

**Submission  
No 291**

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

**Organisation:** Australia ICOMOS

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10 July 2021

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

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

Dear Mr Poulos

### **Review of NSW Heritage Legislation**

Thank you for the opportunity to provide a late submission to the Review of NSW Heritage Legislation, as attached.

The Australia ICOMOS submission is detailed which reflects the many issues, concerns and challenges facing heritage in New South Wales. The submission also contains many recommendations.

I would like to highlight a few key messages:

- the *Heritage Act 1977* itself can be improved but does not need major reform;
- the Act and its implementation need to be much better supported and resourced;
- a higher priority for legislative reform should be the long-promised reform related to Aboriginal heritage;
- a key reform of the Act should be to ensure a substantial majority of Heritage Council members have considerable heritage expertise; and
- there are major problems with current processes related to State Significant Development Applications, in which heritage issues are poorly addressed, and this should be remedied by making such applications fully subject to the Act.

Australia ICOMOS is committed to the best practice conservation and management of our heritage places and is willing to actively participate in the review. We trust that our submission will assist the Standing Committee on Social Issues in its deliberations. We also request that our representatives be given the opportunity to appear before the Committee, to present our recommendations and to respond to any questions.

Yours sincerely

**Helen Lardner**  
President

# Australia ICOMOS Submission to the Review of NSW Heritage Legislation

## Introduction

Australia ICOMOS is grateful for the opportunity to provide a late submission to the *Review of NSW Heritage Legislation*, and respond to the supporting Discussion Paper, announced on 7 April 2021 by the Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts, Don Harwin MLC.

ICOMOS – the International Council on Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an official Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS (<https://australia.icomos.org/>), formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 750 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia, which provides us with an exceptional opportunity to see best-practice internationally.

Australia ICOMOS does not generally engage in advocacy for or against a particular development unless there is reason to question the adequacy of the planning process to achieve proper consideration of heritage issues. However, we have a particular interest in the broader development of policies and processes that have the potential to either enhance or prejudice a best practice approach to the conservation and management of Australia's cultural heritage places. We are also committed to the application of the principles of the *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 2013*, the nationally recognised guideline for achieving appropriate heritage outcomes, which is also acknowledged internationally.

This submission does not respond specifically to each of the key policy themes, or the Focus Questions set out in the Discussion Paper. Although these questions are mostly pertinent, and in some cases fundamental, to the identification, protection, utilisation and promotion of the cultural heritage of NSW, in our view the scope of the Discussion Paper is too narrow. An effective response to the existing shortcomings in the total NSW heritage system requires a broader perspective and will necessitate remedies well beyond some amendments to the *Heritage Act 1977* (the Heritage Act or Act).

Therefore, Australia ICOMOS has responded to the broader terms of the inquiry into the Act, including (d) *the issues raised and focus questions posed in the Government's Discussion Paper*, and more particularly (e) *any other related matter*.

## Generally

A key supposition of the Discussion Paper is:

*Heritage owners, developers and administrators face uncertainty, expense, duplication and delays in relation to heritage listing and approvals. This has led to a perception that heritage listing can be a burden rather than a celebration of our history (p. 7).*

The Discussion Paper provides no clear evidence that this situation is widespread, although we are aware through feedback from our members and others that achieving approvals for minor works to State Heritage Register (SHR) listed properties can be problematic (refer to the **Resourcing Heritage** heading later in this submission), and that there are limited incentives for the owners of SHR listed places. It is likely that any *uncertainty, expense, duplication and delays* are the result of administrative, resourcing, education and attitudinal shortcomings rather than structural problems with the Act itself or the broader heritage system.

- The proposition that major changes are required to the Heritage Act to address these issues is not substantiated. As we outline throughout this submission, there are a range of measures that can be implemented with a view to '*Making heritage easy*', but changes to the Act should not be the highest priority. In implementing the Act, the focus should be on conserving cultural heritage values and achieving practical outcomes – not preventing any change to heritage places.
- Recent major developments approved or proposed for important SHR listed places, especially in central Sydney (such as the Parcels Post Office, Education Department Building, Lands Department Building), do not present positive heritage outcomes. Any changes to the Act or the broader heritage system should not facilitate further adverse outcomes for our heritage places, irrespective of whether they are listed on national, state or local registers.

