

# The Hon Kristina Keneally, Minister for Planning

## Agreement in Principle Speech - Heritage Amendment Bill 2009

13 May 2009

The Government is pleased to introduce the *Heritage Amendment Bill 2009*.

The *Heritage Act 1977*, along with the *National Parks and Wildlife Act 1974* are the State's key pieces of heritage legislation. In particular, the *Heritage Act 1977* has a proud history of identifying and protecting the State's most important pieces of history.

The *Heritage Act 1977* established the Heritage Council of NSW which provides the Minister for Planning with advice on the management of the State's heritage. Importantly, the Act set in place the State Heritage Register, the register of the State's most significant heritage places, those of State heritage significance.

Listings on the Register are made by the Minister for Planning on the recommendation of the Heritage Council and include around 1500 places of Aboriginal, natural and historic significance ranging from the Sydney Opera House to the Aboriginal Fish Traps at Brewarrina.

The last major review of the Act was in the 1990s which led to substantial amendments by the Carr Government in 1998. A further review is now warranted given the implementation of the Rees Government's wider reforms to the New South Wales planning system, which are being undertaken consistent with the State Plan.

Mr Speaker, 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 Act. Eminent panel members were selected by the Government to carry out the task.

Ms Gabrielle Kibble AO chaired the panel. Ms Kibble has held a distinguished career as a public servant, with extensive experience in planning and is a former Director General of the Department of Planning. Following the review, Ms Kibble was appointed Chair of the Heritage Council of NSW. The other members of the panel were Mr Michael Collins and Mr John Whitehouse. Mr Collins is a former Chair of the Heritage Council and has extensive experience in property economics, valuation, property consultancy and asset management. Mr Whitehouse is a well respected lawyer who had involvement in the original drafting of the Act.

The recommendations of the panel were arrived at following a review of the existing legislation, consultation with major stakeholders and considering public and industry submissions.

The panel's review process included comprehensive public participation which involved advertisements for public submissions being placed in major metropolitan newspapers and meetings with key stakeholders including the Heritage Council, the Local Government and Shires Association, Australia ICOMOS (the peak heritage practitioners' body), the National Trust of Australia (NSW), the Property Council of Australia, the NSW Urban Taskforce, the Department of Aboriginal Affairs and the Department of Environment & Climate Change.

The Panel also considered 140 submissions from government departments, local councils, groups and members of the public.

In December 2007, the Panel handed down its report - *A Review of the NSW Heritage Act 1977*. The Review contains 65 recommendations which include greater fairness and rigour

in the heritage listing process and retaining key elements of the current system such as local and State heritage listings and the NSW Heritage Council.

Many of the changes recommended in the Review can be achieved by changes to guidelines and practice by the Department of Planning, the Heritage Council and local councils without the need for legislative change. A lot of these changes are already underway and in fact a document has been released on the Department of Planning's website outlining the Government's response to the Review's recommendations.

The Bill implements many of the principal recommendations of the Review which require legislative change. These areas include membership of the Heritage Council, the State Heritage Register listing processes, archaeology and local listing processes.

The Bill also makes a number of amendments to the *Environmental Planning and Assessment Act 1979* to ensure the Rees Government's reforms to the New South Wales planning system can be properly implemented.

### ***[Constitution and Membership of the Heritage Council]***

The role of the Heritage Council has changed considerably since its establishment in 1977. The constitution of the Heritage Council now needs to evolve from a membership with a focus on organisational representation to a membership with a focus on skills and expertise in order to meet future challenges.

The Bill reduces the membership of the Heritage Council from 15 to 11 members. This is based on one of the options recommended by the expert panel that the Heritage Council's size and composition be brought in line with its counterparts in other states and territories.

The Heritage Council will consist of:

- o a Chairperson
- o 3 statutory members - being the Director-General of the Department of Planning, the Director-General of the Department of Environment and Climate Change and the NSW Government Architect
- o a representative of the National Trust of Australia (New South Wales), and
- o 6 members appointed by the Minister on the basis of skills, knowledge or qualifications in one of a number of areas including Aboriginal heritage... archaeology... architecture...  
... conservation of the environmental heritage... engineering... New South Wales or Australian history... local government... moveable heritage... natural heritage... planning... property... planning or environmental law... property economics... the building... development and property industries ... rural interests... and the cultural landscapes.

This membership is diverse - reflecting a range of specialist heritage, property, planning and other relevant skills which will ensure the Heritage Council makes balanced decisions.

To ensure continuity on the Heritage Council, current members appointed by the Minister on the basis of their skills, knowledge or qualifications in one of the current areas identified in the Act will be retained on the Council for the remainder of their respective terms of appointment and may then seek reappointment. Organisation-based members are able to re-apply under skills criteria.

