

Urban Taskforce

11 October 2007

Ms Gabrielle Kibble, AO
Chairperson, Heritage Act Review Panel
C/- GPO Box 39
Sydney NSW 2001

Dear Ms Kibble

RE: INDEPENDENT EXPERT PANEL – HERITAGE ACT REVIEW

The NSW Urban Taskforce would like to thank you for the opportunity to meet with you and the Panel members on 3 October 2007 to discuss your review of the *Heritage Act 1977*. We would like to take this opportunity to formally submit our concerns regarding the protection and management of heritage.

This submission will focus on the matters raised by the Panel's Terms of Reference.

OVERVIEW

The NSW Urban Taskforce considers that the structure and content of the *Heritage Act 1977* (*Heritage Act*) and its integration with the *Environmental Planning and Assessment Act 1979* (*EP&A Act*) is generally sound. The administration of the *Heritage Act* and its objectives at a state government level are also open, transparent and administered in a consistent fashion.

However, the administration of the heritage requirements at a local government level is causing concern to the NSW Urban Taskforce and its members. There is also a growing belief within the general community that "heritage" is a tool or argument to be used to stop development. We believe there is insufficient understanding that heritage processes are a way of managing the process of change in our urban and natural environments. There is an unfortunate perception that if a site or building is listed as a heritage item or within a conservation area then it cannot be developed or altered, only conserved. **Policy statements – both legislative and administrative – should help correct this misunderstanding by clearly stating that heritage processes are a way of managing the process of change in our urban and natural environments**

Heritage conservation should be about saving the best of what we have and managing the process of change. It should not be about preserving a particular property or structure in an unaltered state. Practitioners need to be properly trained and given necessary tools such as design outcomes for achieving conservation objectives.

We have had the opportunity to review the submission of Graham Brooks and Associates Pty Ltd (Graham Brooks) and concur with the conclusion that:

Both the Heritage Council and the Heritage Office are key components in the successful operation of the State's heritage management system. They must be retained and strengthened.

Integral to the strengthening of those operations is ensuring that both organisations are adequately resourced.

RELATIONSHIP WITH OTHER HERITAGE LEGISLATION

We concur with the submission of Graham Brooks that “Recent changes to the Commonwealth *Environmental Protection and Biodiversity Conservation Act* have largely clarified the distinctions between the operations of Commonwealth and State heritage legislation.”

INTEGRATION OF HERITAGE PROVISIONS WITH THE EP&A ACT

Provisions in local environmental plans enable the assessment of heritage impact of development as an element of development assessment and forms part of the process of managing change.¹

The discussion below of the local heritage processes however identifies the failures in the implementation of the *Heritage Act* at the local level. If these failures are not addressed then the assessment and protection process provided for in local environmental plans will continue to be used to prevent development rather than manage change and conserve those items and areas of significance that are worthy of conservation.

STATE HERITAGE PROVISIONS AND PRACTICES

The NSW Urban Taskforce considers that the State Heritage Register listing system is working well. Further the process and criteria for assessing significance of a building or place in terms of State Heritage Register listing is clear and appears to be achieving the objects of the *Heritage Act*. The same however cannot be said for the process of listing items of local heritage significance as discussed below.

An opportunity exists for the Heritage Office to play a role in educating the community, property owners and practitioners in the objectives of heritage conservation. A public benefit is achieved through the conservation of significant areas or items of conservation value and the creation of a sense of place and identity in our built environment. However, heritage conservation should not be a burden on individual landowners for the benefit of the broader community. Nor should the community or government see the listing of an item or place as a bar to any future development of the building or place.

If property owners are to be committed to the long term retention and maintenance of items or places of heritage significance, then it is necessary for financial incentives including tax relief to be available and clarification as to the nature and extent to which changes to an item or place can occur so that there is certainty of outcome if a development proposal on a site is to be pursued.

FUNCTIONS AND CONSTITUTION OF THE HERITAGE COUNCIL

The Heritage Office and the Council are working well and no significant changes should be made to its administration and composition (respectively). The Heritage Office should continue to be part of the NSW Department of Planning.

