

Briefing Note

Amendments to the Heritage Act

Summary

The *Heritage Amendment Bill 2009* now before Parliament will make substantial changes to heritage practice in New South Wales, including:

- less protection for the preservation of places of heritage significance at the State level than is the case under the current Act;
- substantive changes to the procedures for listing properties on the state register;
- reducing the number of independent members of the Heritage Council;
- increasing the appeal rights of owners to object to proposed listings; and
- making easier the de-listing of properties on the State register.

Most of the amendments to the Act are in relation to State heritage practice listings and do not directly affect local listings. Most changes to local practice are to be implemented via policy changes currently being prepared by the Department of Planning. The details of these changes are not yet known but are likely to affect how local items are to be listed and how land is rezoned on sites affected by a heritage listing.

Key changes to the Heritage Act

Changes to state heritage practice

1. Less protection for heritage properties

The changes proposed in the Bill have the potential to undermine the current independent and scientifically based methodology that is used to assess a place for heritage significance. Economic factors will now be given a higher priority when properties are being assessed for listing on the State Register.

Under current practice, the assessment of a proposed item for heritage significance is undertaken separately from the consequences arising from that assessment, such as the financial implications of preserving that item. The current system is based on international accepted best practise under the Burra Charter. This allows the assessment process to proceed based on independent and scientific grounds having regard to seven agreed criteria and ensures that reasons for determining whether a place 'is significant' are rigorous. Currently a place is listed where it meets one of the seven criteria.

The Bill proposes that a listing meet two of the seven criteria. However, the amendments give a higher priority to economic factors by requiring that three additional matters are considered at the assessment stage:

- Whether 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.

(see Schedule 1[13] and [25])

The cost of conserving a place is relevant to decision making and an important consideration within heritage practice. However best conservation practice requires that the consideration of economic factors is excluded from the initial assessment process – although it would be considered following the assessment of heritage value.

The Bill also fails to provide any benchmarks or objective measures for these criteria (e.g. what would be considered 'necessary'? what is undue financial hardship?) and these need further qualification and clarification.

2. Increased Ministerial control

The Minister's power to influence heritage decisions has been considerably increased and become less transparent under the changes. These amendments widen the Minister's power to:

- Approve (and change) the assessment criteria for listing a state significant place;
- Make a referral or request to de-list a property based on a request by an affected owner, mortgagee or lessee or occupier (section 34 (3));
- Refer an appeal to the Ministerial Review Panel or Planning Assessment Commission; and
- Give no reasons for a decision.

3. **Reduced independence of Heritage Council**

The number of members on the Heritage Council has been reduced from 15 to 11. This will have the effect of reducing independent representation of non government members of the Heritage Council and potentially exclude Local Government representation. There needs to be a member with expertise in Local Government on the Council. .

Changes to Local Government Practice

The Bill proposes the following changes to current practice. These are not opposed; however it is recommended that a minor amendment be made to the Bill to ensure that councils are consulted in relation to heritage related aspects of integrated developments.

Proposed changes:

1. **Integrated development** - where the Heritage Council has approved an integrated development that is heritage listed, the local council or consent authority cannot reject the development application on heritage grounds. However, it is noted that council can reject the application on planning grounds. The Associations recommend that the Bill be amended to ensure that the local council or consent authority (in the case of a regional panel) is consulted during the assessment process. This would ensure councils' heritage experience is utilised in the assessment process (see Schedule 2 [6])

The Associations recommend that the Bill be amended by adding in Schedule 2[6]:

Section 92(3) The Heritage Council is required to consult the consent authority before the matter is determined by the Heritage Council.

2. **Conservation Management Plans** – where a Conservation Management Plan has been endorsed by the Heritage Council, for exempt development, development consent from council is not required. This will only apply to a few applications and mainly maintenance and internal work. This is not opposed but council should be advised of the endorsed plans.

3. **Review of listings** - property owners may request a review of a proposed listing of a local item under a Draft Local Environmental Plan to the Independent Hearing and Assessment Panel. This is not opposed.

Need for review of subordinate legislation

The changes to the Act arise from the Review of the NSW Heritage Act 1977, which recommended a strengthening in the rights of property owners. Although this may be reasonable in certain cases, the Bill allows all property owners to dispute a proposed listing or request a review of an existing listing on economic grounds without defining how this will be evaluated.

