



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ENVIRONMENT, CLIMATE CHANGE AND BIODIVERSITY
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Submission Cover Sheet

Inquiry into ACT's heritage arrangements

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The Heritage Council of Western Australia welcomes the opportunity to provide a submission to the *Inquiry into the ACT's heritage arrangements*. The submission responds to the questions put to the Council in your invitation and aims to provide information that will assist in the development of effective and rigorous heritage arrangements for the ACT.

1. The processes and procedures in Western Australia for protecting non-Indigenous cultural heritage

Identification, management and protection of Western Australia's places of cultural heritage significance is achieved primarily through the interaction of the State's *Heritage Act 2018* (Heritage Act) and the *Planning and Development Act 2005* (Planning Act). The Heritage Council of Western Australia is established under the provisions of the Heritage Act.

The Heritage Act sets out the requirement and process for identifying heritage places at the local and State level. Local governments compile a local heritage survey, which informs the preparation of a Heritage List under the Planning Act; the Minister, on the recommendation of the Heritage Council, approves entry of places into the State Register of Heritage Places.

One of the Heritage Council's primary roles is to make recommendations for the inclusion of places in the State Register. This requires consideration as to whether a place meets the threshold for inclusion, and adequately demonstrates cultural heritage significance at a State level, as opposed to significance for local community or region.

The Planning Act creates a requirement for adoption of a heritage list, identifying those local heritage places considered worthy of conservation. These places, along with any identified as being, or having the potential to be, of State significance, are defined as a 'heritage protected place' for the purpose of the planning framework.

A key element of the heritage protection process is the requirement for development approval to be sought for heritage protected places, for works that may otherwise be exempt. This provision creates a system under which the decision-maker is provided with an opportunity to seek, or be provided with, suitable advice to inform their decision.

Advice on development of local heritage places may come as a required report from the applicant, a review by a planning officer or input from an external heritage consultant. It is acknowledged that the approach to local heritage can vary significantly between different local governments depending on their level of engagement with heritage, resourcing of specialist roles or consultants, and attitudes to heritage within the local community and Council.

For places included in the State Register the Heritage Act places an obligation on the decision-maker, in the development approval process to refer proposals to the Heritage Council for statutory advice. The Act further determines that this advice must be put into effect by the decision-maker, with some exceptions that will be covered below.

The requirement to refer matters for advice relates also to proposals being considered by a decision-maker outside the context of the development approvals process. This allows for projects and actions being considered by State agencies or other matters that may fall outside the planning framework to receive the same level of statutory advice from the Heritage Council.

Under Western Australian legislation the Heritage Council is rarely a final decision-maker on matters that can impact on the cultural heritage significance of a place. Implementation of statutory advice relies on decision-makers understanding and appropriately applying Heritage Council advice. While this generally delivers the intended outcomes the lack of direct visibility and accountability creates risk for conservation outcomes.

The adoption and application of Heritage Council advice by a decision-maker is subject to a caveat in the Act that, in the Council's view, may result in unintended consequences. The decision-maker is able to determine contrary to the statutory advice if it 'finds that there is no feasible and prudent alternative' to making its preferred decision.

It is acknowledged that decision-makers are required to take into consideration a broad range of matters, and that heritage outcomes can compete with other priorities and intended outcomes. However, use of clauses that allow statutory processes to be circumvented should be carefully considered, adequately detailed and supported with explanatory material.

While the Heritage Council understands that the test of 'no feasible and prudent alternative' is supported by case law and is a significant benchmark to be met, we are less certain that all decision makers apply the same standards.

The Heritage Act provides some proactive measures, responding to community desire to see strengthening of protection for heritage places. The most common of these is a heritage agreement, which provides a contract between a public authority and a property owner to take or not take certain actions for a defined heritage outcome. A heritage agreement is moderately simple to implement, sets clear expectations for each party, and in the Heritage Act is defined as running with ownership, avoiding the need to renegotiate on the sale of the property.

This Heritage Act introduced the concept of the repair notice and repair order, mechanisms (absent from earlier legislation) that address neglect of heritage

places that risks damage to heritage fabric. The provisions allow the matter to be addressed in a formal but collaborative manner by the Heritage Council and owner, with the opportunity to escalate to give legal direction should a negotiated outcome fail.

