

**Submission
No 289**

INQUIRY INTO REVIEW OF THE HERITAGE ACT 1977

Organisation: Orwell & Peter Phillips

Date Received: 5 July 2021

SUBMISSION TO PARLIAMENTARY INQUIRY INTO THE HERITAGE ACT

Responses to focus questions

1 *Composition, skills and qualities of the Heritage Council of NSW*

The composition, skills and qualities of Council members should reflect the functions of the Council as set out in the Act. These make it clear that the Council is the body tasked with advising the Minister on all matters of environmental heritage, as well as undertaking research, organising community education, holding conferences and seminars, maintaining the State Heritage Register, and making submissions, all in relation to environmental heritage. Clearly, unless each of the Council members, and the full Council as a body, have wide knowledge, expertise and experience with heritage in all its forms, they cannot properly fulfil their statutory functions. The current composition of the Council as stated in the Act is:

- The Secretary of the Department of Planning, Industry and the Environment
- The Chair appointed by the Minister
- The Deputy Chair appointed by the Minister
- Five other members appointed by the Minister having qualifications, knowledge and skills in any of a total of 14 areas
- A member with Aboriginal heritage qualifications, knowledge and skills
- A member appointed by the Minister from a panel of 3 nominated by the National Trust

Of the 14 areas nominated in the Act as relating to the qualifications, knowledge and skills required of five of the appointed members, 8 such areas (architecture, building, development and property industries, engineering, local government, planning, property, planning or environmental law, property economics, rural interests) have no necessary relationship to heritage. Moreover, neither the Chair nor the Deputy Chair – nor the Secretary of DPIE – is required by the Act to have any heritage qualifications, knowledge or skills. It is therefore quite legally possible for the Minister to appoint a Heritage Council with only two of its nine members required to have any heritage expertise. The Act should therefore be amended to require that every member appointed to the Council, from whatever area, should have demonstrable expertise and experience in heritage, as well as qualifications, knowledge and skills in the other areas listed in Section 8 of the Act.

2 *How should Aboriginal Cultural Heritage be acknowledged and considered?*

This is a matter for Aboriginal people and communities themselves to address. Nevertheless, it is essential for the protection of Aboriginal Cultural Heritage to be accorded pride of place in any heritage system – given that it represents the oldest living culture in the world.

3 *Are the objectives of the Heritage Act still relevant?*

All the objectives in the present Act are still relevant. Objective (b) should however be amended to read “to encourage and regulate the conservation of the State’s heritage”, and objective (d) should be amended to read “to provide for the ~~interim~~ protection of items of State heritage significance”. These amendments would provide support for the regulatory aspects of the Act, and avoid any impression that the protection of heritage under the Act is temporary.

4 *Does the Act adequately reflect the expectations of the contemporary NSW community?*

This is a matter for the community itself, and can only be determined by detailed and comprehensive surveys of the community – a task which the Heritage Council should undertake regularly. Moreover, the contemporary NSW community, whatever its expectations – and the present State Government - are only the temporary custodians of the heritage of the State. It is far more important to consider how the State's heritage will survive into the future for the benefit of the future NSW community.

5 *How can the NSW government legislation better incentivise the ownership, activation and adaptive reuse of heritage?*

Heritage properties are already often widely sought after for their character and generosity of space, and have been shown to generate increased property values. The legislation is already adequate to deal with encouraging people to own, activate and adapt heritage places – what is inadequate is the failure to use incentive provisions that are already in the Act, and the inadequacy of support for the Act in the form of education, promotion, technical advice and the ability to consult expert staff within Heritage NSW at an early stage.

6 *How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?*

There are limited opportunities for the State taxation system to assist private owners – much more could be achieved if the State could persuade the Commonwealth to provide income tax relief by allowing deductions for the maintenance of heritage items, or by maxing such expenditure GST free. Within the State system, the existing relief from land tax and rates could be expanded. Using tiers of government to increase available funding is also possible: if a grant system is administered by local government, and both local government and the grant recipient are required to match grant funding dollar for dollar, every dollar of State grant would become four dollars spent on heritage. Other possibilities include extending the system of transferable heritage floor space to other developing town centres such as Parramatta. A levy on the tourism industry (once it recovers from the pandemic) could be used to pay private owners an annual amount for conserving their properties within parts of the State that benefit from heritage tourism.

7 *What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?*

There are some examples of large corporations demonstrating good corporate citizenship by preserving and adapting historic buildings. Rewarding philanthropy is again most effectively done at Commonwealth level by making it possible for donations towards heritage conservation to qualify as allowable deductions against income.