These changes to the membership of the Heritage Council will ensure an adequate and balanced representation of skills, perspectives and experience which will equip the Council to meet future challenges.

The Bill also reforms the constitution and procedures of the Heritage Council. These changes are generally consistent with the procedures of the Planning Assessment Commission and joint regional planning panels - both established under the Environmental Planning and Assessment Amendment Act 2008. This will ensure better consistency in terms of governance.

### ***[State Heritage Listing Processes and Practices]***

A number of changes are proposed to the heritage listing processes aimed at improving the operation and fairness of the current system at the State level. In particular, these changes are intended to provide more rigour and flexibility in the processes for listing and removing listings and allow better consideration of economic and non-heritage issues.

### ***[Criteria for State Heritage Significance]***

The Heritage Council publishes the criteria for establishing whether an item is of State heritage significance warranting listing on the State Heritage Register. The Heritage Council is required to notify the Minister of the criteria. The Bill amends the Act to enable the Minister to approve the criteria before the Minister causes notice of the criteria to be published in the Gazette. In considering whether to approve the listing criteria, I will have regard to Australian and International best practice.

### ***[Directing the Listing of an Item on the State Heritage Register]***

Currently in order to list an item on the State Heritage Register, the Minister needs to be satisfied that the item is of State heritage significance, following a recommendation by the Heritage Council. This approach ignores a range of other important issues that have a bearing on the conservation of an item.

As well as considering whether an item is of State heritage significance, the Minister will also be required to consider a range of broader planning and economic issues. These issues include a recommendation from the Heritage Council about whether or not the item should be listed, whether or not the long-term conservation of the item is necessary, whether the listing would render the item incapable of reasonable or economic use and whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.

These additional criteria that the Minister will be required to consider will ensure an appropriate balance is achieved between conservation of the State's heritage, the rights of land owners and the costs of heritage conservation.

I am very well aware of how important these considerations will be.

I am very well aware that we cannot risk losing our heritage and we need to have an eye to the future on what possibilities exist for our heritage items. We also need to ensure that these future possibilities can be realised.

In order to encourage requests for listings on the State Heritage Register, the Rees Government has introduced the *State Heritage Register Thematic Listing Program*.

Traditionally, nominations have been sourced from the community. This has been invaluable in ensuring the State Heritage Register reflects community values and that the community is actively involved in the listing process. One draw back to this approach is that nominations have been considered in an ad-hoc fashion. As a result, some important places are yet to be listed on the State Heritage Register.

The Heritage Council has recommended a more strategic approach to State Heritage Register listings, seeking nominations in accordance with agreed themes. I have approved the first two year program in which State listing nominations will be invited by the community according to agreed themes. These themes include:

- the Governor Macquarie sites - to mark the bicentenary of Macquarie's tenure as Governor from 1810-1822
- Convict sites - to acknowledge the importance of convicts to the development of NSW, as well as the current Australian Convict World Heritage nomination
- World War 1 & 2 sites - to acknowledge the 90<sup>th</sup> anniversary of World War I (2004-09) and the 70<sup>th</sup> anniversary of World War II (2009-2015) and
- Aboriginal heritage - to ensure this important aspect of the State's history continues to be recognised.

The Heritage Council will concentrate its resources on the assessment of nominations in line with these themes. However, nominations outside the themes will continue to be accepted from the community and sites under threat will always be a priority.

As mentioned, the Heritage Council uses published criteria to establish whether an item is of State heritage significance, warranting listing.

Currently, an item is required to comply with at least one of seven criteria. Before making a recommendation to the Minister that an item should be listed, the Bill requires the Heritage Council to satisfy itself that an item satisfies more than one of these criteria or the item is of such particular significance that it should be listed. This amendment will avoid the possibility of frivolous or borderline nominations for State heritage listing being made. It is important that the Register maintains its integrity and standing in the community's eyes.

#### ***[Referral of a Heritage Council Recommendation to List an Item]***

Currently the Minister can refer a recommendation from the Heritage Council to list an item on the State Heritage Register to a Ministerial Review Panel for advice or request the Planning Assessment Commission to review matter.

The Bill allows the Minister to make a referral or request to the Panel or the Commission on the Minister's own motion or after a request by an affected owner, occupier, mortgagee or lessee. This provision addresses concerns raised in the panel's Review about the rights of owners of items who consider that they will be negatively affected by a proposed listing.

I am committed to ensuring the views of owners are heard when I consider listing nominations.

I will ensure that the Planning Assessment Commission has the necessary expertise to assess objections to listings on the State Heritage Register.

#### ***[Directing the Removal of a Listing from the State Heritage Register]***

Currently the Minister is able to direct the removal of a listing from the State Heritage Register if the Minister considers the item is not of State heritage significance and the Heritage Council recommends its removal. However heritage significance alone is too narrow a criterion to justify removal from the Register. I believe that a broader range of economic planning and other issues should be able to be considered.