- There are a number of fundamental problems under the current heritage system, including the use of the State Significant Development approval process to turn off the approvals provisions of the Heritage Act, and a lack of adequate resourcing for heritage agencies at both State and local levels, but the Discussion Paper is silent on these issues. These should be a key focus of the current inquiry.
- The Discussion Paper does not address sustainable development goals where they are relevant to heritage development.
- The challenges posed now and in the future by climate change and its impacts on the significant heritage of NSW will put increased pressure on an under resourced heritage system and on property owners struggling to manage heritage items. Recent bushfires are a clear example of such impacts. Additional resources need to be committed to developing and implementing policies, strategies and practices to address this looming issue. This review provides an important opportunity to futureproof our state heritage system and provide greater resilience for our heritage.

### **Heritage Act & State Heritage Register (SHR)**

The Act does have some shortcomings but is not the primary cause of complexity in the process, nor the adverse heritage outcomes or unreasonable obligations on owners. Areas where the Act could be revised to enhance its effectiveness would include:

- The *Functions of Heritage Council* (Cl.21) should be amended to include the requirement that the Heritage Council function as an independent statutory expert body with its primary aim being to identify, protect and promote the cultural heritage of NSW, and with the obligation to provide the Minister with objective advice on heritage matters.
- The provisions for appointment of Heritage Council members should be amended to provide for a greater range and a substantial majority of members with heritage expertise, and also for community representation. The current Heritage Council membership requirements as set out in s 8 of the Act allow for a preponderance of members with no understanding or commitment to heritage conservation.
- The current provisions are not adequate to address the aspirations of Aboriginal people in relation to the protection and promotion of their significant heritage, including shared heritage with both Aboriginal and non-Aboriginal values. Ideally a separate Aboriginal Heritage Council comprised of Aboriginal knowledge holders and appropriately skilled (Aboriginal and /or non- Aboriginal) professionals working in Aboriginal heritage, should be established to work co-operatively with the existing Heritage Council to ensure that Aboriginal cultural values are addressed. Alternatively, the Heritage Council needs to include greater representation of Aboriginal knowledge holders and appropriately skilled professionals.
- As is the practice in some other states, the Heritage Council should determine whether to list a place on the SHR, not the Minister. This would de-politicise the listing process and allow for the process to focus on heritage significance as the key consideration for listing. It would also reduce the potential for a future development or political agenda to influence the extent of a listing (for example confining the SHR listing of the Tramway Powerhouse at Ultimo instead of the entire Powerhouse site complex). Consideration of proposed changes to places, or circumstances such as financial hardship should be a completely separate process from heritage listing – which should only be informed by the independent assessment of heritage values. There have been many cases where factors such as structural feasibility or economic circumstances may change over time, or with different owners or different development proposals – so the principle of separating heritage assessment and listing from development approval is of fundamental importance.
- Provision for consideration of ‘*Development in the vicinity*’ (currently included in model Local Environmental Plans (LEPs) for local items but not in the Act) should be included to allow for nearby development to be considered in terms of its potential impacts on the values of the SHR listed place. This proposition may be challenging in legal terms, but currently the lack of this provision creates the potential for highly inappropriate development with significant adverse heritage impact to be approved immediately adjacent to a highly significant SHR listed item (eg. the Chief Secretary’s Building at 50 Phillip Street).
- The Heritage Act/Integrated Development Assessment (IDA) requirement for a separate Section 60 (s 60) application to be lodged at the end of an IDA approval process is unnecessary, adds another layer of process, and should be removed and replaced with a single set of approval terms that are

incorporated within the relevant development consent.

- The Applications provisions of the Act (Division 3) should be supplemented by clear guidelines to facilitate consistent and effective decision making (similar to Development Control Plans formulated to complement Local Environmental Plans), rather than through substantial changes to the Act itself. These guidelines could be developed to respond to various types of SHR listed places and developments, and (unlike the Act) can be regularly revised and/or supplemented as appropriate.

## Aboriginal Heritage

We note that the Terms of Reference include *(c) how the Act could more effectively intersect with related legislation, such as heritage elements of the Environmental Planning and Assessment Act 1979 and the National Parks and Wildlife Act 1974*. Some additional comments are provided in an attachment that address the Focus Questions set out in the Discussion Paper that are relevant to the integration of Aboriginal heritage in NSW in the current Act and associated processes.

The Discussion Paper raises the need to integrate Aboriginal cultural heritage into the heritage system, and asks the question *'How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act?'* (Focus Question 2). However, the paper provides no proposal for progressing the issue.

