment of environmental impact. Demolition of a listed item should be a last resort only, which follows from an exhaustive process of assessment, consultation and a thorough assessment of practicable alternatives. Such a rigorous approach is adopted by the Land and Environment Court when it assesses a proposed demolition of a listed item (see, for example, the approach adopted by the Court in relation to demolition of a contributory item:

<https://www.caselaw.nsw.gov.au/decision/549f84273004262463abec2e>).

In the circumstances of the case study below, Council would act as determining authority for an assessment under Part 5 of the *Environmental Planning & Assessment Act 1979*, and no merits appeal would be available to the Court from Council’s determination to proceed with demolition. We consider that a merits appeal to the Court should be available to objectors wishing to challenge a “self-determination” by a Council or Authority which involves demolition or substantial alteration of a listed item.

A “category” approach to heritage listing is not appropriate

It would be inappropriate to change the current approach to one of assessing listings on the state heritage register using a category or grade approach. Given that there has been no benchmarking exercise, this would appear to be a “top down” way of weakening state heritage protection.



Better administration, enforcement and resourcing of heritage protection required

More funding and resourcing is required to allow better administration and protection of heritage at the state and local level. The case study below offers an excellent example.

Aboriginal Cultural Heritage cannot stand apart from other heritage issues

Aboriginal stakeholders, including traditional custodians, must be consulted extensively about replacing and updating the outmoded protections afforded aboriginal cultural heritage in the National Parks and Wildlife Act. Specific aboriginal heritage legislation must recognise and address the concept of “country” and the protection of landscape stories and intangible values, not merely physical evidence or “relics”. Most importantly, a process must be outlined for identifying who is entitled to have a voice about “country” and how its social historic values can be protected.

However, under no circumstances should the Heritage Act’s role in protecting indigenous heritage be removed or watered down. The Heritage Act must continue to protect indigenous (and natural) as well as non-indigenous heritage. It is inappropriate for any revision of the Heritage Act to be undertaken in isolation from the review of Aboriginal cultural heritage legislation. These matters need to be considered together in an integrated way. In this regard, the case study below offers an illustration of the way in which Aboriginal cultural and social history can be overlooked, in relation to activities associated with economic development.

2. Case Study: Protecting heritage timber bridges in the Bega Valley Shire, 2021

The focus of this case study pertains to the zone of coastal land, between Wallaga Lake, just north of Bermagui and Tathra, 57 kilometres south. The zone is characterised by striking natural beauty, coastal wetlands and estuarine lagoons, wild beaches, native forests and majestic mountains. Unlike most coastal areas of NSW, this area remains relatively undeveloped due, in large part, to its remoteness from Melbourne and Sydney. It is also due to the prescience of earlier state governments, which have included extensive tracts of this area into national parks and nature reserves. Two of the national parks, Gulaga and Biamanga, are under the management of the indigenous owners.¹ Preserved within these parks is a unique history of Aboriginal social and cultural heritage of this area, inextricably tied to the natural landscape. The overall result is a cultural landscape that combines an evolving history of Aboriginal and non-indigenous settlement in this area, carefully described on a relatively untouched natural landscape.

¹ Plan of Management Yuin Banguri (Mountain) Parks, 2014.



Sympathetic development has also been achieved through local council planning decisions. Coincidentally, limitations to council revenue have meant sections of the local road system have remained on a small scale or unsealed until recently. The distance from Sydney and subsequent low population growth has ensured that the road network in the wider region has remained, up until recently, a low priority for state and federal governments.

Remoteness has brought its benefits. The exceptionality of this coastal landscape is recognised at both local and federal levels of government. At the local level, the southern part of the zone is designated in the Bega Valley Shire Council Development Control Plan as significant Rural Landscapes (Murrah and Tanja), forming the Bermagui to Tanja Cultural Landscape.² At the federal level, this zone is part of a broader coastal zone, extending from Narooma, NSW, in the north to Orbost, Victoria, in the south, which has been designated 'Australia's Coastal Wilderness' by the Australian Tourist Board in its National Landscapes Plan.³ These designations recognise this coastal zone as worthy of protection and preservation. They also recognise its value for the local economy through its potential for environmental and cultural tourism.

The certainty of that recognition at both local and state levels has been exposed as extremely fragile by recent developments, pointing to areas that should be strengthened in the existing Heritage Act. This is particularly the case at the local level, when pressures of economic development and political imperatives come into play.

