



HERITAGE COUNCIL OF NEW SOUTH WALES

Submission to Review of the NSW Heritage Act 1977

June 2021

Introduction

Why a new Heritage Act?

The current Heritage Act 1977 (the Act) was born in the era of bulldozers at midnight and a community alarmed about the actual and potential loss of our built heritage. We owe a lot to Jack Munday and the government of the day for recognising the problem and creating an appropriate mechanism at that time to begin to deal with it.

While the Act has served the State well, it remains focused on the protection and regulation of built heritage, with some tacit references to movable heritage and cultural landscapes. The Act pays lip service to community awareness and education about heritage and effectively ignores Aboriginal cultural heritage and intangible or “living” heritage.

Much has changed about our understanding of what Heritage means in 21st-century New South Wales and the Council agrees it is now timely for the Act to be reviewed and updated.

Our vision for heritage in New South Wales

The Heritage Council’s vision is that we **celebrate, conserve and protect our heritage**. All our heritage should be celebrated, as it is through our heritage that we better understand and learn from the past, value the present and use that knowledge to shape our future. Heritage places can assist in addressing key issues facing cities, regional areas and rural communities today. They can serve as anchors for urban revitalisation and even contribute to our response to climate change by realising the environmental savings of preservation compared with demolition and new construction.

They enhance not only our emotional and spiritual welfare through the enjoyment of living in or visiting a place, but can be a source of strength and confidence for a community through their ability to tell us who we are, where we have come from and what we have accomplished. A recent example of this is the new addition to the Australian Museum that respects the original design, enhances and augments the 1970s addition, and creates new additions that are iconic modern architecture in their own right.

As the Heritage Council of NSW, we see our role as not only to celebrate, conserve and protect the heritage present now, but through good decision-making, planning and design excellence, to facilitate the creation of the heritage of the future

The Heritage Council’s philosophy/approach

The Heritage Council believes strongly that its role, enabled through a revised Heritage Act, is to facilitate change that is respectful of heritage, to use regulatory protection where necessary, and to work with the community to understand the importance of and reasons to celebrate our heritage. When heritage is threatened and regulation or enforcement is required, the Council needs to be able to be forthright and fearless in advocating for that protection, using contemporary regulatory tools in the updated Heritage Act.



Figure 1: The six major focus areas of the Heritage Council of NSW as outlined in the Heritage Council of New South Wales Annual Report 2019-2020

The major missing element of the current Heritage Act

All of New South Wales is Aboriginal land and has Aboriginal cultural significance in some form. With this in mind, any assessment of contemporary cultural heritage values must start with recognition and assessment of Aboriginal cultural heritage values. Yet the Act is effectively silent on this. The Heritage Council believes very strongly that a revised Heritage Act, accompanied by independent Aboriginal cultural heritage legislation, must not only recognise, celebrate and conserve Aboriginal cultural heritage, but also protect it where necessary and key decisions about that heritage must be guided by Aboriginal people.

In the following “themes” we set out the Heritage Council’s views and recommendations on specific aspects of the review of the Heritage Act.

Theme One: What is “significant heritage”?

A central issue with the Heritage Act as it stands is the lack of a clear definition of what heritage is. The objects of the Act [Part 1(3)] state a desire to identify, promote, conserve, protect and even encourage the adaptive reuse of the State’s heritage, but the Act itself provides only the vaguest terms on what that might constitute. When the Act was gazetted in 1977 this was primarily seen as the built heritage of our towns and cities, driven as it was by the large scale demolitions occurring and proposed in places such as The Rocks and Woolloomooloo in Sydney.

The Act classifies those things protected by its provisions as *environmental heritage: those places, buildings, works, relics, movable objects, and precincts, of State or local heritage significance*. While it is true that the environment we live in contains all of those things, the use of the term environmental heritage is no longer clear. Those unfamiliar with the jargon of the sector mistake this as being concerned with a natural space, not one built and shaped by human endeavour.

Further, the definition excludes heritage concerns that are increasingly in the public eye, namely Aboriginal cultural heritage and landscape scale heritage: two areas that are of growing concern to the Heritage Council. “Environmental heritage” also excludes a less tangible sense of heritage that is

important to the diverse communities that comprise Australia, especially to Aboriginal people, a sense that heritage can include traditions, rituals, and beliefs.