8 *How could tailored heritage protections enhance heritage conservation?*

Tailored heritage protections that group heritage items according to their use or asset class are totally against the fundamental principles of heritage conservation, which make heritage significance the sole determinant of appropriate conservation controls and actions. It should be pointed out that items of National and World Heritage significance already have their own controls at Commonwealth level, in addition to the State controls. There are already numerous levels of regulation within the

Australian system; indeed, a former concept of regional significance within the NSW heritage system was deleted in a previous amendment to legislation. Categorising some items of State significance as being of less importance and subject to fewer controls risks devaluing many of the items on the State Heritage Register in the public perception, much as local heritage significance is downplayed at present.

9 *How should heritage items that are residential properties be accommodated under a proposed category scheme?*

In the first place, there should be no category scheme. In the second, residential properties should be treated in accordance with their significance as individual items and as part of State significant precincts. In particular, any proposal to allow uncontrolled alterations to highly significant interiors, such as those within Millers Point, should not be contemplated. The essence of the State heritage system is that a listing applies to the whole of the property, and any proposed works must be guided by the significance of the place and its elements, not by its asset class or use.

10 *Would greater community engagement deliver a more robust State Heritage Register?*

The present system for listing items on the State Heritage Register allows any person or community to nominate a place, and this should not change. The problem with the current system is that there are insufficient resources to assess nominations, resulting in long delays that may threaten the protection of the item. Unless Heritage NSW is to be adequately resourced, any system for nominations will be compromised.

11 *Would streamlining enhance the listing process?*

Heritage listings are currently updated on the State Heritage Register from time to time. The problem again is that there are insufficient resources devoted to this process, so that updates may not occur for some time. Within certain Government Departments (such as the former Sydney Harbour Foreshore Authority) it has been common practice to update conservation management plans and the associated heritage listings on a regular basis, but most other government and private owners lack the resources to do this. Streamlining with limited resources that does not enable adequate assessment of the current significance of the place and its elements would be a retrograde step. What would assist the listing process is to include within the listing a schedule of the most significant elements of the place, to guide both owners and assessors.

12 *How could we improve the current approval permit system?*

The current system suffers from inadequate scrutiny of minor changes at one end and inadequate resources to assess major change at the other. The current system for standard exemptions, which relies on self-assessment, involves no notification of proposed works to Heritage NSW. This makes it impossible for the Heritage Council to audit particular cases or to monitor how well the system is working in practice, as it will have no idea what is being done or by whom unless alerted by someone else, in which case any (possibly irreversible) damage to the heritage item will already have occurred. At present the system may feel adversarial because it is so under-resourced that Heritage NSW staff have no time to discuss proposed works at an early stage, and to assist owners with advice that will smooth the application process. The greatest possible improvement to the system would be to resource the public service adequately and to provide assistance in the form of both personal advice and

technical information to help owners through the process. As a suggestion, the current local government Heritage Advisor system could be extended to include a number of experienced heritage professionals who would deal only with State significant items.

13 *Are the current determination criteria for heritage permits still appropriate?*

It is entirely reasonable to require the length and detail of the assessment and approval process to relate to the heritage significance of the item and its elements, and the nature and extent of proposed changes. Although it is important for heritage items to continue in viable use, it is of paramount importance that their heritage qualities should not be compromised through inappropriate adaptations. In time, these cumulative changes will result in the gradual loss of our heritage and defeat the whole purpose of the Heritage Act.

14 *How could we improve heritage conservation within land use planning systems?*

To begin with, by eliminating conflicts between the heritage listings of properties and the other planning controls. It is all too common to see zoning, floor space ratio and height maps that take no account of the fact that a property is also shown as heritage listed on the heritage map. Development expectations for the property are consequently raised beyond what is appropriate for the heritage item, laying the groundwork for future conflict between owners and authorities. The level of development appropriate to a State heritage listed property should be determined primarily by the significance of the property and its curtilage and setting, and reflected in all of the planning controls for the property.

15 *Are there opportunities to enhance consideration of heritage at the strategic level?*

Refer to the previous answer. In addition, consideration of heritage in the case of State significant development is at present seriously compromised by the turning off of any controls under the Heritage Act, leaving the Heritage Council and Heritage NSW with no statutory role. Given the increasing number of State-significant government owned properties that are the subject of major development at the moment, this is of great concern. It is vital that the expert advice of the Heritage Council and Heritage NSW be sought at the earliest stages of such projects so that heritage issues can be properly considered and incorporated into the development.

