



NSW GOVERNMENT
Department of Planning

Review of the NSW Heritage Act 1977

Implementation

Introduction

In July 2007 the former Minister for Planning the Hon. Frank Sartor MP appointed an independent panel of experts to conduct a review of the NSW Heritage Act 1977. In December 2007 the Panel completed its report - *A Review of the NSW Heritage Act 1977*. The Review contains 65 recommendations which incorporate greater fairness and rigour into the heritage listing process. Importantly key elements of the current heritage management system such as local and State heritage listings and the NSW Heritage Council have been recommended to be retained.

The recommendations of the Panel were arrived at following a review of the existing legislation, consultation with major stakeholders and consideration of public and industry submissions. Overall, the Panel considered substantial community input including 140 submissions from 126 government departments, local councils, groups and members of the public. A summary of submissions is contained in the Panel's report.

While some recommendations require amendment to the Heritage Act 1977 to be implemented, many of the recommendations of the Review will be implemented by changes to guidelines and practice by the Department of Planning, the Heritage Council and local councils.

The table below summarises how the recommendations of the Review are proposed to be implemented.

1.4 Proposed Recommendations - State Heritage Provisions & Practice		
Recommendations	Implementation	Comment
1. To provide a more strategic and systematic framework in which to consider nominations and to assist in reducing the significant backlog of SHR nominations, the HC and the D-G of the DoP should set a thematically based forward program. The program would be agreed with the Minister and include the order in which nominations or types of nominations would be progressed.	Policy	Thematic listings program agreed to by the Heritage Council and the Minister. First 2 year program launched by the Minister for the following themes: <ul style="list-style-type: none"> • Governor Macquarie • Convicts • World Wars I & II • Aboriginal Heritage.
2. The thematic program would be prepared on an annual basis and would set time limits for formal nominations to be made by the Heritage Council to allow sufficient time and resources for these nominations to be considered.	Policy	Thematic Program is on a 2 yearly basis – 2009-2010. A 2 yearly timeframe is preferred to allow sufficient time for the community to prepare and submit nominations, for those nominations to be assessed by the Heritage Council, and determined by the Minister.
3. A new function could be added to the Heritage Council under s.21(1) of the Heritage Act “to prepare a thematic forward program of proposed nominations for the State Heritage Register to be agreed by the Minister”.	No change needed	Thematic Listing Program is being undertaken in accordance with existing Heritage Council functions defined by the Act.
4. With the introduction of a thematically based forward program, the Heritage Council should call for nominations from the public provided that such nominations were in keeping with the identified theme. Public nominations should otherwise be limited to “emergency” nominations only.	Policy	Community nominations have been called for following the launch of the program by the Minister: <ul style="list-style-type: none"> • Advertised in major Metro newspapers • Website calls for nominations • Peak heritage bodies advised.

<i>1.4 Proposed Recommendations - State Heritage Provisions & Practice</i>		
Recommendations	Implementation	Comment
5. The Heritage Act should be amended to provide that items proposed for listing on the SHR must meet more than one of the heritage significance criteria, except where the place possesses a very high level of rarity and is clearly and outstanding item.	Bill	Amendment in the Bill.
6. Owners of places proposed for listing on the SHR should have a mandatory right for a Ministerial Review Panel or a Commission of Inquiry prior to Ministerial decision on a proposed listing.	Bill	The Bill allows for the Minister to refer an owner objection to a Ministerial Review Panel or the PAC at her discretion.
7. Other than the above, no additional appeals mechanism is required in the process for considering a nomination for the SHR.	NA	Noted.
8. Heritage curtilages should in general be restricted to the legal lot boundary on which the heritage item is located, or to a smaller portion of land within that lot boundary.	Policy	This matter will be dealt with by Departmental guidelines.
9. Where a heritage curtilage encompasses land outside of a lot boundary, that land should only be listed if it is essential for the conservation of the first item. In such cases full consultation with the second landowner should occur prior to listing.	Policy	This matter will be dealt with by Departmental guidelines.
10. The use of a heritage agreement to protect non-core curtilage land could be considered rather than statutory listing on the SHR.	Policy	Heritage Agreements can only be made with the Minister for items listed on the SHR.
11. Development within the curtilage of a heritage item that is consistent with the conservation management plan or heritage agreement for that item should be allowed.	No change needed	No legislative change is required as this already occurs. Heritage Council approval will continue to be required unless a CMP or a heritage agreement exempts the activity from the need for such an approval.