In general, the Heritage Council supports a regulatory and administrative framework that encourages the seeking of early advice, provides technical and financial support, and guides proponents to deliver positive heritage outcomes. A regulatory framework that also provides a range of options to address non-compliance (from monitoring and facilitation to enforcement measures) is preferred.

One area in which the Heritage Council is seeking to strengthen activity is proactive engagement to confirm that intended or stated heritage outcomes have been delivered. This includes development being delivered consistent with heritage approvals and conditions; commitments under heritage agreements or orders being met; grant-funded projects meeting the intent of the grant; and sponsored activities delivering the stated outcomes. This is partly a compliance function but will require ongoing engagement and communication, which are key focus areas for the Heritage Council. The Council (supported by the Department) already provides policies, procedures and guidelines to assist heritage owners and development application proponents, and work to expand and strengthen these is ongoing.

2. What your governance arrangements are

The Heritage Council is convened with a Chair and eight members nominated by the Minister. The Heritage Act requires that members have expertise in cultural heritage matters and calls for a balance of ability and knowledge within a listed range of fields. Governance is one of the fields for which a member may demonstrate expertise. The recently adopted amendments to the Heritage Regulations 2019 add further areas of expertise and a refined process for appointment of Council members.

A balanced set of skills and expertise has been an important contribution to the Heritage Council's governance and decision making. Having this as a stated intent in the legislation is encouraged – the Heritage Council is currently identifying its own skills matrix to identify gaps and opportunities that may be filled in the next recruitment process.

Governance policy and procedure are generally derived from best practice and established approaches informed by the Public Sector Commission and other relevant bodies. Some elements of the Heritage Council's governance, such as financial management and audit, are fully managed by the supporting Department.

Performance indicators for the Council and Department are established by State government and tracked and reported by the Department. The Heritage Council conducts an annual review of its performance through a survey of Council members.

3. Any changes to your governance arrangements arising from the passage of the *Heritage Act 2018*

The review of the former Act did not indicate significant issues with governance. In general, the new Act delivers minor updates to bring some elements in line with best practice, such as inclusion of conflict-of-interest requirements and penalties in regulations. The Heritage Act 2018 is acknowledged as an evolution of the former legislation rather than a fundamental shift.

From a governance perspective the most significant change is the shift to skills-based appointments rather than members nominated to represent specific organisations or sectors. This clarifies that members have a primary responsibility to the Heritage Council and manages expectations from the relevant community or industry sector.

The Heritage Act in general utilises plain English and is easier to comprehend than the previous legislation. This itself provides governance benefits with more consistent interpretation and better implementation. These are supported by the Heritage Council's education and information programs.

4. What your relationship and governance arrangements with the Department of Planning, Lands and Heritage looks like, including the division of roles and responsibilities

The Heritage Council is a separate financial entity and maintains a line in the State budget, although this provides only limited funding covering the Council's grants program, salaries and expenses for board members, sponsorship program and incidental expenditure. While there is provision for the Heritage Council to be an employing authority the preference has been for employment to be via the Department.

Department officers deliver all of the Council's operational activities and strategic programs. The Council does not have direct influence on resourcing, although Department priorities and resource requirements are intended to be derived from the Council's Strategic Plan and associated work program, developed by the Department and regularly reviewed by the Council.

The Department provides all financial management, governance, and technical support for the Council and drafts its Annual Report. The Department is

responsible for audit functions, although the Heritage Council is represented on the Audit and Risk Committee.

A Service Charter is maintained to further detail and clarify expectations on roles and responsibilities of the Council and Department.

Prior to the merger of government departments in 2017 the Council was supported by a dedicated agency. Since the merger, support is given by a Department with responsibilities across multiple portfolios and reporting to four Ministers.

There are aspects of a larger department that better support the Heritage Council's functions, including greater flexibility in budget allocation, ability for heritage officers to engage directly with other department officers on heritage matters, and improved opportunity to integrate heritage with other agency projects. Nevertheless, the Heritage Council must now compete with other priorities of the larger Department, in all aspects of resourcing, and to a certain extent has lost its independent presence.

The Heritage Council considers, therefore, that its preferred model is a dedicated department that allows officers to focus solely on heritage matters and work closely with its statutory board and Minister in support of its legislation.

Nerida Moredoundt
Chairperson of the Heritage Council of Western Australia