LOCAL HERITAGE PROCESSES

(a) Listing process including alterations to an existing list

The principal local environmental plans (LEPs) of Councils contain a schedule listing items of local heritage significance, conservation areas, elements of streetscape or the natural environment. Many of these lists or inventories are more than 15 years old.

¹ See for example: provisions of clause 35 of the *Standard Instrument (Local Environmental Plans) Order 2006*.
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The lists were prepared at a point in time and only altered to add additional items rather than being reviewed to consider:

- whether the listed items ever were of local heritage significance;
- whether they remain significant after the passage of time; and/or
- the implications of evolving listing criteria for items of local significance.

We are aware of anecdotal evidence that suggests that many of the lists are not robust, having been prepared following nomination to councils by local special interest groups or identified in a local government area (LGA) wide survey that involved little more than a brief site inspection of sites/localities identified by the council. Once an item or place is listed there is no clear program or procedure for the review of the list including the removal of items.

Ideally the current process of LEP review and adoption of new standard instrument LEPs would include a review by ALL councils of their current heritage lists rather than the simple transfer of old and untested lists into a new LEP. However this is not practical for those Councils whose LEPs are in an advanced stage of preparation.

The NSW Urban Taskforce would like to see a mandatory regular review system implemented for local heritage lists incorporated into principal LEPs. This can occur as part of the regular five-year review of the LEPs, or it can be legislated as a separate process. The first review should have to take place within three years, or when the standard LEP is finalised for the LGA (whichever is the latter).

Some items are only listed as heritage items under LEPs as a result of political campaigns, in the light of a particular development proposal. Quite frankly, this kind of ad-hoc political manipulation of the heritage system devalues the system and cheapens the concept of heritage conservation. **Councils should not be permitted to add items to the heritage lists included in LEPs on an ad-hoc basis.** Instead, proposals for items to be listed under LEPs as heritage items should be considered holistically at the time of the regular review. This will enable a more robust assessment of heritage value, based on objective criteria, independent of any political campaigns that might emerge from time-to-time.

To ensure that new listings are worthy of incorporation into an LEP, and as part of the first review of the existing listings, there should be a peer review of new listings (and, for the first review, all existing listings). Such a review would be conducted on an LGA by LGA basis. The Heritage Office should appoint experts to conduct the review, but the cost of the review should be met by the relevant council. This would provide a robust and technically sound process at arm's length from the political process, help remove political considerations from the listing process and ensure that only items of genuine heritage significance are listed. A council's proposals should have regard to this peer review report.

There should be a clear process to hear landholder objections to the listing of their property in an LEP as a heritage item at the time of each review. For this purpose councils should be required to write to each affected landholder:

- advising them that their property is either currently listed and the listing is being reviewed or that their property is proposed for listing (as appropriate);
- advise the landholder of the criteria for an item to be listed in an LEP;
- provide a copy of any report/study and peer review which relates to the proposed listing/omission;
- to invite the landholder to inform the council whether the landholder supports or opposes the proposed or continued listing of an item in the LEP and why they hold this view; and

- advise the landholder that the council will make a determination as part of the review and that this determination may be appealed to an independent arbitrator if the landholder is dissatisfied with the council determination.

When council makes a determination to include or (in the case of an item that was already included) omit an item as a heritage item under an LEP, the Council must write to the landholder and advise them:

- of the decision; and
- their right to have the decision reviewed on its merits by an independent arbiter appointed by the Heritage Council.

The Heritage Council would maintain a panel of experts who are available to act as arbitrators when landholders dispute a council's determination in relation to the inclusion (or omission) of a property from the LEP list of heritage items.

The fee if the arbitrators would be paid would a uniform fee, determined by the Heritage Council as part of the process of forming the panel. The landholder would be required to pay 50 per cent of the fee, and the council the remaining 50 per cent.

The arbitrator's decision would be binding on the council. That is, the council could not proceed to exhibit an LEP which included the subject property if the arbitrator has determined it should not be listed. If the review of heritage items is occurring separately from an LEP review, the council would be obliged to submit an LEP amendment to the Department of Planning within a set timeframe, reflecting the outcome of the review (including the outcome of any arbitrations).

