SUBMISSION TO THE REVIEW OF THE NSW HERITAGE ACT

Introduction
This submission is in three sections. The first section contains the principles that, in the opinion of Australia ICOMOS, should be the basis of a sound State heritage system. These principles are derived from a document formulated by Australia ICOMOS more than 20 years ago. The second section contains the key comments and recommendations that Australia ICOMOS commends to the Review Panel. The third section responds in more detail to the terms of reference for the Panel.

1. **Principles of a sound State heritage system**
   1.1 Assessment of significance (identification and listing) must be based only on cultural significance and must be separated from management decisions
      o Reasonable or economic use, or financial hardship, may provide valid arguments against conservation, but should not be accepted as arguments against listing
   1.2 An adequate listing process is a fundamental component of a sound heritage management system
      o Properly compiled lists provide certainty and a basis for good decisions
      o Defensible lists require adequate resources and good survey briefs
      o Lists are dynamic and may change as items are discovered or lost, or values change over time
   1.3 Once significance has been established, conservation by agreement should be the objective (rather than conservation by compulsion).
   1.4 The system must be simple to operate and simple to understand
      o The same assessment criteria should be used at all levels of government, as agreed by Commonwealth and State Heritage Ministers since 1997\(^1\)
      o All statutory planning instruments (including the Heritage Act) should contain identical heritage provisions, with any necessary local variations to these provisions being dealt with through advisory documents such as Development Control Plans
   1.5 Heritage must be fully integrated into the planning and environment system
      o Inconsistencies between heritage provisions and other planning controls such as land use zoning should be eliminated
      o Conservation of cultural heritage should be seen as one aspect of a sustainable environment

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\(^1\) This agreement is contained in the Preamble to the Heads of Agreement on Commonwealth and State roles and responsibilities for the Environment (notably Articles 2 and 6) signed at the Council of Australian Governments (COAG) in 1997, and reinforced by the decision of the Environment Protection and Heritage Council (EPHC) meeting of 23 June 2006 to develop consistent heritage criteria and thresholds as part of the Cooperative National Heritage Agenda
1.6 Management decisions should be based on heritage significance
   o As indicated in Article 2 of the Preamble to the 1997 COAG agreement, the level of government at which heritage decisions are made should reflect the assessed significance of the heritage item – State items by the State Government and local items by local government.

1.7 Good decision-making requires good information
   o Management decisions for heritage items should be based on a well founded understanding of their cultural significance
   o Appropriate professional and expert advice should be available to decision makers
   o Development of appropriate professional standards for heritage management practice should be fostered

1.8 The system must be adequately resourced at all levels of government to enable it to function properly

1.9 The system should be fair to both owners and stakeholders
   o There should be provision for independent review of decisions on both listing and management

1.10 The system must allow elected governments to make final decisions where necessary, and to receive the best possible advice before doing so
   o The Heritage Council should be a committee of experts in both heritage and other relevant disciplines, rather than a committee of representatives from interest groups or government departments
   o Delegation of decision-making by elected governments to bureaucracies with appropriate and adequate skills, with provision for elected governments to call in decisions in certain cases (for example where there are serious objections to a proposal), is the preferred model for administration of the system

1.11 The process should be transparent and accountable, with all advice and decisions, and the reasons for them, being made public, as required by Article 2 of the Preamble to the 1997 COAG agreement,

2. Key comments and recommendations

   Generally

2.1 The heritage system in NSW already meets many of the Australia ICOMOS principles for a sound State heritage system, generally works reasonably well and appears to have broad public support. However, there is also room for improvement and refinement of the system

Resourcing

2.2 A regional system of expert advice on assessment and management should be established to overcome the serious under-resourcing of heritage management at the local government level

2.3 The Heritage Council and Heritage Office should be adequately resourced to fulfil their responsibilities for listing and managing State heritage items, as well as providing leadership and guidance for local government and the public through technical and professional support

Assessing significance

2.4 The present method for assessing significance (based as it is on the Burra Charter) is sound, although it is sometimes not as well applied and used as it should be
2.5 Assessment must be adequately resourced so that all heritage values are identified when places are formally assessed.

2.6 Thematic and regional studies should be undertaken to improve comparative analysis and thus the quality and reliability of individual assessments.

2.7 Copies of completed studies and assessments of significance should be lodged in a central repository and be available to others to avoid duplication of effort.

**Listing**

2.8 Consistent criteria should be used for heritage listing at all levels of significance (National, State and local) in accordance with the 1997 COAG agreement and the 2006 EPHC project under the Cooperative National Heritage Agenda.