- Refer to the comments above regarding the need for an Aboriginal Heritage Council.
- The most pressing heritage area in which statutory reform is warranted in NSW is in relation to Aboriginal cultural heritage. This process has been underway for some years, and it should have greater priority than changes to the Heritage Act. Important matters to be covered include a process for identifying who speaks for Country, empowerment of Traditional Custodians to make decisions that affect their heritage places, and identification and protection of Aboriginal places of cultural value that are not necessarily defined by the presence of 'Aboriginal Objects' – for example cultural landscapes or places with intangible associative values. It is particularly important that Aboriginal heritage is managed through a separate NSW statute and not relegated to a subsection of the *National Parks and Wildlife Act 1974*.
- It is important that new Aboriginal heritage legislation be derived from a thorough consultation process with Aboriginal people and particularly those who are Traditional Custodians. It would be an abrogation of the importance of remedying the current shortcomings of the NPW Act and the consultation that has already occurred, to change direction and attempt to rely on the Heritage Act, with its place-based focus on heritage, to recognise and protect Aboriginal cultural heritage.
- Notwithstanding the point raised above, the Heritage Act of NSW purports to protect and present the places that are significant to the Heritage of NSW. The first 2 objectives of the Act are to:
  - (a) to promote an understanding of the State's heritage*
  - (b) to encourage the conservation of the State's heritage*

It is not possible to do this adequately without appropriate recognition and inclusion of Aboriginal history and heritage. Currently, there is a missed opportunity to promote an understanding of Aboriginal heritage and the narrative of shared values.

- We note that for some complex Aboriginal places that cross several Aboriginal community boundaries (such as The Bundian Way), it has been found that additional consultation steps may be required to achieve the optimum listing. It would be better if the need for the listing process, including the public consultation that was identified as the 'minimum' requirements and recognition included that consultation be tailored to the needs of the particular listing and its complexity.
- The Act relies on the protection of places of local heritage significance by local authorities, but many local government bodies and other instrumentalities do not adequately consider Aboriginal heritage values. For example, although there are several heritage studies for the Shoalhaven LGA, none of these include an LGA wide assessment of Aboriginal heritage places and therefore such places are not included in the LEP or visible on the State Heritage Inventory. Aboriginal people argue that some of the places included on the LEP for their non-indigenous heritage values, also have Aboriginal heritage values but these are not reflected in the LEP or in subsequent site management and planning decisions.
- In many cases assessments of the heritage values of buildings, heritage landscapes or other perceived 'historic' places do not include assessment of Aboriginal heritage values. We recommend

that this should be introduced as a standard assessment requirement for all heritage listings.

### SHR Listing Proposals

- The Discussion Paper argues that '*the current heritage listing procedure has been described as lengthy and complex, with some items taking more than a year to be listed on the SHR*' (p17). The proposal for the broader community to participate in identifying items of value for potential listing warrants consideration, but it is not clear how this would reduce the time frame for listing, especially as there have been many cases where the delay can be attributed to the internal processes of government. Allowing the Heritage Council to approve listings rather than the Minister has the potential to reduce the time taken to list places.
- The proposition that the Minister, before deciding to add an item to the State Heritage Register, should consider what opportunities there are for adaptive reuse and activation of the item (p15) is impractical and open to manipulation. It requires a degree of foresight about whether, and if so how, a place may or may not be used at some time in the future that may not be open to any authority at the time of nomination (the Queen Victoria Building was a case in point).

Moreover, the economic provisions already included in the Act (s 32(c) and (d)) that are required to be considered in regard to listing a place are capable of subjective and selective interpretation and are contrary to *Burra Charter* principles. Decisions about listing a place should be based on heritage significance only and separated from management or economic viability considerations. These provisions should be removed from the Act.

- The proposal for a process to update existing SHR listing information (p. 17) to ensure that the information is relevant and accurate is supported. We accept that, over time, change does occur to SHR listed places, particularly as a consequence of changes approved under the Applications or Exemptions provisions of the Act, and the SHI listing forms should be amended to reflect these changes. Moreover, many of the places listed on the SHR were inscribed at an early stage following the introduction of the SHR by amendments to the Act in 1999 (in some cases through transitional arrangements for places subject to 'Permanent Conservation Orders' made in response to a threat from development), and the information may be less comprehensive than would be required for listing now.