The 2016 [NSW Community attitudes to heritage](#) found that 60% of respondents were somewhat or very interested in Indigenous/ Aboriginal cultural practices. The same proportion was interested in celebrations, festivals or events which related to heritage (e.g. local agricultural shows, National Trust Heritage Festival). Of six core heritage types, 9% of respondents identified migrant heritage as being the least protected (most at risk).

We note that there is work underway within Government to develop separate Aboriginal cultural heritage legislation. The Heritage Council believes that, considering all heritage in New South Wales (and Australia) is shared heritage, Aboriginal Heritage should actually be part of a single heritage framework. In our view, developing separate Aboriginal Heritage legislation establishes a mechanism that won't clearly work with the Heritage Act and one which creates an opportunity to play one view of heritage off against another. It continues to treat Aboriginal people as the other and segregates responsibility for what is now our shared history.

If heritage legislation starts from a position of focusing on Aboriginal heritage values, our heritage becomes one and tells a story of occupation and ways of life. It provides room for understanding and collaboration and not isolation. We would be provided with a real opportunity to reflect the environment and climate change in what we do and how we address it. We would be provided a real opportunity for cultural landscapes to be embraced for heritage consideration. But most of all we would stop segregation and shifting responsibility for some uncomfortable realisations of our past and we would suggest continue today.

However, noting the Government's current intention to pursue separate legislation in response to a preference expressed by the Aboriginal community, the Heritage Council endorses the continual efforts to make this a reality. But in the meantime, the people of NSW are looking to the Heritage Act and the Heritage Council to address the growing awareness of this important gap. Any proposed revision of the Heritage Act needs to take this issue into consideration, and make provision for the Heritage Act to work effectively as standalone legislation incorporating Aboriginal cultural heritage, or alongside future Aboriginal cultural heritage legislation.

This review also presents an opportunity to support a Connecting with Country approach. There is a tendency to see Aboriginal places as distinct from non-Aboriginal places without acknowledging we are always on Country wherever we are. We need to better understand that post-contact heritage is generated from a shared history between two cultures even though each culture is distinct. A framework that addresses this has recently been developed by the New South Wales Government Architects Office and could be taken as a model from which to draw.

[“Connecting with Country”](#) takes an Aboriginal perspective that provides practical ways for government, planners, designers, and industry to address the legislative requirements of the NSW Environmental Planning and Assessment Act 1979 (EP&A Act) and key policies. Of specific relevance is object (f): “to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)”.

Similarly, the complex nature of landscape is overlooked in the Act but is increasingly being considered by the Heritage Council. Pressure from development on the edges of our major cities Sydney, Wollongong and Newcastle, as well as cultural landscapes in rural and regional areas has seen communities turn to the Heritage Council in efforts to manage these places.

The potential for a new term such as cultural heritage” to be introduced as a replacement for environmental heritage could assist with greater inclusion of different types of heritage under the Act, as well as allowing a broader conversation about what heritage is to the diverse multicultural communities whose own heritage is also part of the broader story of NSW. Cultural heritage is used to describe heritage in all other major state legislations in Australia, including the ACT, and is used internationally in some jurisdictions. As an example, English Heritage defines cultural heritage as *Inherited assets which people identify and value as a reflection and expression of their evolving knowledge, beliefs and traditions, and of their understanding of the beliefs and traditions of others.*

RECOMMENDATION:

1. Define Heritage more broadly.
2. Replace “environmental heritage” with “cultural heritage”
3. Ensure the amended Heritage Act includes the celebration, conservation and protection of Aboriginal heritage or, if that cannot be achieved in the medium term, is designed to align with future separate Aboriginal cultural heritage legislation
4. Embed the Connecting with Country approach
5. Include Cultural Landscapes as potentially significant heritage items

Theme Two: Who should decide on what is and isn’t significant heritage?