2.9 The State Heritage Register is valuable and should be retained, and reviewed to eliminate gaps and inconsistencies so it becomes progressively more robust.

- Items on National and World Heritage lists should also be on the State Heritage Register for purposes of recognition and comparison.
- There should preferably be a single assessment process that results in a place being listed either at a local or a State level (at present items recommended in local heritage studies for State listing are then reassessed by the Heritage Council).
- Items that were the subject of Permanent Conservation Orders but are not of State significance should be removed from the State Heritage Register.
- Improving the State Heritage Register will require additional resources but will improve certainty for the development industry.
- The Minister should be able to make the final decision on State Heritage Register listing, and should be required to publish reasons if his decision is not in accordance with the Heritage Council’s recommendations.

2.10 Heritage agreements are supported as a management tool but do not replace significance assessment or listing.

2.11 There is wide public misunderstanding about heritage listing and what it means, despite efforts by the Heritage Council, so improving communication with the public continues to be important.

**Management**

2.12 There is a need to establish a logical link between the significance of an item and the regulatory framework that applies.

2.13 The reduction of regulation and approval times for minor changes to listed items through the Heritage Council’s Standard Exemptions is supported, and should be more widely adopted also at local government level.

2.14 Duplication of assessment within the planning system should be removed so that heritage issues are assessed once by the appropriate body - local items at the local level and State items at State level.

- One example is the requirement for additional approval under Section 63 of the Act, following a development consent which already embodies the terms of Heritage Council approval.

2.15 Inconsistencies between heritage provisions and other planning provisions such as zoning should be eliminated at the stage that planning instruments are made.

- One example is the application of wide-ranging planning policies such as SEPP64 adjacent to World Heritage areas.

2.16 A standard set of heritage provisions across all local government areas will improve the certainty and consistency of assessment processes and outcomes.

- The standard provisions at both State and local level should include some control of development in the vicinity of listed items and conservation areas.
**Monitoring and review**

2.17 Heritage outcomes should be adequately monitored both for compliance with permit conditions and for the effectiveness of the system generally in achieving the aims of heritage conservation.

**Integration**

2.18 The artificial separation of built, natural and Indigenous heritage through legislation and government bureaucracy should progressively be reduced by cooperation, with a view to having all heritage brought together under a single Ministry, as occurs in other states.

### 3. Detailed response to terms of reference

**Duplication and overlapping with other legislation**

3.1 Although heritage places may be entered on more than one list (for purposes of recognition and comparative analysis), applications affecting them should be dealt with once by the authority corresponding to the level of significance of the item (National, State or local).

3.2 Delegations of control to a lower tier of government (National to State or State to local) should only occur through specific bilateral agreement, and must ensure that the lower level of government is adequately resourced to manage the process.

**Strengthening the integration of heritage provisions with the EP&A Act**

3.3 Heritage provisions in planning instruments should be standardised across the State and be in line with State and National provisions.

3.4 Conflicts between heritage objectives or provisions and other planning provisions should be actively identified and resolved.

   - Examples include inappropriate land use zoning of or adjacent to heritage items, and inappropriate development exemptions in conservation areas.

**State heritage provisions and practice**

(a) **listing process**

3.5 Listings should preferably be based on thematic and regional studies to enable better comparative analysis.

3.6 Items should be assessed once, then a decision made on whether to list and at what level (or levels).

3.7 Recommendations in local heritage studies for listing items as State significant should be assessed by the Heritage Council before listing occurs to avoid duplication of assessment.

3.8 There should be an independent expert appeal process (on decisions to list or not to list) with eligible grounds for appeal being related only to significance criteria and thresholds, not to other factors.

(b) **alternatives to the listing process**

3.9 The listing process is fundamental to adequate identification of significance.

3.10 Perceived problems with listing arise from its consequences (management issues) or the adequacy of the significance assessment, rather than listing in itself.

3.11 Other initiatives such as heritage agreements are appropriate management tools but are no substitute for adequate assessment of significance for identification.
(c) **the public benefit of outcomes**

3.12 One of the key findings of the recent Productivity Commission Inquiry into historic heritage was that conservation of heritage produces a tangible public benefit that is strongly valued throughout the community.

3.13 The Heritage Act was created by the State in the 1970s in response to wide public concern about the destruction of the State’s heritage places.

3.14 Public concerns appear to relate mostly to individual cases of inappropriate listing or heritage management, rather than systemic failures of the process or lack of support for the principle of conserving heritage.