The road that traverses this unique coastal zone, comprising Wallaga Lake and the Bermagui-Tathra Roads, is linked by a series of bridges, five of which still survive in their original timber form. Three of them, Wallaga Lake Bridge, north of Bermagui and the Cuttagee and Murrah Bridges in the south, are classified as heritage items in the Bega Valley Council Local Environment Plan.⁴ All of these bridges are single lane structures, requiring motorists to give way, a system that still operates effectively today. Considered by locals as the historical markers that highlight and complete the magnificence of the natural landscape, these timber bridges not only represent their heritage, they allow locals to live that experience when they go about their daily lives. The current heritage listings are only focussed on the bridges as engineering. For the community, however, they represent the last link to a pioneering past and reflect a broader concept of heritage significance that takes account of the social and cultural history of the area.

In March this year, the State Member for Bega, Andrew Constance, announced that the heritage-listed timber bridge at Cuttagee Lake, built in 1935, was to be demolished and replaced with a two-lane concrete bridge. This followed a successful Council application to the NSW Fixing Country Bridges Program, which resulted in the allocation of \$7.5 million in funding. This was approved despite

² Bega Valley Development Control Plan, 2013, 4.6

³ <http://www.environment.gov.au/topics/national-parks/national-landscapes-0>

⁴ <https://legislation.nsw.gov.au/view/html/inforce/current/epi-2013-0408#sch.5> Schedule 5



program guidelines stating that heritage-listed bridges were ineligible for funding. This program is explicitly targeted at the replacement of timber bridges and the need to remove the expense of their maintenance for local communities, while providing improved road services for residents, freight and tourism.⁵

Following the strong community objection and other issues, the offer of Fixing Country Bridges funding for Cuttagee Bridge was withdrawn, stating an inability to guarantee completion of the project within the required time frame. Council then voted at a subsequent meeting to continue with planning for the demolition of the bridge, and to apply for the funding for its replacement through the Federal Government's Building Better Regions Fund.⁶ This second source of funding does not have the same restriction regarding the funding of heritage items. Funds, in fact, are available for projects that support or protect local heritage and culture, suggesting that the reason for demolishing this bridge is not entirely one of maintenance costs or safety.⁷

Prior to the announcement of the Fixing Country Bridges funding, no consultation had been undertaken with the local community regarding the intention to de-list the bridge as a heritage item and then demolish it. An immediate community response in opposition to the demolition, including a petition that had attracted 11,000 signatures calling for the retention of the bridge, failed to stop Council voting to continue with its demolition. In response, Council agreed that they would consult with the community in retaining 'some heritage character' in the new two-lane concrete replacement.⁸

Council has asked the State Government to take responsibility for the entire road and its bridges, from Wallaga Lake to Tathra, an act that will further remove the fate of these bridges from the hands of the community. Council's website currently lists the other timber bridges on this road for replacement, including the heritage-listed Murrah Bridge.⁹ The heritage-listed Wallaga Lake Bridge is already under the control of Roads and Maritime Services. If Cuttagee Bridge is demolished, it is only a matter of time for these other heritage-listed bridges to be also replaced.

⁵ Fixing Country Bridges Guidelines, 3

⁶ Bega Valley Shire Council Minutes, 10 March, 2021.

⁷ Building Better Regions Funds, Infrastructure Stream, Round Five, 14, 6.2 b

⁸ Bega Valley Shire Council Minutes, 10 March, 2021, 11.7

⁹ BVSC Infrastructure Prospectus, 2017, 52



3. Responses to relevant focus questions, arising from the case study.

Focus Question 2: How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act

This case study has identified the need to expand the concept of cultural landscapes in relation to both Aboriginal and non-indigenous history. Any revision to the Act should ensure that Aboriginal social and cultural history is given equal status with non-indigenous history under the Act. Currently, recognition of Aboriginal heritage is relegated to the National Parks and Wildlife Act.

In this case study, there appears to have been no consultation with the traditional owners of the land in the Biamanga National Park prior to Council taking the decision to demolish the single lane Cuttagee bridge and expand it to a two-lane structure. This is despite the fact that the incorporation of the adjacent Cuttagee headland into Biamanga National Park is a stated objective in the Yuin Banguri Plan of Management, indicating the cultural significance of this area for the Aboriginal custodians.¹⁰ Construction associated with the replacement and upgrade of Cuttagee Bridge is likely to have a significant impact on areas adjacent to the current footprint of the road and bridge. In particular, work on the north-eastern approach would very likely encroach into the area of the Cuttagee headland.