Since the first iteration of the Heritage Act in 1977, the composition of the Heritage Council has changed. The original Act allowed for up to eleven members, reduced to nine as its current make-up. Then as now, members were decided on by the Minister, but from a more specific skill set and with dedicated nomination places on the Council from relevant specialist associations. Of these only the National Trust of Australia (NSW) retains its position as a nominating body, with the Department of Planning entitled to representation on the Council and the Government Architects Office having an observer position.

The current requirements for membership of the Heritage Council allow a significant degree of flexibility in who the Minister appoints to the Heritage Council. This can potentially result in the Council comprising all heritage specialists or all generalists, and we believe neither extreme is desirable. While each Australian jurisdiction has specific differences in the makeup of Heritage Councils and their equivalents, there is commonality in the requirement of a set number of members having specific and defined skills and expertise in heritage fields.

We believe that the act should specify a clear and definite requirement for some heritage specialists and some community members who may be from broader backgrounds including property,

planning, the law or finance. We also believe that that the Government Architect should be reinstated as a full voting member of the Heritage Council. As the nature of cultural heritage changes to be more complex and nuanced, this balance of skills and experience is all the more important. A common factor should be a demonstrable interest in and passion for cultural heritage.

As the Council looks towards a more inclusive approach to heritage, we consider it timely to also increase the numbers of members with expertise in Aboriginal cultural heritage from one to two, a man and a woman. Two such members would allow for specific knowledge on both men's and women's cultural heritage to be addressed and could be accommodated by an increase in the overall Council numbers.

RECOMMENDATION:

1. Ensure the Heritage Council has a diverse mix of skills and experience to reflect both the complexity of heritage issues and the NSW community it serves.
2. The Government Architect position be reinstated as a full voting member of the Council
3. Two members, a man and a woman to have Aboriginal Cultural Heritage expertise and experience on both women's and men's cultural heritage

Theme Three: How should the independence of the Heritage Council be supported and guaranteed?

In the Council's view, to adequately perform its functions, the Heritage Council must have the statutory power to act independently, impartially and in the public interest.

One of the key objects of the Act is to promote an understanding of the State's heritage and to conserve that heritage. However, because the Heritage Council cannot itself employ staff and does not have its own funding, it must delegate the bulk of its functions to the agency with responsibility for administering the Act, being Heritage NSW.

The current administrative structure does not ensure the effectiveness of the Heritage Council and the achievement of its strategic action plans. It neither has the staff, the funds nor the power to fully acquit its statutory functions in a manner that is independent, secure and functional.

Because the current Act prevents the Council from obtaining its own funds from consolidated revenue and employing its own staff, it is entirely dependent on resources provided by Heritage NSW, a branch of the Department of Premier and Cabinet (DPC). Further, all of the "services and functions" of the Council including regulatory and compliance functions are in fact delivered by staff of Heritage NSW.

However, being part of DPC and the wider public service Heritage NSW is tied to the shifting policies and machinery-of-government changes of the government of the day, this may result in various conflicts of interest. These include political priorities directly affecting the resourcing levels and strategic priorities of Heritage NSW, including in its advisory, compliance and enforcement functions, and its ability to service the Heritage Council. This can give rise to a perception of, and at times an actual, lack of independence, due to its reliance upon scarce Heritage NSW resources. It also impedes the ability of the Council to plan with confidence and to allocate resources to achieve its strategic priorities, which include meeting the Objects of the Act.

Further, there are situations where the Minister responsible for heritage, or indeed the government in general, are on the one hand seeking independent advice from the Heritage Council on whether a place is of State Heritage significance, while at the same time other agencies may be pursuing projects which impact on places of potential State Heritage significance. In those situations, the staff of Heritage NSW is advising both the Heritage Council in its deliberations, and at the same time advising the Minister and government on how to achieve their policy intentions. This can create a potential conflict of interest for those staff.

We therefore believe that the Heritage Council should be able to employ its own staff, primarily to ensure that the Council receives independent advice, and also is able to seek and if necessary to employ external advisors free of any perception of conflict of interest.

RECOMMENDATION

1. The Heritage Council be enabled to hire independent staff directly to assist it in its duties, including a senior leader and appropriate staff, and have the ability to have staff seconded to it
2. The Heritage Council should have a separate budget to enable it to perform the functions it is required to undertake by the new Act
3. Consideration be given to creating a single agency with a board (comprised of the same expertise as recommended above for the Heritage Council) which can provide independent advice to the Minister and to delegate functions to its staff.