The Bill continues to allow the Minister to direct the removal of a listing from the Register if the Minister has considered a recommendation from the Heritage Council about whether or not the item should be listed and has formed the opinion that the item is not of State heritage significance.

The Bill also amends the Act to allow the Minister to direct the removal of an item where the Minister has considered a recommendation by the Heritage Council and has formed the opinion that the long term conservation of the item is not necessary and that the listing renders the item incapable of reasonable or economic use, or that the listing is causing undue financial hardship to the owner, mortgagee or lessee.

These matters are consistent with the criteria that the Minister is required to consider in deciding whether to direct the listing of an item on the State Heritage Register. It is appropriate that the criteria for listing mirror the criteria for delisting.

As is current practice, recommendations made to the Minister by the Heritage Council that an item be removed from the State Heritage Register will need to be based on sound information and provide detailed justification for the removal of the item. I will not support frivolous or unjustified requests for the removal of an item from the Register.

### ***[Conservation Management Plans]***

A 'conservation management plan' is a document that explains the heritage significance of an item and includes policies for its ongoing management. It is best practice to prepare these plans for heritage items, particularly for those listed on the State Heritage Register.

The Bill allows an owner of an item listed on the State Heritage Register to lodge a conservation management plan with the Heritage Council for its endorsement. An endorsement will allow works identified in the plan to be carried out without any further Heritage Council approval. This is a significant approval streamlining measure designed to cut red tape.

However the Heritage Council will only endorse a conservation management plan for minor development, specifically identified as 'exempt development' by a conservation policy or strategy contained within the plan, which does not materially affect the heritage significance of the item. This reflects current best practice and will ensure that the community retains the ability to comment on more significant development through the approvals processes under the Act.

Additionally, the Bill requires the Heritage Council, when determining an application for approval under the Act relating to an item listed on the State Heritage Register, to take into consideration any applicable endorsed conservation management plan. This will improve certainty for owners and development applicants.

These amendments will also assist the Government in its negotiations with the Commonwealth to enter into bilateral agreements to reduce the duplication of State/Commonwealth approval processes for places in NSW listed on the National Heritage List.

### ***[Stop Work Order]***

At present, unauthorised works to items under an interim heritage order or listed on the State Heritage Register can only be stopped by means of an injunction granted by the Court. This provides a slow and costly process for delivering interim protection of these items.

The Bill allows the Minister or the Chair of the Heritage Council to issue a 'stop work' order if it is considered that an item under an interim heritage order or listed on the State Heritage

Register is being or is about to be harmed and where a prior approval of the Heritage Council has not been obtained.

The 'stop work' order is an order of an interim nature only. It will last for forty days and will give the Minister or the Heritage Council time to commence other action, such as seeking a Court order to restrain a breach of the Act or a Court order imposing sanctions for the failure to obtain an appropriate approval under the Act.

There will be no right of appeal against the 'stop work' order. However neither the Minister nor the Chair will be able to make more than one stop work order in relation to the same work. This will prevent rolling stop work orders being imposed without end and without any redress or right of appeal being available.

It will be my preference in cases of illegal works that attempts are made by the Heritage Council and the Department of Planning to reach resolution by negotiation in the first instance.

### ***[Archaeology]***

Under the existing Act, Heritage Council approval is required to disturb a 'relic' which is defined as any deposit relating to the European settlement of New South Wales which is 50 or more years old. This broad definition captures too many items, many of which would not generally be considered part of the State's archaeological heritage.

The Bill redefines what a relic is - moving from an arbitrary age based definition to requiring that a relic be something of heritage significance before Heritage Council approval is required. This new approach will ensure the Heritage Council's focus is on matters of heritage significance, reduce compliance costs as part of the development approvals process and cut red tape.

### ***[Local Heritage Listings – Referral to an Independent Hearing and Assessment Panel]***

The Review of the Act identified that improvements are required to local council processes for listing items of local heritage significance in local environmental plans. It is, for example, essential that the views of owners are thoroughly considered by councils before listing decisions are made.

Under the Government's recent reforms to the planning system, a council can constitute an independent hearing and assessment panel to assess any aspect of a development application or any planning matter referred to the panel by the council.

The Bill clarifies that a council can refer an objection to a proposed heritage listing to an independent hearing and assessment panel. This will enable greater consideration to be given to the concerns of owners of items that are proposed to be listed and will facilitate more rigorous assessment of the heritage significance of an item.

This measure, as well as others to be introduced by the Department of Planning, will increase opportunities for owners to have a say about proposed heritage listings.

### ***[Integrated Development]***

Now on to another issue, that of integrated development.