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

The community still expects to be consulted about decisions to demolish or destroy heritage-listed items and relies on the existing Act to provide protection. Indeed, this is the very reason the Heritage Act was originally implemented. We have observed, however, that an exceptionally strong and ongoing community opposition to demolishing a heritage-listed bridge has had no effect in dissuading local councillors, intent on demolition in the name of progress and economic development. A strengthening of the category of local heritage within the Heritage Act to ensure that the decision to remove heritage status lies outside the purview of locally elected officials would mitigate against political agendas. It would also ensure that local communities, in seeking to protect their heritage, are not seen as frivolous and ignoring the more pressing financial needs of their wider communities.

¹⁰ Plan of Management Yuin Banguri (Mountain) Parks, 2014, 63.



Focus Question 5: How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?

We also believe that it is imperative that mechanisms be put in place that reinforce the preservation objectives of the Act and that agencies must be made accountable to the public. There is a danger that ‘incentivisation’ will result in the reduction of preservation measures and allow for the easier and less sympathetic re-development of protected heritage items.

Council’s decision to replace the Cuttagee Bridge was driven, in part, by the burden of the ongoing costs of its maintenance. Our case study has revealed the undesirable consequences that ‘incentivisation’, can bring, in this case, through the Fixing Country Bridges program. The current Heritage Act should be used to strengthen the protections afforded by the category of local heritage status and ensure that local councils receive adequate funds from government, as a result of heritage listing, so that these items are not seen as a financial burden.

This case study has shown that there is also an urgent need to strengthen the Act to protect heritage items from political imperatives associated with road funding. The Fixing Country Bridges Program is expected to replace over 400 timber bridges in NSW.¹¹ Most may occur with little examination of their potential heritage value. Local government should not be faced with a choice between external funding for a replacement bridge or the retention of a heritage bridge as a cost to its community. There should be, in these government programs, the possibility of retention and repair with funding. If we continue with the trend to economic development as the overall guiding principle, much of our heritage will be lost.

A cynical view might be that such funding programs are an expedient way of delivering economic improvements, particularly in the case of cash-strapped local councils. These funding programs are observably simplistic in their guidelines and not characterised by detailed evaluation of applications, as noted by the provision of \$7.5 million for the replacement of Cuttagee Bridge that, as a heritage item, was not eligible for this funding. Similarly, the local State member, in announcing the successful funding applicants, stated that this funding was also available for the repair of bridges, although this is not stated in the program guidelines.¹²

We believe that there is an urgent need to increase the funding available to councils that have responsibility for the maintenance and improvement of heritage items, particularly the heritage bridges which service local road networks.

¹¹ <https://www.nsw.gov.au/media-releases/replacing-bridges-to-better-connect-regional-nsw>

¹² https://www.facebook.com/permalink.php?story_fbid=1882096905262391&id=568704756601619;



Focus Question 14: How could we improve heritage consideration within land use planning systems?

Land use planning must integrate landscape protections so that cultural landscapes such as that in the case study can be protected, while allowing sensitive development. Such protections are already offered in other jurisdictions where settlement has continued within strict development guidelines that enable the natural and built landscape to be preserved.¹³ There are many examples of this sort of integrated thinking, a local example being the Victorian government's approach to the conservation of landscapes through their Conservation Management Plans.¹⁴ The government must look more broadly at the natural and cultural landscape protections that are afforded in other places and put the best examples up to the public for consideration. The existence of such exemplary planning models is precisely why a broad based benchmarking exercise must be undertaken before any changes are made to the Act.

In national parks, where preservation is the goal, development is prohibited and only passive recreation is allowed. Such a designation and its protections are not possible in this coastal zone, given its settlement history. The coastal area described in the case study, through a degree of luck, has become an exemplar of otherwise lost environmental and cultural heritage. Given that threats to this heritage have been identified, the Heritage Act must extend and strengthen the category of cultural landscapes, with clear protections that apply equally to built heritage items within the landscape, which may still be in use.