In addition to the review of the local listing process, it would be beneficial for Council staff and Councillors to receive targeted training in relation to the objectives of listing and conservation management. Any proposal for the listing of buildings or places on a local heritage list should then be subject initially to thorough research and analysis by the Council and its consultants before being subject to peer review.

Consistency of approach by ALL Councils in NSW is required in the listing process and this could be achieved through the adoption of clear guidelines for the determination of heritage significance and the use of standardised inventory forms by all Councils.

(b) Public benefit of outcomes

A review of the local heritage listing process as described above, together with a broad awareness program to educate the community and Council's, would provide for a more robust listing process and certainty for landowners in the management and development of listed sites.

Buildings and places worthy of conservation would be retained and opportunities for their ongoing management clearly known by all interested parties.

(c) Test for achieving local heritage status

Presently there is no consistent approach undertaken by local government to identify the heritage significance of an item of local heritage. As with the standardisation of LEP provisions and the zoning of land, the NSW Urban Taskforce considers that there should be clear and objective criteria and tests available to practitioners and councils to determine the significance of local heritage.

The Heritage Office could develop these guidelines and their implementation directed by the Minister under s.117 of the EP&A Act. The guidelines could be based on baseline studies, which identify key themes and considerations to be used to support a proposed heritage listing.

(d) Integrated development applications

The *Environmental Planning and Assessment Act* and *Heritage Act* are linked through s.91 and s.58 of the respective Acts, which provide that where an approval to undertake work is required under s.57 (1) of the *Heritage Act* and development consent is required under the *Environmental Planning and Assessment Act* then the development is classified as integrated development. The *Environmental Planning and Assessment Act* establishes a process for the referral of development applications for integrated development to the Heritage Council for general terms of approval.

The process was designed to streamline the approval process and provide applications with an earlier indication of authority requirements where approvals in addition to development consent were required to undertake a proposal. In effect it was to be a one-stop shop for development applications where multiple associated approvals or licences were required.

Implementation of the process however has led to increased processing times for some development applications, requirements on applicants to produce detailed reports earlier in the development process and uncertainty in circumstances where authority requirements differ from the general terms of approval issued with a development consent.

The delays in processing arise, we understand, from a lack of resources available to assess the referrals from councils and this is compounded when development of a large site is proposed through staged development applications. This results in multiple referrals and the reproduction of multiple reports such as heritage impact assessments and specific area conservation plans that address the same essential issues relating to a heritage site, but are replicated for each subsequent stage. This is a waste of departmental and applicant resources. Consideration needs to be given as to how to more effectively manage staged applications on large sites.

The e-planning system when implemented should provide better management tools for the referral and tracking of integrated development applications. However, without adequate resources agencies such as the Heritage Council will be unable to respond faster than they do today.

While a consent authority is able to determine an integrated development application by granting consent if the approval body fails to inform the consent authority, in accordance with clause 70 of the *Environmental Planning and Assessment Regulations*, in practice few councils will determine an application before it receives the general terms of approval even though the referral period has expired. This adds to the delay in the determination of the development application.

As part of the planning reform process the whole integrated development application process should be reviewed. In addition adequate resources should be made available to assess applications referred under s58 of the *Heritage Act*.

(e) Purpose of a heritage conservation area

Identification of a conservation area under a list in an LEP should be about conservation of the built form of buildings as viewed from the public domain. It should relate to the preservation of the sense of place or the identity of the locality and should not be concerned with alterations to the internal fabric of a building.

Too often, development control plans adopted by Councils are becoming overly prescriptive and being used as a checklist to prevent the adaptive reuse or internal upgrade of buildings within a heritage conservation area. Clear guidelines are required for Council and practitioners to follow and to educate the community about the functions and purposes of a heritage conservation area and how it is different to a heritage item.

We would like to thank you for the opportunity of making this submission to the Panel and should you have any issues that you would like to discuss further, please do not hesitate to contact myself or Clare Brown, our Manager of Policy and Planning.

Yours sincerely

NSW Urban Taskforce

A handwritten signature in black ink that reads "Aaron Gadiel". The signature is written in a cursive style with a long horizontal stroke extending from the end of the name.

Aaron Gadiel
Chief Executive Officer