1.4 Proposed Recommendations - State Heritage Provisions & Practice		
Recommendations	Implementation	Comment
12. If there are properties presently listed on the SHR without curtilages these should be reviewed and an appropriate curtilage identified and approved by the Heritage Council.	Policy	An audit of existing curtilages will be carried out by the Department. This is a significant task requiring considerable resourcing.
13. No items should be listed on the SHR without explicitly defined curtilages. This includes items to be listed as a whole from a state agency s.170 Heritage and Conservation Register .	No change needed	All current SHR items are listed with curtilages.
14. Timeframes for the nomination process under Sections 33(d) and 34(1) of the Heritage Act should be removed.	No change needed	Timeframes to be retained for certainty in the listing process.
15. The Minister's reasons for delisting an item from the SHR should be broadened under Section 38 to include the following additional matters: - that the item is not, or is no longer, of State heritage significance, - that the long term conservation of the item is not necessary, - that the listing renders the item incapable of reasonable or economic use, or - that the listing is demonstrably causing undue financial hardship to the owner, mortgagee or lessee.	Bill	Included in the Bill.
16. Section 38 of the Heritage Act should be amended to enable the Minister to direct the removal of a listing from the SHR if she considers that the item meets one or more of the above criteria. The proposed amendment to the Act should give the Minister the powers to delist an item having considered the recommendations of the Heritage Council.	Bill	Included in the Bill in an amended form. See 15 above.

<i>1.4 Proposed Recommendations - State Heritage Provisions & Practice</i>		
Recommendations	Implementation	Comment
17. The Heritage Office [Branch] should be directed to reassess items transferred onto the SHR from the former system of Permanent Conservation Orders to determine if those items meet the criteria for State significance. Those items which do not meet the criteria should be automatically removed under savings and transitional provisions to an Amendment Act.	Future Amendment	This is a significant task requiring substantial resourcing. There are over 700 former PCOs. No Savings/Transitional provisions have been included in the Bill to fast track de-listing. This could be considered for later amendments.
18. The use of heritage agreements and similar mechanisms are recognised as an important tool to support heritage conservation and should be put into wider use, in conjunction with statutory listing.	No change needed	This can be carried out under existing provisions of the Act.
19. The use of exemptions under Section 57(2) of the Heritage Act could be expanded for minor works and other applications that will not impact upon significance.	No change needed	The Department supports in principle the expansion of the exemptions for minor works to State Heritage Register items. This can be carried out under existing provisions of the Act.
20. For applications relating to items listed on the SHR, the current appeals process to the Land & Environment Court is appropriate and should continue.	No change needed	Appeals for applications under the Heritage Act are determined by the Minister. Appeals for Integrated Development Applications are to the Court.

<i>2.7 Proposed Recommendations - Functions & Constitution of Heritage Council</i>		
Recommendations	Implementation	Comment
1. The Minister could consider several options for the potential reform of the Heritage Council constitution (as outlined in the Report).	Bill	Modified model in Bill. The Bill reduces Heritage Council membership from 15 to 11 with 6 skill based members, 3 State Agency members, the Chair and the National Trust.
2. Allow the Heritage Council to devolve itself into a smaller sub-committee or sub-committees as required to undertake some or all of the duties of the Heritage Council in relation to individual matters. These sub-committees could replace the existing committees if required.	No change needed	This is currently the case and can be carried out under the Act at present.
3. The need for the appointment of Alternate Members under Section 13 of the Heritage Act could be removed altogether, as there are concerns that the use of alternates in the past has contributed to inconsistent decision-making, where the mix of Council members could change unpredictably from meeting to meeting.	Bill	The Bill enables the Minister to appoint deputy members. This will enable some flexibility in the case of the absence of appointed members. State Agency members can appoint their own deputies.
4. The Heritage Act could be amended to enable the Minister to appoint an 'acting member' to fill in for a member who has been approved to take a leave of absence by the Minister, for a period of up to six months.	Bill	The Bill enables the Minister to appoint deputy members. This will enable some flexibility in the case of the absence of appointed members.
5. If a member is to be absent from the Heritage Council for a period of longer than six months, then they would be required to resign and the position filled as per the arrangements to fill casual vacancies.	Bill	The Bill provides that the office of an appointed member becomes vacant if they are absent from 3 consecutive Heritage Council meetings unless granted leave.