Theme Four: How should the types of heritage significance be categorised?

Australia has, generally speaking, four categories of heritage significance for places:

- World (UNESCO listing)
- Australian
- State
- Local.

The Heritage Act primarily deals with items of State significance while also containing provisions for the interim protection of items of local significance. Generally, the listing of items of local significance is largely carried out by the relevant local council via local environmental plans made under the Environmental Planning and Assessment Act 1979. The Heritage Council is responsible for recommending the listing of places of State significance.

Recognising and celebrating NSW heritage has evolved and the approach to listing should also be reconsidered.

The introduction of a wider range of categories of heritage listing is an opportunity to better recognise and manage this diversity. We believe that any such categories should be based around achieving the vision of celebration, conservation and protection with the ability to discriminate between the three areas of this vision through levels of significance and management requirements rather than connected to function, use or ownership (as suggested in the Act review Discussion Paper).

Developing a category system is something that requires significant thought and consultation in its own right. There are wide views on the best way to proceed, however in our view the current system of a single category of State significance is worth reviewing.

Levels of protection are utilised in some other jurisdictions around the world. Most familiar is the English system of Graded Heritage sites. Buildings or sites listed under the English *Planning (Listed Buildings and Conservation Areas) Act 1990* are graded using published guidelines by Historic England to reflect their relative special architectural and historic interest. The grades are:

- Grade I buildings are of exceptional special interest;
- Grade II* buildings are particularly important buildings of more than special interest;
- Grade II buildings are of special interest, warranting every effort to preserve them.

The Historic England listing, like all listing approaches, does not prevent change or adaptation to listed places but rather requires a measure of approval for works to occur. Another example is New York City which includes the category of Interior Landmark as a listing option. Interior Landmarks are those places that have a special character or special historical or aesthetic interest or value as part of the development, heritage, or cultural characteristics of the city, state, or nation, and are customarily open or accessible to the public, or to which the public is customarily invited, such as a theatre, a courthouse, or office building.

These examples illustrate the types of nuanced approaches employed by other jurisdictions have adopted to deal with different types of heritage places.

A majority of the Heritage Council supports a category system that would broadly involve:

1. **World / Australian:** a category of sites of global or national significance meriting substantial regulatory management and rigorous protection that cannot be circumvented or overridden by other statutory instruments. This category might include our most significant places and cultural landscape areas and need not necessarily be listed by the Commonwealth or UNESCO.
2. **State Significance:** a category of sites of state significance requiring regulatory management to protect those sites from threats such as demolition or adjacent overdevelopment. This category could have two sub-categories:
 - a. those requiring whole-of-site management and;
 - b. those requiring only part-of-site management, eg facades and/or public spaces, some cultural landscapes.
3. **State Recognition:** a category of sites of state significance not requiring extensive regulatory management through formal listing but meriting recognition, conservation and, celebration; and
4. **Local Significance:** a category of sites of local significance deserving of protection and management through local environmental plans.

The introduction of the proposed categories as set out above would also require a change in the nature of the State Heritage Register. It is suggested that World/Australian and State Significance categories retain the current process where the Heritage Council would recommend these sites to the Minister for listing on the Register

For State Recognition sites, it is suggested that the Heritage Council itself ought to have the capacity to determine places deserving of recognition and celebration under Ministerial delegation. This category may even have a less formal listing than the current State Heritage Register.

A significant concern of the Heritage Council is the reluctance of owners to support the listing of private residences. The Heritage Council notes the proposal in the Discussion Paper to formulate "tailored regulatory settings for groups such as residential properties" and welcomes this recognition

of the issue and the intention to give owners of such properties greater clarity and certainty about heritage listing. In the category system advocated above, the Heritage Council believes the 'part-of-site' subcategory would capture the majority of heritage significant private residences and supports the development of consistent protections for this group of items, noting that only select private residences of exceptional and outstanding heritage significance would be subject to 'whole-of-site' management subcategory with bespoke regulations and exemptions.