Updating empirical information would require rigour but could be managed as an administrative process. However, major change, such as amendments to significance assessments (particularly where these might affect conservation policies or compliance with SHR criteria) should be subject to appropriate independent expert review and public consultation before adoption by the Heritage Council.

- A rigorous and open staged review of the SHR to allow for the removal of places that do not meet at least one SHR criterion could be considered. The credibility of any list that is based on the assumption that the places inscribed meet the prescribed threshold is diminished if this is not the case. As noted in the point above, some of the places listed on the SHR were inscribed at an early stage following the introduction of the Act in 1977 in response to a threat from development, and if reviewed against the current SHR criteria, may not warrant listing.

This is likely to be a controversial proposal and would need to be predicated on a rigorous and open process, and subject to appropriate independent expert review and public consultation before adoption by the Heritage Council. The process should also be contingent on any place proposed for removal from the SHR items being protected on LEPs (as long as it is assessed to be of Local significance).

- Conversely, the credibility of the SHR is compromised if places that are clearly of State significance are not inscribed. There are likely to be numerous examples of unlisted places that would meet at least one SHR criterion, both tangible and intangible, and in terms of buildings the NSW Art Gallery and Sydney Hospital would be obvious candidates for listing (both publicly owned and much valued establishments). A staged process of assessment, and if found to meet at least one SHR criterion, inscription of these places on the SHR should be funded and implemented in a timely manner.
- Similarly, there are many places of Aboriginal and natural (including geological) heritage places that are arguably of State significance and these places are grossly under-represented on the SHR. The co-operative recognition of Aboriginal Places (as designated under the NPW Act 1974) as places meeting the State significance threshold goes some way to addressing the imbalance relating to Aboriginal heritage. We recommend the funding of thematic studies aimed at identifying Aboriginal

and natural heritage places of State significance to address this imbalance and provide a more accurate representation of the heritage of NSW.

### SHR Listing Categories

- The proposed categories for listing across the SHR and LEPs (p. 14) is not supported. Australia already has a multi-level listing process (National, State & Local), and the Discussion Paper offers a simplistic and inadequately justified rationale for the further complexity of a multi-category SHR, assuming '*This one-size-fits-all approach is unable to respond to the often very distinct differences in item type or circumstance*'. The latter statement unhelpfully confuses the concept and process of heritage listing with the concept and process of decision-making.

In accordance with the *Burra Charter* principles, the process of determining heritage significance before deciding on appropriate change or management should apply irrespective of the level of significance, although the complexity of the process will vary accordingly.

- The Discussion Paper provides no information about how the approval process for works applications will differ across the proposed multi-category SHR, although it is assumed that there will be less rigour for items listed on the lower categories. This could lead to unacceptable heritage outcomes, especially for lesser significance items subject to high impact works. There are already fast track processes in place for minor works (eg. s 57 Exemptions), and these should be developed further to avoid unnecessary process, delays and costs.
- There would be considerable benefits in expanding the available guidelines and resource material to provide all participants in the heritage system with more-customised resources to support values-based conservation (including adaptive re-use) of different types of heritage place – such as cultural landscapes, urban areas, archaeological sites, or industrial heritage.

### Applications for Change

The Discussion Paper asks the question '*How could we improve the current approval permit system?*' (Focus Question 12). The Heritage Council has recently introduced some initiatives to streamline the system for dealing with applications for changes to SHR listed places, particularly the new range of standard exemptions which were introduced in December 2020. However, these changes have in some circumstances made the process more cumbersome, in particular changes to the Standard s 57(2) Exemptions.

- As an example, the standard exemption most commonly used by owners of a heritage item previously was Exemption 2 – *Repairs*, which permitted general repairs of any heritage fabric with the proviso the repairs did not damage significant fabric. However, the new Standard s 57(2) Exemption 2 – *Repairs to Non-Significant Fabric* severely restricts the application of this exemption to non-significant fabric. As most fabric in a heritage building/item has some level of significance, there is confusion in the application of the exemption, and at least the possibility that minor works that should be exempted will require a formal s 60 application, with consequent and wasteful obligations on both applicants and Heritage NSW.
- A number of heritage items have been listed on the SHR with applicable Site Specific s 57(2) Exemptions. In numerous instances these specific exemptions reference conservation policies in a CMP that has been endorsed by the Heritage Council. Under the current arrangements new CMPs are no longer able to be endorsed, so future site-specific exemptions will not be possible, and applicants will now be obliged to lodge a s 60 application to Heritage NSW. The process of endorsing CMPs could be reinstated, although there are risks that this could exacerbate the current situation where unreasonable delays and complexities can be a disincentive for the owners to engage in a constructive process of altering a SHR listed place. In any case, greater reliance could and should be placed on appropriately skilled, experienced professionals who subscribe to an appropriate Code of Ethics (in particular members of Australia ICOMOS) to certify that the proposed works are minor in nature and would not adversely impact on SHR heritage significance.
- A fundamental requirement to reduce unnecessary delays and complexities for owners to engage in the process of altering a SHR listed place is to provide the administrative resources and appropriate personnel to facilitate the process. The prevailing attitude needs to be that sensitive change is acceptable and the objective of the process is the retention of heritage significance (not resistance to change). Heritage NSW must be committed to achieving good heritage outcomes in a timely fashion,