<i>2.7 Proposed Recommendations - Functions & Constitution of Heritage Council</i>		
Recommendations	Implementation	Comment
6. Section 9 of the Heritage Act could be amended to remove time limits on membership tenure.	Bill	The Bill states that a member's term is for 3 years, but that the member is eligible for reappointment.
7. The Minister could consider appointing members for varying terms to ensure appropriate rotation.	Bill	This will be a matter for the Minister's determination. At present continuity of membership is achieved by staggering the membership terms.
8. Consideration should be given to amending the Heritage Act to provide for emergency "stop work" powers for unauthorised works to items which are the subject of an IHO or SHR listing. This power should be exercised by the Minister of Heritage Council Chair on similar terms to the existing Section 136 orders.	Bill	This has been included in the Bill.
9. A bilateral agreement could be formed under the EPBC Act between the State and the Commonwealth which accredits the heritage assessment and approvals processes for World, National and Commonwealth heritage items. It may be appropriate to formally recognise this role within the functions of the Heritage Council.	No change needed	NSW wants to continue negotiating bi-lateral approval agreements with the Commonwealth to reduce the duplication of approvals for places on the World and National Heritage Lists. The Conservation Management Plan provisions in the Bill give CMPs greater status in line with Commonwealth requirements, better enabling the Heritage Act to be accredited by the Commonwealth for Bi-lateral Agreements. The existing Heritage Council functions under the Act are considered to be sufficiently broad for this purpose.