It is also recommended that the Act clarify that when an item is listed, the elements considered as directly contributing to the significance of the place be properly identified. The aim is to ensure a clear and consistent approach to the preservation and management of listed items and places. For example, as the significance of sites varies, so the impact of heritage listing upon them also varies. While in some instances, all the fabric or the entire site is subject to direct management, in others, only the exterior or particular elements require it with the remainder of the site exempt from control. With this in mind, establishing categories that align with these degrees of significance and management and are removed from the nature of property ownership or the type of property use is a logical approach.

[Heritage NSW Fact Sheet](#) – *Significance and significant fabric*

Broadly, 'significance' is why something is special. In NSW, heritage significance is defined according to the following values of the item: historical, scientific, cultural, social, archaeological, architectural, natural, aesthetic. The NSW Heritage Act 1977 distinguishes between State and local heritage significance. A heritage item can have both state and local significance.

As we have noted earlier in this paper, for those sites that have shared values or standalone Aboriginal Cultural Values it is imperative that Aboriginal stakeholders have the primary role around making decisions on those places within either the Heritage Act or in a complimentary Act

A further significant concern of the Heritage Council and the wider community is the ability of other legislation to override the Heritage Act in certain circumstances. A declaration of State Significant Development, as described in Division 4.7 of the Environmental Planning and Assessment Act 1979, means that approvals under the Heritage Act for the proposed development are not required. We consider that the exemption from approval should not apply to our most important and iconic sites, buildings and landscapes which should be listed in World/Australian category. Any proposed development which affects these sites would require Heritage Council approval.

RECOMMENDATION

1. Establish a broader category system to better protect, manage and celebrate the diversity of heritage
2. Place greater focus in the Act on the clear articulation of the elements that directly contribute to the significance of a heritage item
3. Establish a category of significant sites where the protections of the new Heritage Act cannot be overridden by other legislation

Theme Four: what is the best nomination process to achieve an appropriate State Heritage Register?

Building a representative and comprehensive register for NSW heritage is an ongoing task by its nature, as what the community values as heritage evolves. Although the Register includes historic, Aboriginal and natural heritage, the way it has been populated in the past means it has overwhelmingly captured built heritage and is dominated by government-owned properties, grand residences, churches, and infrastructure such as railway items and bridges. This is slowly being addressed, and the recent recognition of the Sikh community and its traditions through the listing on the Register of two Sikh temples at Woolgoolga, and the listing of the Calga Aboriginal cultural landscape on the Central Coast, are good examples of this shift. Potentially, a greater community involvement in the heritage process would ensure a more diverse and representative Register

However, a key problem is that the nomination and listing process is deemed by many to be too long and too complicated. Partly this is due to a lack of resources within Heritage NSW and partly this is through the process as it has developed. As noted earlier, the current Heritage Council lacks the legal power to direct Heritage NSW and relies on cooperation to achieve its goals.

The nomination system currently adopts a one size fits all approach, no matter the complexity of the site being nominated, or the knowledge and ability of the nominator. The application form itself is relatively complex and does not give a great deal of guidance to the applicant on the likelihood of success of the listing application. Applicants, who are skilled and knowledgeable, such as organisations like the National Trust, or government agencies, typically have the resources to properly complete an application. Individuals and small non-government organisations however often struggle with the process. This could be improved significantly through an online application process that is much more intuitive and better guided. The greatest gain might be through breaking the process into two stages, an initial expression of interest type application, with a full a more detailed application only submitted if requested to do so. This process is typical for many grant making systems and would arguably make life much easier for heritage listing applicants.

Once a full application is submitted to the Heritage Council, there is typically still a lot of work done by staff of Heritage NSW South Wales to fill in gaps in applications and to check the veracity of the application. Given the reducing resources available in Heritage NSW South Wales and the very great diversity in the nature of places nominated, the system might be improved by requiring skilled applicants to do more if gaps are identified, and by commissioning external peer reviews. A grants program could be made available to less skilled or resourced applicants to help them through the process, reducing the dependence on staff of Heritage NSW.

These processes are largely administrative and may not need to be referred to within an amended Heritage Act. However, we believe that any changes to the Act should not preclude innovation in the application process.