Integrated development is a type of development requiring development consent and one or more approvals pursuant to specified Acts. Currently the integrated development provisions under the Environmental Planning and Assessment Act 1979 do not apply to development carried out by the Crown.

The Bill amends these provisions to enable them to apply to Crown development, but only where an approval is required under the Heritage Act for such development.

This will mean that for Crown development, a consent authority will be required to obtain the general terms of approval proposed to be granted by the Heritage Council in relation to the proposed development. A development consent granted by the consent authority will be required to be consistent with these proposed general terms of approval.

Additionally the Bill will prevent a local council from refusing any development application on heritage grounds if an approval of the Heritage Council under the Heritage Act has been given for the same development.

It is logical that the State's prime heritage body, the NSW Heritage Council should have a primary role in assessing the heritage impact of a development. I do not see why a local council should be able to refuse a development on heritage grounds where it has been rigorously assessed and approved by the Heritage Council.

These amendments will ensure greater consistency between a development consent granted under the Environmental Planning and Assessment Act 1979 and an approval under the Heritage Act and also provide for a more effective integration of heritage issues in the planning process.

#### ***[Other amendments to the Environmental Planning and Assessment Act]***

I now turn to three further sets of amendments to the Environmental Planning and Assessment Act that arise not out of the review of the Heritage Act, but instead out of the practical implementation of the planning legislation.

First of all let me be clear for the benefit of all honourable members, I am including these amendments in this legislation so that we can progress with the planning reforms that the Rees Government is committed to implementing. However I want to ensure that these amendments are subject to full consideration by the House and I welcome the views of honourable members.

#### ***[Section 118 Panels – Functions to make Development Control Plans and Contributions Plans]***

The Environmental Planning & Assessment Act authorises the Minister for Planning to appoint planning assessment panels or regional panels under section 118 of the Act to exercise functions of a council as a consent authority under Part 4 of that Act or in relation to the making of local environmental plans.

The proposed amendment has arisen out of practical experience with planning assessment panels in the Burwood, Ku-ring-gai and Wagga local government areas. A local environmental plan is only one of three important plans that need to be made for an area. As well as the local environmental plan, areas need the more detailed controls in a development control plan (DCP) and a contributions plan for community infrastructure and open space to ensure they are developed properly and effectively for existing and future communities.

The Environmental Planning and Assessment Act already allows the Minister for Planning to appoint a planning administrator under section 118 of the EP&A Act to exercise those additional functions of a council to prepare, make and approve a DCP and prepare and approve a contributions plan. However, the requirement for this separate appointment is difficult to justify and should be included in the existing provisions relating to these panels for simplicity and transparency.

Accordingly the Bill amends the Environmental Planning & Assessment Act to allow the Minister to also vest these panels with the functions of preparing, making and approving development control plans and preparing and approving contributions plans that apply to land as well as performing council's functions in relation to local environmental plans.

Nothing in this Bill alters or abridges the existing obligation on the Minister for Planning to give notice in writing to councils and allow 21 days for them to make submissions before appointing a planning assessment panel or joint regional planning panel to perform these functions.

***[Section 22 Committees – Protection from Personal Liability]***

The Bill will also ensure members of committees constituted under section 22 of the Environmental Planning and Assessment Act 1979 are protected from personal liability when exercising their functions in good faith. This amendment is appropriate given the role of section 22 committees and is proposed to reinstate the protections previously afforded to section 22 committee members prior to amendments to the Act in 2008.

***[Joint Regional Planning Panels – roles of councils and panels]***

Last year, the Environmental Planning and Assessment Amendment Act 2008, one of the pieces of the 2008 planning reform legislation, introduced new provisions for the establishment of Joint Regional Planning Panels. These regional panels were modelled on the successful Central Sydney Planning Committee where a combination of technical experts and local councillors determine development applications for major development.

The provisions in the Act for regional panels are scheduled to commence on 1 July 2009. I have now sought expressions of interest for the State members of these panels. Advertisements for those expressions of interest have been placed in the Sydney Morning Herald and the Daily Telegraph. Similar advertisements will be appearing in seventy-four local papers across the State.

The Department will soon be writing to councils asking them to select their members and providing information and support on how this is to be done. More details of the proposed regions and the proposed thresholds for regionally significant development are available on the Department of Planning's website.

In this context the Bill includes important technical amendments that will provide extra clarity as to the respective roles of councils and council staff in processing development applications compared with that of regional panels in making determinations and imposing conditions on those determinations.

The provisions are generally consistent with similar provisions under the *City of Sydney Act* applying to that Council and the Central Sydney Planning Committee and that already apply to regional panels exercising other council functions.

The provisions are designed to assist local councils and their staff in performing functions relating to regional panels, like the preparation of assessment reports and for that reason I support them and am keen to ensure they are included in the legislation.

I commend the Bill to the House.