(d) **the test for achieving State heritage status**

3.15 The current criteria for assessing State significance, which are generally consistent with National and International criteria, (and consistent with the COAG and EPHC agreements), are sound.

3.16 The issue of a threshold for State significance is a matter of informed judgement.

3.17 Improved guidelines relating to the threshold will assist future listing as well as providing improved justification for the public.

(e) **the role of the property owner or stakeholders and appeal rights**

3.18 Owners and stakeholders are entitled to be informed and consulted about listing and management decisions.

3.19 Both owners and other stakeholders should have the right to object to listing and management decisions and to appeal against them to an independent expert authority.

3.20 The public benefit of conservation should be recognised through government support for private owners in the form of tax relief, appropriate flexibility in planning controls, financial support and promotion.

(f) **the approval process for alterations to items on the State Heritage Register**

3.21 The increased use of a fast-track approval process and appropriate exemptions for minor work is supported.

3.22 The need for a separate s60 approval following Integrated Development approval should be removed provided there is adequate provision in the system for review of detailed works (comparable to the construction certificate process).

3.23 The Heritage Act should be amended to allow the Heritage Council a formal role in the approval of development of land in the vicinity of State listed items that could materially affect their significance.

3.24 The Heritage Council should not be excluded from formal referral and consultation on projects of State significance under Part 3A of the EP&A Act.

3.25 The approval process needs to incorporate improved checks on compliance

- Compliance requirements at present rely almost entirely on consultants engaged by the applicants, with little or no independent review.
- Heritage compliance should be assessed by an independent person reporting directly to the consent authority.
- Heritage compliance should be included in the requirements for an Occupation Certificate.

3.26 The Heritage Council should periodically review project outcomes to assess whether its compliance conditions are achieving the intended results.
(g) **resources and time efficiency**

3.27 Assessment for both listing and application for works should be done once rather than duplicating the State assessment process at local level.

3.28 The results of all heritage studies and assessments (including those that do not result in listing) should be lodged in a central repository and be readily available to the public to minimise duplication of effort (for example, by publishing the results on the web).

3.29 The Heritage Council and Heritage Office should be adequately resourced to fulfil their responsibilities for listing and managing State heritage items, as well as providing leadership and guidance for local government and the public through technical and professional support.

- The Heritage Council’s technical committees, including the Technical Advisory Group and the Fire, Access and Services Advisory Panel, are a unique and valuable source of advice and expertise to the State.
- The Heritage Council’s publications (in hard copy and on the web) and training programs are considered to be an efficient and effective way to raise public and professional standards of conservation.

**Functions and constitution of the Heritage Council**

3.30 The Council’s primary role is to provide the best possible advice to the Minister and it should therefore be a committee of experts, rather than a committee of bureaucrats or advocates of interest groups.

3.31 The Council should have an independent Chair and Deputy Chair.

3.32 The Council needs to have expertise in all aspects of heritage and also other disciplines such as planning, property development and project economics.

3.33 The Council must exercise judgement on heritage significance and on the management of heritage items (for example, whether issues of economics or practicality affect conservation).

3.34 The current committee system for dealing with the work of the Heritage Council operates well and is supported.

3.35 The delegation of decisions to the Heritage Council and the Director of the Heritage Office, with the Minister having the power to make final decisions, is supported.

3.36 The Director, Heritage Council and Minister should be required to publish the reasons for their decisions if they depart from the advice they have received.

**Local heritage processes**

3.37 Heritage assessment and management processes should be standardised across local government areas.

3.38 The standard heritage controls should continue to permit controls where required over development in the vicinity of a heritage item.

3.39 Local heritage management is seriously under-resourced.

- In some cases the lack of adequate resources at the local level has resulted in heritage issues being marginalised and poorly integrated into other aspects of planning and environmental control.

3.40 A regional system of heritage assessment and management teams would provide a more effective use of resources, enabling the establishment of full-time teams with a broad range of heritage expertise to assist local government.
3.41 Proposals to demolish locally listed heritage items should continue to be referred to the Heritage Council, at least until the accuracy and comprehensiveness of local heritage studies and listings has been substantially improved.

3.42 Adequately resourced and properly briefed heritage studies are essential if local lists are to be improved, and will be cost-effective in the long term.

3.43 The use of fast-track approval and exemptions for minor works (similar to those applying at State level, and to the Exempt and Complying Development procedures in LEPs) should be encouraged and supported by the development of standardised regulations and guidelines for their application.