Further, if a category system is adopted with a State Recognition category as identified above, this approach may allow for a similar and less time and resource intensive process for the listing of items or sites within that category.

The Heritage Act provides that in considering an item for listing, the Heritage Council may, and the Minister must, take into account:

- whether the long-term conservation of the item is necessary
- whether the listing would render the item incapable of reasonable or economic use

- whether the listing would cause undue financial hardship.

Unlike for the heritage assessment criteria, there is no guidance in NSW as to how to interpret and take into account these considerations. In practice, the Heritage Council rarely provides advice to the Minister on these considerations given that most listings are not opposed by the owner and so these issues are not generally raised. In the cases of commercial buildings where the owner opposes listing, these criteria are important as shown with the recent listing of the former MLC building in North Sydney. The Heritage Council asserted that conservation of the item was necessary and that the building could be economically used without causing undue financial hardship. This view was upheld by the Independent Planning Commission. Given the lack of guidance within the Act itself, arguably a future Heritage Act should provide greater direction around these three points.

While in the long run, heritage assets bestow huge value to their communities, in the short-term economic pressures to redevelop them mean that some owners may resist listing. A range of heritage incentives could be applied such as tradable heritage floor space offsets (similar to the scheme contained in the Sydney Local Environmental Plan 2012), reductions in stamp duty or land tax as part of the listing process.

As raised in Theme Three, other jurisdictions have mechanisms in which specific components of sites are listed, making it clear for future custodians which parts of a place or building have what levels of protection around them. Under the current Heritage Act, certain works do not require an approval and these are set out in exemptions, which can include general exemptions or site specific exemptions. It has been noted however that these do not always match what has been identified as significant fabric within the listing document. Tighter requirements for identifying what is and what is not considered important for the conservation of the significance of a place or building would go some way to addressing this issue for custodians. If greater attention is paid to what is actually significant about a place during the listing process, ensuring that that significance is clearly identified, then owners will have much greater clarity around what can be changed without formal approval processes. Such approval processes are a particularly sore point with the owners of private dwellings who wish to adopt and maintain contemporary living standards.

RECOMMENDATION:

1. Clarify the purpose of the State Heritage Register
2. Improve the listing process through a two-stage approach
3. Align approvals processes and exemptions to the category of listing
4. Consider adopting a range of economic incentives for heritage listing including tradable heritage floor space

Theme Five: What should happen once something is listed on the State Heritage Register?

Listing a place, building, landscape, relic, archaeological or cultural site on the State Heritage Register is an exciting and important moment in the conservation, preservation and recognition of that item. It is not the end point. The vast majority of places listed on the Register now and in the future are living places that people continue to actively use such as residential dwellings, government owned institutional buildings or even a pieces of infrastructure such as a bridges. Even cultural landscapes continue to evolve as circumstances change and more people interact.

To work effectively, the Heritage Act needs to be able to respond to the changing circumstances that apply to places listed on the Register. Heritage listing is not supposed to be, nor was it ever designed to be, something that stopped places from evolving and living. The best heritage outcomes

for places are that they survive and adapt to change as required. Retrofitting heritage buildings is now established as a cost-effective method to deliver improved environmental performance. Most buildings can be retrofitted to improve performance without major impact on their significance, and if embodied energy is taken into account, retrofitting can also be a more energy efficient option than building a newer structure.

As with listing, economic incentives can drive better heritage outcomes. In the case of residential buildings additional reductions in State and local rates and taxes could encourage good stewardship. Ideally, Commonwealth tax deductions could also apply such as discounts on capital gains or multiplies for heritage maintenance deductions.

New South Wales is blessed with multiple examples of heritage buildings and places that have been successfully adapted to meet new uses. Prime examples of this type of place in Sydney include the [Finger Wharves of Walsh Bay and Woolloomooloo](#), the former [Railway Workshops at Eveleigh](#) operating as the arts precinct at Carriageworks and the business and technology hub at Australian Technology Park. Most recently the former [Newcastle Railway Signal Box](#), a component of the larger Newcastle railway station group, has been transformed into a [restaurant](#) and bar while retaining the form and fabric of the old signal box.