<i>2.7 Proposed Recommendations - Functions & Constitution of Heritage Council</i>		
Recommendations	Implementation	Comment
10. A new role for the Heritage Council could be inserted in Section 21 of the Heritage Act, which is “to advise the Minister on matters relating to places listed on the World, National or Commonwealth Heritage Lists”.	No change needed	The existing Heritage Council functions under the Act are considered to be sufficiently broad for this purpose.
11. The Minister could consider progressing discussions between the NSW Government and the Commonwealth regarding a bilateral agreement to accredit NSW heritage approvals processes for World, National and Commonwealth heritage items.	Policy	NSW wants to continue negotiating Bi-lateral approval agreements with the Commonwealth to reduce the duplication of approvals for places on the World and National Heritage Lists.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
1. Owners of proposed heritage items should be consulted at the outset of the heritage assessment process and subsequently during the preparation and exhibition of the LEP	Policy	This is already is current practice and should continue to occur. Department of Planning Guidelines will be prepared to confirm that this is best practice in LEP preparation.
2. Where owners continue to object to the listing of their property following the exhibition of the draft LEP, one of 3 options should be considered: a) establishment of an Independent Hearing and Assessment Panel (IHAP) to consider objection and make a final recommendation to the Council; b) establishment of a Public Inquiry under Section 68(1) of the EP & A Act to similarly consider the objection and make a final recommendation to the Council; or c) the appointment of a planning arbitrator to determine the matter whose final decision would be binding to the Council.	Bill	The Bill proposes that local councils be able to refer owner objections to LEP heritage listings to an IHAP. Existing and proposed owner objection opportunities are: <ul style="list-style-type: none"> • Department of Planning Heritage Study and LEP Guidelines that require a consistent and rigorous heritage assessment process by councils • heritage study stage • LEP gateway criteria • exhibition of draft local environmental plan • Independent Heritage and Assessment Panel • Ministerial decision.
3. Gateway criteria should be established to guide councils in their decision-making on listing heritage items and identifying conservation areas, and to guide IHAPs when hearing objections to listings. (Expert Panel indicates what the gateway criteria should address)	Policy	Agreed. These criteria will be prepared as part of the work undertaken by the Department of Planning for the establishment of the Gateway proposal.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
4. In deciding whether to list a local item, Councils should have particular regard for planning goals for the area and the recommendations contained in regional and sub-regional strategies	Policy	Agreed. Councils will be required to take into account the recommendations in the strategic plans.
5. The DoP could prepare a circular to issue to all councils detailing the gateway criteria and how they should be applied	Policy	The Department will prepare guidelines for councils.
6. Expert Panel supports the aims of the draft Planning Reforms to streamline the LEP making system, particularly as this will improve the process of listing and de-listing of heritage items	Policy	Noted.
7. Heritage LEP Guidelines should be prepared by the DoP jointly with the Heritage Council. These Guidelines should support the Standard LEP template in striving for greater standardisation and clarity of controls across the State	Policy	The Department of Planning (Heritage Branch) will prepare Heritage LEP Guidelines.
8. Heritage Council is to continue to provide support to local government through dedicated programs. Particular emphasis should be given to educating Council staff, councilors and local heritage professionals in the appreciation and application of the heritage listing criteria	Policy	Support currently in place including funding of local heritage studies and local heritage advisors as well as training of local heritage advisors.
9. Regional and thematic heritage studies could be used to improve comparative analysis and therefore the quality and reliability of individual assessments. The Heritage Council could explore opportunities to work with individual councils or regional groups of councils in undertaking such studies	Policy	As part of the NSW Heritage Grants program, regional groupings of councils are encouraged to request funding to help them prepare regional and thematic heritage studies. Regional/Thematic studies can be carried out by the Department.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
10. Councils should be encouraged to identify if a property is listed as a local heritage item, or is located in a conservation area, or in the vicinity of a local heritage item or conservation area on Section 149 Certificates. This will ensure that potential property owners are made aware up front of the heritage values and implications for development	No change needed	S149 certificates already identify properties as having a heritage listing or which are located in a conservation area in the LEP. The s149 certificate cannot indicate 'in the vicinity of' as this is difficult to identify.
11. Councils should review existing heritage schedules in LEPs as part of the Standard LEP adoption. Where there is insufficient background information to support existing listings, Councils should be required to provide new evidence and Statement of Significance to support listings or otherwise remove items. Councils may be exempted from reviewing their schedules where existing heritage studies and inventories are recent and based on sound analysis.	Policy	Although this principle is agreed to, many councils do have a resource, staging and timing issue. The NSW Heritage Grants Program has prioritised funding to those councils preparing new LEPs to help in this regard.
12. Councils should be required to review heritage listings in LEPs on a regular basis, preferably at least every 5 years, to consider the current condition and circumstance of each item and identify items that no longer meet criteria for local heritage significance. However, this should not necessarily be seen to be an opportunity for major expansion of heritage lists but rather to identify any anomalies.	Policy	Although this is agreed to in principle, it is recognised that many councils do not have the resources to fully review each listing every five years.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
13. Items should only be designated as having State significance where such items are listed on the State Heritage Register. All other items should be listed in LEPs without a correspondence ranking. If this approach is adopted, the provision in the Standard LEP requiring the referral of proposals involving the demolition of State significant items (but not including items listed on the State Heritage Register) or subject to an IHO) to the Heritage Council could be removed.	Policy	Changes to the Standard LEP are being implemented so that all listings do not include 'state significant' unless the item is on the State Heritage Register (09/10).
14. A model Heritage DCP should be developed to guide development in conservation areas. The model DCP could provide for the designation of conservation areas only where there are clear heritage values associated with them. Areas with high amenity or other distinguishing characteristics worthy of retention, but not historically significant, should be dealt with through Character Statements.	Policy	This project is proposed to be incorporated in the Department of Planning's Heritage Branch's workplan.
15. The Minister should consider removing the duplicative processes for development approval under Section 91A of the EP & A Act and Section 57 of the Heritage Act by either: a) exempting development from the requirement to obtain approval under s.60 of the Heritage Act if approval has already been granted under s.91A of the EP & A Act, or b) for development which has already been approved under s.60 of the Heritage Act prior to seeking approval under s. 91A of the EP & A Act, preventing a consent authority from refusing the subsequent DA on heritage grounds provided that the development is the same as that for which the s.60 approval has been granted.	Bill	This action does not require statutory changes and can be implemented by procedural changes (09/10). Included in the Bill.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
16. The Heritage Council's general terms of approval should be structured to match more closely with councils' conditions of consent, particularly in terms of timing, for example, prior to the issue of construction certificate etc.	Policy	This does not require statutory changes and is being addressed in the processing of applications by the Heritage Council.
17. The EP & A Act could be amended to enable State Government agencies to use the IDA provisions in relation to development on the SHR listed assets.	Bill	Provided for in the Bill.
18. The Heritage Council's <i>Statements of Heritage Impact Guidelines</i> should be revised to provide guidance on: - how heritage impact statements should be tailored to the scale of development; - the circumstances under which development involving local heritage items should be exempt from the requirement to prepare a HIS; - developing a simple pro forma to enable owners and builders to prepare their own heritage impact statements; and - alternative documentation that can be supplied to councils for small scale developments to determine heritage impact.	Policy	This project is proposed to be incorporated in the Department of Planning's Heritage Branch's Work Plan.
19. As proposed in the draft Planning Reforms, consideration should be given to amending the EP & A Act, standard LEP template and SEPP 60 to enable exempt and complying development to be undertaken in relation to items of environmental heritage and conservation areas.	Policy	Work on this is progressing by the Department of Planning.