but the agency requires the resourcing, attitudinal and systemic support to do so (refer to the **Resourcing Heritage** heading later in this submission).

### **State Significant Development**

The use of the SSD approval process, where the statutory approval role of the Heritage Council is switched off, is leading to unacceptable heritage outcomes, often for highly significant publicly owned SHR listed places. There has been a substantial escalation in the number of SSD applications that include SHR items in recent years. The process can result in heritage impacts not being properly considered until the proposed redevelopment is at an advanced stage and it is not possible to revise the overall approach.

The Discussion Paper does not address this very important issue, but the use of SSD to override rigorous heritage input at an early stage of the project planning is not acceptable and should not continue.

- The use of the SSD approval process is particularly inappropriate where a publicly owned and highly significant heritage item is affected (for example Central Railway, the Education Department Building or the Chief Secretary's Building). The process is particularly concerning where existing height and FSR controls are revised to allow for a particular development driven by non-heritage imperatives. The NSW Government has a responsibility on behalf of the public to carefully manage the process so that the heritage values of these places are respected and conserved.

### **Section 170 Heritage Places**

There has been a significant diminution in recent years of the recognition of the importance and standard of conservation for publicly owned and/or managed heritage items on Section 170 (S170) Registers. Many agencies are not utilising the best practice conservation approaches that the public would expect of a government that (in principle at least) requires for privately owned items.

Most importantly, S170 registers rarely identify the Aboriginal sites on property owned and/or managed by government instrumentalities.

- A number of state agencies have not submitted S170 Heritage and Conservation Registers with the result that many highly significant State-owned properties are not listed on the SHR, including, for example, the Art Gallery of NSW and Sydney Hospital. The Department of Education has one of the largest state government asset portfolios; however, has only 11 SHR listed sites. By contrast, other state agencies, such as Sydney Water and Transport (Sydney Trains) have a positive culture towards heritage, a team of specialist heritage staff and an integrated approach to heritage management resulting in good heritage outcomes and a greater percentage of SHR listed sites. There is no consistent, whole of government approach to heritage listing and management of state-owned heritage places. Heritage NSW and the Heritage Act 1977 provide an opportunity to improve state government heritage management and ensure that state agency heritage management leads by example.
- A review of all State-owned heritage assets should be undertaken to ensure all they are appropriately heritage listed in line with their identified significance, and funding made available for their ongoing management in accordance with the requirements of s 170A and the *Burra Charter*.
- The guidelines gazetted under s 170A of the Act need to be reviewed to ensure that State government agencies are appropriately managing heritage items under their ownership or control. A draft document '*Principles for State Heritage Asset Management V1*' was prepared in 2018 but never finalised.
- State government owned heritage is vulnerable to unsympathetic redevelopment and demolition by neglect due to Heritage NSW not having the resources to support state agencies and ensure they are leading by example. There is also the ability for state agencies to bypass local government heritage provisions (and external scrutiny) by using self-determination under Part 5 of the *Environmental Planning and Assessment Act 1979*, Infrastructure SEPP 2007 and the Educational Establishments SEPP 2017.
- Many state agencies do not meet their obligations under s 170 or s 170A of the Act (eg. annual submission of a Heritage Asset Management Strategy (HAMS), annual reporting on changes to s 170 Registers and notification when a s 170 listed place is demolished, transferred or ceases to be occupied).



## Archaeological Heritage

We note that the Discussion Paper is silent on archaeological heritage and the associated provisions of the Heritage Act. While this might suggest that there is no intention to alter the current provisions, we would welcome reassurance that the silence on this aspect of the Act does not herald a reduction in protection for archaeological heritage.