16 *How could heritage compliance and enforcement be improved?*

To begin with, compliance and enforcement requires resources, firstly to be informed about potential breaches of heritage regulations and secondly to be able to inspect the properties to confirm non-compliance. The present Standard Exemptions system, as noted above, does not assist compliance and enforcement because there is no way of knowing what actions are being undertaken under this process. In addition, many State significant items fail to comply with the Minimum Standards for Maintenance and Repair. Nevertheless, providing scope within the act for infringement notices and fines would be a positive step, provided that the fines are commensurate with the breach and that other remedies are available – such as enforcing installation of fire protection and security measures where these are inadequate, especially in unoccupied places, and faithful reconstruction of elements that have been demolished

without approval. Wealthy owners might not be dissuaded from failing to comply if the only penalty is a modest fine.

17 How could understanding of state heritage be enhanced?

The education objective of the Heritage Act has been neglected for several years. The Heritage Council should be much more active in this role, but it can only do so if Heritage NSW is adequately resourced. These resources should be considered as an investment in the heritage system that will in time yield greater public support for it and improved operation of the approval system in particular.

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

While tourism is seen as a natural bedfellow of heritage, it brings with it a number of challenges for heritage, including increased pressure on the heritage resource and its setting. Organisations such as the former Sydney Harbour Foreshore Authority have dealt well with heritage tourism in combination with exemplary heritage conservation, and lessons can be learnt from their successes.

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

In the first place, public buildings, probably the greatest heritage resource in NSW, should remain in public ownership and should not be sold off to the private sector, becoming accessible only to those with the money to visit or occupy them. Instead of selling off these valuable resources and commissioning new buildings at great cost to the environment, the State government should adapt these buildings for new government uses while retaining community access to them. The Sydney Customs House is a great example of a former public building with new public uses.

Responses to terms of reference

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

Although there may be a need for minor changes to the Act (refer to the response to focus questions 1 and 3 above), it is far more important for the heritage system to ensure that the Act is widely applied (and not made inoperative by other legislation in any circumstances) and is properly implemented and enforced, and that Heritage NSW is provided with adequate resources to implement the Act in a way that serves both the heritage it protects and the people for whom it is protected. Best practice is achieved through implementation and adequate resourcing rather than legislation. There are many aspects of the current Act that could actively benefit heritage (such

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

As indicated in several of the responses to focus questions above, it is the adequacy of the implementation of the Act that needs attention, rather than (except in minor respects) the Act itself. Both the Heritage Council and Heritage NSW currently lack the breadth and depth of heritage experience and expertise to provide an adequate response to the needs of the community and the protection of heritage. Even where outside expertise is available to Heritage NSW at no cost (for example, the Technical Advisory Panel), numbers of experts are artificially limited and the meetings are infrequent. Many of the functions of the Heritage Council listed in the Act (community

education, conferences and seminars, research, publications) have been in decline for some years, and the ability of Heritage NSW to provide sound technical heritage advice to applicants has been seriously hampered by the lack of qualified staff.

(c) How the Act could more effectively intersect with related legislation, such as heritage elements of the EP&A Act and the NPW Act?

As previously mentioned, with adequate resources and expertise the Heritage Act could be beneficially used to enable the provision of early heritage advice on major projects, rather than being turned off as it is under current legislation. Separating the Heritage Council and Heritage NSW from other Departments would facilitate the provision of timely and independent advice to government.

(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

As indicated in the answers to focus questions 8 and 9 above, this would add unnecessary complication to the State heritage system, risk devaluing certain State-listed items, and fail to provide adequate protection for highly significant elements such as the interiors of residential properties.

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

The most effective support would be a demonstration of State government leadership in the conservation, activation and celebration of its own heritage assets, rather than the progressive disposal of many of these assets to the private sector. Unless the State government acts as a responsible custodian of publicly owned heritage, it will not encourage private owners to do likewise.

(iii) Improvements to heritage compliance and enforcement procedures

Refer to responses to focus questions 12 and 16 above.

(iv) Streamlining heritage processes

As indicated in the responses to focus questions 11, 12 and 13, streamlining can only succeed if there are adequate resources to implement it, and when the time and effort needed to deal with aspects of the heritage process are commensurate with the significance of the item and the changes proposed to it.

(e) Any other related matter

O P PHILLIPS