3.9 Proposed Recommendations - Planning & Heritage		
Recommendations	Implementation	Comment
20. As part of the mandatory default code proposed for exempt and complying development proposed in the draft Planning Reforms, consideration should be given to including appropriate exempt and complying development standards specifically tailored for local items of environmental heritage and conservation areas. Where a proposal does not comply with these requirements it would be subject to the local DA process.	Policy	Work on this is progressing by the Department of Planning.
21. The EP & A Act could be amended to make provision for councils to enter into heritage agreements for local heritage items, similar to the provisions that apply to heritage agreements for State listed items.	No change needed	This matter is currently under investigation by the Department.
22. To assist councils wishing to enter into agreements with owners, the Heritage Office [Branch] of the DoP could issue Heritage Agreement Guidelines together with a standard heritage agreement template.	Policy	This project is proposed to be incorporated in the by the Department of Planning's Heritage Branch's Work Plan.
23. The definition of "public purpose" under Section 93F of the EP & A Act could be amended to include "the protection and enhancement of heritage items". This would enable councils and developers to enter into planning agreements that provided for the conservation of heritage items.	No change needed	This matter is currently under investigation by the Department.
24. In preparing the Heritage LEP Guidelines, possible planning incentives could be explored that could be included in the Standard LEP template as "optional" provisions.	Policy	Incentives are being explored by the Department.

<i>3.9 Proposed Recommendations - Planning & Heritage</i>		
Recommendations	Implementation	Comment
25. The current review of existing SEPPs and REPs should include a review of the heritage listings and heritage provisions in these instruments, particularly with a view to removing any overlap, providing for the effective rationalisation of controls, and incorporating heritage provisions and listings into LEPs wherever appropriate.	Policy	This is being progressed by the Department of Planning (08/09).
26. Regional and sub-regional strategies should guide heritage policy formulation at the local level, particularly in balancing heritage and broader planning goals.	Policy	This is being progressed by the Department of Planning.

<i>4.5 Proposed Recommendations - Duplicative & Overlapping Provisions with Other Legislation</i>		
Recommendations	Implementation	Comment
1. Consideration should be given to undertaking a separate inquiry into the management of Aboriginal heritage in NSW having particular regard to the existing requirements of the Heritage Act 1977, the Aboriginal Land Rights Act 1983 and the NP&W Act 1974.	Policy	The Minister has directed that these discussions are to be progressed. Any inquiry should be a whole of Government approach led by DECC and involve DAA and other relevant Departments.
2. The Minister should consider undertaking discussions with his ministerial colleague responsible for DECC, to determine the agency best suited to manage natural heritage including consideration of nominations of natural places for the SHR, advice to the Minister and the processing of statutory applications for natural heritage matters.	Policy	The Minister has directed that these discussions are to be progressed.
3. The NSW Government should pursue a bilateral agreement with the Commonwealth under the EPBC Act which accredits the State's approval regimes under the EP & A Act and Heritage Act for development which includes a "controlled action".	No change needed	It is the desire of the NSW Government to pursue an Approvals Bi-Lateral Agreement with the Commonwealth for places listed on the World and National Heritage Lists to reduce the duplication of approvals.

<i>5.6 Proposed Recommendations - Other Identified Issues</i>		
Recommendations	Implementation	Comment
1. Section 4 of the Heritage Act could be amended to require that a relic has to have heritage significance in order to be protected under Division 9.	Bill	Provided for in the Bill.
2. The definition of "relic" could be replaced with new definitions for "archaeological object" and "archaeological site". This will also require amendment to the definition of "movable object".	Bill	The definition of relic has been amended in the Bill to reflect levels of significance. The definition of archaeological objects and site were considered as part for the Bill amendments, however, expert archaeological advice identified some problems with the Review's proposed changes. As a result of this decision, the definition of moveable object did not need to be amended.
3. The s.170 Register Guidelines should be redrafted to require agencies to take a thematic approach to the identification of heritage assets, with the goal of identifying a representative group of items from different asset classes for conservation.	Bill	The Bill proposes that S.170 Registers be prepared in accordance with Regulations. The Regulation is yet to be drafted. The recommendations of the Review will be considered in the drafting of the new Regulation along with other policy considerations.
4. Where an agency has completed its s.170 Register and this Register has been endorsed by the Heritage Council, local government should not have the power to list items specifically excluded from the Heritage Register while those items remain in government ownership.	NA	This has not been included in the Bill.
5. Agencies should develop internal management procedures and (potentially) expertise with the aim of being the delegated authority under the Heritage Act to self-approve works up to the level of "material affect".	No change needed	A number of agencies already have this delegation. Further work with other agencies is proceeding.

<i>5.6 Proposed Recommendations - Other Identified Issues</i>		
Recommendations	Implementation	Comment
6. Councils should be encouraged to explore opportunities to establish local heritage funds to assist owners in conserving and managing local heritage items.	No change needed	Under the NSW Heritage Grants Program local councils can apply for funds to help establish a local heritage fund for the conservation of local heritage items. Local Heritage Funds are encouraged by the Department.