- It cannot be assumed that extant heritage buildings and or structures in themselves retain all the significant heritage values relating to a property. Archaeological remains including those found in places with no extant visible structures have been demonstrated to be of the highest heritage significance (such as the remains found during construction of the Conservatorium of Music) and the provisions relating to the investigation, discovery and protection of archaeological relics should be retained.

## Resourcing Heritage

An important guiding theme in the Discussion Paper is '*Making Heritage Easy*'. Applicants, the public and the professional heritage community have, in dealing with Heritage NSW in recent years, experienced delays, difficulties in contacting key staff, and at times unreasonable demands to modify the scope of works applications that are benign in terms of the impact on heritage significance. These experiences are not primarily due to any shortcomings of the Act, but are the outcomes of resourcing, attitudinal and systemic problems within NSW Heritage. The outcome is the opposite of '*Making Heritage Easy*'. To address these difficulties, the resourcing, professional expertise and customer focus of the staff at Heritage NSW should be enhanced.

- The progressive reduction of qualified heritage professionals employed in Heritage NSW has led to problems of capacity and morale resulting in an attitude of 'holding against the tide' which is often the result when agencies are continually told to 'do more with less'. The prevailing attitude needs to be that sympathetic change is acceptable and the objective of the process is the retention of heritage significance (not resistance to all change). The role of Heritage NSW should be to facilitate good heritage outcomes by working with stakeholders and heritage professionals, not to resist all proposed change. To meet the Objectives of the Act and provide the optimal service to NSW, the skilled resources of Heritage NSW need to be enhanced as a matter of urgency.
- The majority of listed heritage places in NSW (approximately 95%) are on LEP schedules, and local government has the responsibility for their listing, compilation of information, determining applications for works and providing incentives for their conservation. The NSW government will achieve enhanced management of the State's heritage by increasing resourcing to local governments. As well as increased funding for heritage advisors and specific projects such as heritage studies and thematic histories, this should include expanded in-kind support, such as heritage training for planning officers, workshops for councillors and greater visibility of the Heritage Council and Heritage NSW officials in rural areas.
- There should be greater delegation to local government for works applications for SHR items, within strict guidelines, delegation thresholds and reporting requirements. This increased delegation must be supported by allocating increased resourcing to local governments, including heritage advisors, training, workshops etc.

See attachment for additional responses to select Focus Questions relevant to Aboriginal Heritage

## **ATTACHMENT: Additional responses to select Focus Questions relevant to Aboriginal Heritage**

### **Introduction**

It is a positive aspect of the application of the Heritage Act in NSW that it does enable places to be listed for their Aboriginal cultural heritage values.

It also provides the opportunity to recognise that many places have Aboriginal and non-Aboriginal values concurrently. This enables a recognition of shared and or conflicted heritage that is key to a full understanding of heritage significance and provides opportunities for increased understanding.

The absolute separation in legislation in some states about places of Aboriginal and so-called historic heritage value leads to a State endorsed 'invisibility' of Aboriginal heritage in the colonial period especially in Queensland. Despite the potential for a more comprehensive narrative on the heritage of NSW provided by the legislation in NSW, in practice Aboriginal Heritage values of listed places have not been consistently assessed. Many properties listed for other values are likely to also have Aboriginal values some of these are likely to meet the threshold for state significance. The Victorian Heritage Council while maintaining that the Act excludes places of Aboriginal value only, has recently been considering a review of listed historical places to identify if they 'also have' Aboriginal values as a contributing value. Nevertheless, the heritage register still gives a skewed view to the public of the range of places of significance to the history and development of the state because it excludes places of Aboriginal cultural value only.

### **Focus Question 1: What should be the composition, skills and qualities of the Heritage Council of NSW?**

It is not ideal that expertise on Aboriginal heritage is relegated to one appointee. Ideally an Aboriginal Heritage Council should be constituted to work side by side with the general NSW Heritage Council to consider/advise on places nominated solely for their Aboriginal heritage values and to work collaboratively with the general heritage council on places that have both Aboriginal and other non-Aboriginal heritage values. For a robust assessment of Aboriginal heritage values membership should include Aboriginal people recognised as knowledge holders, spokes people on Aboriginal heritage AND specialists in related technical fields such as archaeology and anthropology who have an extensive experience across a range types of heritage items and places and who may or may not be of Aboriginal descent.