To ensure good and viable outcomes for government owned properties that are to be leased to external operators we recommend that those seeking to activate and adaptively reuse state-owned heritage sites are given certainty through long-term leases (eg: 30 year lease for Signal Box Café in Newcastle; 25 year lease for Fort Denison). Other incentives to facilitate good adaptive reuse should also be considered and preferably enabled through amendments to the Heritage Act.

RECOMMENDATION

1. Promote adaptive re-use of listed heritage items
2. Enable long term leases of Government owned assets for different circumstances
3. Consider a wider set of economic incentives for heritage preservation

Theme Six: What should the obligations be for the owner of a heritage place?

Government-owned sites and places represent the vast majority of sites on the Register. The NSW Government, as the regulator of listed heritage, has a reputational obligation to be a model owner.

There is, however, a lack of consistency across government agencies about the listing of items eligible for the SHR and their maintenance following listing. For many private owners of SHR items this is seen as an imbalance in the system and there is a perception that State agencies do not have to comply with the same obligations as private owners.

The Act currently sets out minimum standards for maintenance and repair of SHR items which cover basic matters such as weather and fire protection, security and essential maintenance and repair. Consideration should be given to extending and clarifying the obligations and the standards to which owners must maintain their heritage assets.

The Act also contains provisions for the requirement of approval under section 57-60 prior to carrying out any works (not covered by exemptions). Works carried out without approval or contrary to conditions of an approval is a criminal offence.

While generally enforcement powers are rarely required to be exercised to achieve compliance, in some cases strong enforcement is necessary. However, the Act has not kept pace with other

legislation in providing modern investigative powers and tools to compliance staff. For example, there are very limited powers to enable staff to determine whether a breach has occurred. Unlike the *Protection of the Environment Operations Act 1997* (POEO Act) or the *Environmental Planning and Assessment Act 1979*, the Heritage Act does not contain provisions facilitating the collection of evidence, such as the power to require production of documents and information, or to compel answers to questions.

This can make it difficult to gather sufficient evidence beyond a reasonable doubt, which is the standard of proof typically required for each element of an offence. This includes evidence that specific individuals harmed an item at specific times. Without this level of evidence, convictions can be very difficult to achieve.

Another problem is enforcement. Currently the Act only allows for criminal prosecution. However, such actions involve considerable time and cost which often considerably exceed the penalty imposed. A previous successful prosecution for destruction of an Aboriginal engraving resulted in a penalty of only \$5,000. In this situation it is unclear whether the deterrent nature of such a prosecution outweighs the cost to Government.

The new Heritage Act needs to contain a similar range of investigative and enforcement provisions as contained in other environmental and planning legislation like the POEO Act and the EP&A Act. In addition, wider enforcement options need to be available. An urgent need is to have the ability to issue penalty infringement notices up to an amount of \$25,000 for minor offences. These tools are a far more effective and efficient means of achieving compliance than formal court prosecutions.

Without such powers, it is more difficult to take a contemporary, graduated and proportionate response to non-compliance. The Act should be updated to insert modern enforcement provisions and ensure that such provisions apply equally to both government and non-government owners

RECOMMENDATION

1. Update the Act to include modern enforcement provisions found in similar environmental and planning legislation including the power to issue penalty infringement notices
2. Expand the minimum obligations of heritage management and ensure these apply equally to government and non-government owners

Theme Seven: What are the economic impacts of listing?

There is a common belief that heritage listing reduces the value of the property. This is in part at least true, and results from the perception that a heritage listed property is hard to maintain and update to meet contemporary living and usage standards. The processes involved in planning, designing and securing approvals to make changes to listed properties can also be expensive and frustrating to property owners. This is often the basis for owner objection to the heritage listing of a property.

In all heritage legislation, the community is asserting a right to protect property, which may conflict with the property owners' views and overrides other legislated rights. Where the property is publicly owned, this becomes a policy issue for government to be resolved in Cabinet (usually with input from community groups as with the Sirius Building). Increasingly though, our most important heritage is privately owned by institutions & corporations, trusts or individuals, and if there is a real or perceived "heritage discount" there will be resistance to listing, as with the MLC Building.

In some other circumstances heritage listing actually appears to improve property values, for example in historic precincts such as Paddington in Sydney.