In relation to our case study, Council recognises the concept of Cultural Landscapes in its Local Environment Plan (LEP). It is an anomaly that the LEP protects the views within the Bermagui to Tanja Cultural Landscape, as seen from the road, nominating setbacks and conditions of building. There is nothing, however, in the planning controls that protects the view of the road and its bridges, nor specifies any controls over its character. The bridge at Cuttagee Lake, a critical component of the Bermagui to Tanja Cultural Landscape, allows the motorist to enjoy the view of the estuarine lagoon and its ocean beach. Conversely, for the viewer on the shores of the estuary and beach, the bridge and its road provides a visual frame for the estuary that it traverses. Given these views are reciprocal, the replacement of the heritage-listed timber bridge with a two lane concrete one will have a significantly detrimental effect on the experience and enjoyment of the surrounding landscape. This reciprocity of heritage items within a cultural landscape can and must be strengthened within the provisions of the current Act.

¹³ UNESCO, Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972; Australia. ICOMOS (International Council on Monuments and Sites) has classified the Gulaga-Tilba Valley as a cultural landscape.

¹⁴ Conservation Management Plans: Managing Heritage Places. A Guide. Heritage Council of Victoria. 2010



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

We believe it is insufficient that a local council can act as determining authority of an assessment under Part 5 of the *Environmental Planning & Assessment Act 1979*, and no merit appeal would be available to the Court from Council's determination to proceed with demolition. Any revisions to the Act should make councils and agencies accountable to the Courts via a merits appeal if they want to destroy a publicly owned item or landscape.

Another protection that is critical to preservation of heritage items such as the Cuttagee Bridge when under threat of demolition is the process of obtaining an Interim Protection Order. The current system does not afford the quick response that is often needed to prevent demolition. A community attempt to obtain an Interim Order was rejected. In this case, protection was not available to Cuttagee Bridge because it was not of state significance but was considered the responsibility of the Council.¹⁵

Our experience is that it is better to allow items to be nominated for protection even if no immediate threat or risk. Such a change would ensure better planning and more effective protection.

Focus Question 17: How could understanding of state heritage be enhanced?

The social and cultural history of the far south coast bridges in their natural landscape is an important part of our heritage, which the community wants to be recognised, celebrated and preserved. This case study has found that local government does not have sufficient understanding, expertise or finances needed to apply of the concept of cultural landscapes, particularly in relation to the interaction between the natural and the built form.

We believe that any revision to the Act should ensure that agencies and councils have better resources to broaden the field of what is protected and to help preserve what is protected by any listing.

Focus Question 18: How could we improve heritage tourism or help activate heritage places for tourism?

The impending loss of the heritage timber bridge in our case study is an illustration of 'an opportunity about to be missed' in relation to heritage and tourism. This coastal area is already recognised for its potential in attracting heritage tourism. However, Council's unilateral decision to demolish the heritage-listed Cuttagee Bridge has demonstrated there is a limited understanding within Council and agencies of the concept of heritage tourism.

¹⁵ Correspondence, Heritage NSW Department of Premier and Cabinet, 19 April 2021



The issue here lies in the status of the road and its bridges. Functionally, they are the means by which this zone is accessed and enjoyed. The road and its bridges are also a major contributor to the zone's heritage character. Together they map the history of non-indigenous habitation in the zone, while the bridges are, in themselves, heritage items, historical records of non-indigenous settlement and activity.

The existing Heritage Act has been effective in ensuring that this coastal region has preserved its heritage to the extent that the community reaps the economic benefits that heritage tourism can bring. In the face of the pressures associated with such tourism, the existing Act must be strengthened to ensure protection for heritage items, when imperatives such as transport, freight and industry come into play. Given the recognised significance of this coastal zone at all levels of government, measures must be put in place to ensure that it is protected against future development pressures, even those associated with the very tourism which it is intended to attract.

4. Conclusion

As a community, we expect leadership from ministers and councils in respecting heritage. We also expect that government agencies should set a good example for councils. Heritage should come first and the community should be consulted as a priority. Demolition should not be a "tick and flick" exercise, but be taken seriously and be able to be supervised by the Land and Environment Court.

We believe that the existing Heritage Act has been successful in promoting and protecting heritage and should be retained in its existing form. The focus now should be on strengthening the enforcement of the Act and ensuring that adequate funds are available to support its implementation, particularly at the level of local government. The community expects, indeed, demands that any changes to the Act should not water down the protective aspects of the Heritage Act, particularly on the basis of a need to "cut green tape".

Ms. Jo Cave, Chair

Dr. Di Haskell, Deputy Chair

Dr. Ken Robinson, Secretary and Treasurer

Dr. Bill Caldicott, Board Member

Mr. Phil Keir, Board Member

Ms. Sheena Boughen OAM, Member

Far South Coast Environment and Heritage Conservation Inc.