The regulations and/or guidelines will clarify the interpretation of the additional matters that are now to be considered by the Heritage Office during the listing process. Given that the details contained in the regulations and guidelines will be of critical importance in interpreting the new provisions, the Associations recommend that a committee be established to review the regulations and guidelines. This will ensure that the provisions are reasonable, workable and provide a balance between preserving heritage values and economic issues.

Need for further consultation with Local Government

The media release on 14 May from the Minister's Office, announcing the proposed Bill, indicated that 'a standard set of criteria by which proposals to list local heritage items would be assessed was to be

introduced.’ The media release also states that this process would ensure that owners’ concerns and the economic impacts of a listing are fully considered by councils. The Associations support further consultation with Local Government on these criteria.

Conclusions

General

Given the importance of the subordinate legislation in interpreting and applying the amendment to the Act, the Associations recommend that a committee be established to independently review the subordinate legislation (regulations and guidelines). The committee should comprise key stakeholders and independent experts including representatives of the Local Government and Shires Associations of NSW and heritage organisations, such as the National Trust.

State Heritage Issues

The higher priority given to (poorly defined) economic criteria has not been justified and goes against best heritage practice. It is critical that there be greater clarity around the assessment of economic criteria and particularly clear benchmarks and objective criteria. The Bill fails to provide that clarity.

The Heritage Council should include members with expertise in Local Government who could provide the necessary knowledge and experience from a local perspective. The membership is unnecessarily restrictive and reduces the opportunity for a wider range of independent skills and organisations that could improve the rigour of the listing process.

The Minister’s powers need to be more transparent. Currently the Bill allows owners to make representations directly to the Minister to object to proposed listings or to apply to de-list an item under the State Register. This creates a probity risk as well as being an inefficient method of dealing with reviews.

In addition, the Minister can change the currently best practice criteria for listing a state heritage item, without reference to public debate or Parliamentary scrutiny. Such powers to alter current practise need to be subject to an independent and professional review.

Local Government Issues

The opportunity for an owner to make an appeal against a proposed Local Listing to an Independent Hearing and Assessment Panel (IHAP) is supported in principle. It would be helpful if the IHAP had members with relevant expertise to ensure there is value in this process.

Where council is restrained from refusing a DA on heritage grounds (that has been approved by the Heritage Council) the Associations recommend that the Heritage Council be required to consider the opinion of the local council during the assessment process.

Where a Conservation Management Plan is endorsed by the Heritage Council, a development application is not required in relation to exempt development (internal works and maintenance). However, Council should be advised of the endorsed work.

While such changes have not been incorporated in the Bill, Local Government has not been consulted on the proposed criteria. The Associations would welcome the opportunity of discussing the proposed policy change being developed.

Recommendations

The Associations recommend that:

- A committee be established to review the subordinate legislation, regulations and guidelines arising from the amendments to the Heritage Act, and particularly the listing of an item or place on the State Register. The committee should comprise key stakeholders and independent experts including representatives of the Local Government and Shires Associations of NSW and heritage organisations, such as the National Trust.

- The Heritage Council be required to consult with the relevant local council prior to the Heritage Council making a decision on State listed items which are integrated development. This would ensure councils' heritage experience is utilised early in the assessment process.

Associations' Policy Position on Heritage

1. Local Government strongly supports the principles of heritage conservation contained in the Burra Charter. It recognises the role of councils in identifying, preserving and managing places of cultural, natural and Aboriginal significance (and moveable items). It supports councils implementing conservation strategies that apply to regulatory functions and council services. These strategies need to:
 - form a part of social and environmental planning;
 - provide a balance between preserving heritage and supporting change; and
 - include educative strategies that foster understanding of heritage policies.
2. Local Government supports the current legislative framework that has established a mechanism to successfully identify and conserve local heritage that has preserved distinctive urban and rural environments that might otherwise have been lost. These places have provided local identity, diverse streetscapes and architectural forms, iconic places, archaeological records, Aboriginal sites and natural ecosystems. Preservation has resulted in the retention of community memory and cultural identity.
3. Local Government opposes changes that would undermine the current principles and intent of the Heritage Act 1977 and the Environmental Planning and Assessment Act 1979. However it is acknowledged that there is a need for improvement to the processes and procedures under this legislation.
4. The issues that arise in the Local Government sector in relation to heritage are mostly procedural and often reflect lack of capacity and funding. It is essential that Local Government continue to be given financial assistance to prepare, update and review heritage policies given the high proportion of listed items managed by councils.
5. The key area of focus for Local Government is the updating of Heritage Studies and their translation into planning instruments, both LEPs and DCPs. The updating of heritage studies is very important given that councils are currently revising their LEPs.