Finance publication [Money](#) cautions potential heritage home owners on the financial demands of owning heritage. The review also notes the Productivity Commission assessment that in parts of Sydney's north shore a heritage listing can add 12% to a home's market value.

There is some evidence from other jurisdictions that properties close to a heritage listed property may actually increase in value as a result of their proximity. A study in New York City of the value of properties close to major cultural facilities, many of which were also Heritage properties, showed a significant halo effect of increased value around those properties. It is well-known that Heritage tourism is a growing sector of the tourism industry and that towns with significant heritage infrastructure attract greater numbers of tourists, for example Tenterfield, Bathurst and Berrima in New South Wales. Amendments to the Heritage Act should facilitate projects and programs that increase heritage related tourism, and the economic benefits that result. There is also evidence that social and health benefits result from culture centred place making, of which heritage is a key part.

In addition, understanding the economic value of heritage controls and listing is a valuable tool to help engage the community in heritage protection. Such an approach has been used by Sydney Opera House to understand its value to the Australian economy and community.

The reforms to the Act should consider additional financial incentives to ensure that heritage property owners are not disadvantaged, and that communities benefit from their heritage assets. There are multiple ways that the NSW Government could address these economic imbalances:

- **Purchase & Sale / Lease.** The NSW Government could purchase property, list, restore or develop it, then sell back to private owners. This approach would allow the listing and any exemptions to be internalised in the property price, and the long-term value to be captured by the State. This approach was taken with Millers Point over 40 years (albeit without a clear strategy), and could be made far more effective, especially by using long-term leases.
- **Conservation Investment Fund.** A state fund could be created to directly invest in the purchase / sale process, or co-invest in heritage protection projects with other stakeholders. It could be possible to provide Deductible Gift Recipient status to such a fund, with appropriate independent governance. To make a difference, this fund would need to be seeded with \$200m - \$500m in equity or debt.
- **Direct Grants.** A budget allocation for direct grants could be enhanced to enable more significant listing or development projects.
- **Planning Incentives.** For properties in more densely populated areas, such as Sydney CBD, planning incentives for heritage protection, such as floor space ratios or airspace could be ways of internalising the value of heritage protection within a precinct. Such tools could also be applied at a precinct level to ensure neighbouring properties add value to each other.
- **Tax Incentives.** The NSW Government levies numerous taxes on property, such as land tax and stamp duty. The reform of these taxes could include incentives to encourage heritage protection, such a stamp duty rebate for purchase of Listed State or Local heritage property. In addition, the Commonwealth Government could provide tax incentives with income tax deductibility, and it would be logical for these to apply for National listings.

RECOMMENDATION

1. Undertake a comprehensive economic study to assess to what extent, if any, property values are impacted by heritage listing, and what are the wider economic, social and health/community welfare benefits of heritage listing
2. Investigate the creation of a conservation investment fund to finance purchase / sale / lease arrangements for heritage property, where listing would create changes in short & long term value.
3. Establish financial incentives for listing and improvement state and locally listed heritage property.
4. Investigate tax incentives for Heritage with the Commonwealth Government

Conclusions

A great deal has changed since 1977 when the New South Wales Heritage Act was first put in place. We are much more conscious that all of New South Wales and indeed Australia is Aboriginal land with Aboriginal cultural heritage values, and that all subsequent heritage is built on that land. We have seen the meaning of “heritage” shifting from the more Anglo-British concept of built heritage to one of a broader sense of cultural heritage including intangible elements and whole landscapes. We are much more aware of the impacts of climate change and of the need to protect our heritage from that change, and to recognise that preserving heritage benefits the environment and climate. We know that celebrating, conserving and protecting our heritage builds better and more satisfied communities, and delivers real economic benefits through activities such as cultural tourism. We also know that the custodianship of a heritage place brings both costs and benefits, and we should ensure that for those custodians, the benefits outweigh the costs.

We should grasp the opportunity to bring our Heritage Act up-to-date so that the people of New South Wales are really given the ability to celebrate, conserve and protect their heritage.



Frank Howarth AM PSM

Chair of the Heritage Council of NSW, on behalf of the full Council