All members should have some awareness of at least the existence of Aboriginal heritage values and to be able to assess whether the presence or absence of such values have been adequately assessed. Ideally, all NSW Heritage Council members should undertake an induction to ensure a baseline familiarisation with Aboriginal cultural heritage and the types of places items and values that might need to be considered.

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

It would be useful if the Heritage Act acknowledged in a preamble that the *National Parks and Wildlife Act 1974* exists to provide protection for Aboriginal objects and designated Aboriginal Places. It is a useful initiative that Aboriginal Places (NPWACT 1974) and the SHR places (Heritage Act 1977) are visible together on the NSW Heritage website. Further it would help to note that in relation to Aboriginal heritage the Heritage Act seeks to identify and register a sample of places of significance as part of the heritage of NSW, that have been identified by Aboriginal people as being especially worth conserving and promoting to the public to illustrate important elements of their heritage.

Aboriginal people have a unique knowledge and relationship to landscape, which can result in the multi-layered significance of places. Given the antiquity of occupation of the continent, it could be expected that the majority of the State has some level of significance to Aboriginal people and that Aboriginal heritage values make up part of the significance of many items.

### **Focus Question 3: Are the objectives of the Heritage Act still relevant?**

The objects of the Act are adequate in relation to items of State Heritage Significance however objectives a) and b) use the term 'the State's heritage', which arguably includes items of local significance. There is an expectation that Local Government will provide for the adequate protection of these other places which may be below the State significance threshold, but which nevertheless are important to local communities. However, this does not necessarily occur in relation to Aboriginal heritage. There is also a lack of resources to assist private landowners to care for items, in general. Many local government bodies and other instrumentalities do not adequately consider Aboriginal heritage values. For example:

- Although there are several heritage studies for the Shoalhaven LGA, none of these include an LGA

wide assessment of Aboriginal heritage places.

- In many cases assessments of heritage values of building and heritage landscapes do not include assessment of Aboriginal heritage values.
- S170 registers rarely identify the Aboriginal sites on government property.

There is a missed opportunity to promote an understanding of Aboriginal heritage and the narrative of shared values.

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

The Act does not reflect the expectation of the contemporary NSW Aboriginal community in that:

- the Heritage Council does not include a strong Aboriginal membership and or expertise in Aboriginal heritage,
- consultation processes do not adequately address Aboriginal rights and interest,
- places listed for their architectural, landscape and historic values are not adequately or routinely assessed for their Aboriginal heritage values and there is a lack of awareness of shared values, and
- there is an expectation that listing would at least result in financial and technical assistance with the conservation and management of items and places.

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

Community engagement can be looked at in several ways. Here we consider two aspects relevant to Aboriginal heritage, that is a) engagement over the listing of items/places themselves (for current process see Section 33 of the Act) and b) engagement aimed at providing guidance and promoting an understanding of the heritage of NSW.

In relation to Aboriginal heritage the State Heritage Register has historically only included places that Aboriginal people have nominated and or agreed to, but even so, recent examples such as the controversy around the SHR site *The Bundian Way* reflect the need for more targeted consultation with specific communities to complement consultation formats such as public exhibition. While the Act refers to 'landowners' and 'land managers' this does not necessarily reflect the range of rights and interests (eg. Native Title) that Aboriginal people might have in an item or place. And it may take a bit more research at times to ensure that all appropriate people have been consulted. It would be useful to specify that at least the native title holders (or where Native Title is yet to be determined any registered Native Title claimants) and the relevant Aboriginal Land Council are to be consulted regarding any proposed State listing of a place or item for its Aboriginal cultural values. Ideally the Aboriginal Heritage Council, proposed in response to question 1 – would be well placed to assist in identifying the appropriate groups to notify.

Additional engagement with Native Title holders and Land Councils could contribute to a more robust SHR.

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

Many Aboriginal communities have small collections of objects/museums/keeping places that are under resourced. Developers of heritage places might usefully be required – or offered incentives – to provide assistance (financial or expertise) to enable and support the communities to better promote their own heritage.

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

Discussions with Aboriginal community representatives have repeatedly referenced the inconsistency and lack of transparency with breaches of heritage legislation. Some kind of public record of breaches/fines/non-compliance (such as exist for doctors, accountants and many other professions) would increase confidence in the system and provide greater awareness of the necessity to protect heritage as well as acting as a deterrent.

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

Upskilling and resourcing interested Aboriginal organisations to promote their own heritage should be part of any strategy to grow heritage tourism.