

Heritage Act Review 2007 National Trust of Australia (NSW)

Introduction

The National Trust of Australia (NSW) welcomes the opportunity to participate in the review of the NSW Heritage Act, 1977 with amendments. Thank you also for the meeting we had with the panel on 21 August. It was most productive and answered many of our questions about the nature of the inquiry.

While there is obviously some disquiet about the management of heritage in NSW, demonstrated during the Productivity Commission Inquiry, the Trust is of the opinion that the Act has been very successful and that it should continue to stand as separate legislation from the Environmental Planning & Assessment Act.

What has been a continuing disappointment however is that the implementation of the Act has never been appropriately funded. For any form of legislation to work effectively, it needs appropriate administration. It also needs commitment from Government of its intent. The myriad of SEPPs that have been produced which override the Act give a clear indication to the community that Government is not serious about preserving the past for the present and future.

Heritage requires a 'whole of government' commitment and the National Trust of Australia (NSW) hopes that appropriate recognition will be made in all environmental and building legislation of the important role that the past plays in our sense of place.

The discussion below follows the Terms of Reference for the inquiry.

1 Duplicating and overlapping provisions with other legislation

Discussion

It is not uncommon for items to appear on more than one list, often for satisfying different criteria, although the most common listing is on a local list. In NSW there are:

- 25,000 items on local lists (under EP&A Act 1979)
- 1, 500 on the State Heritage Register (under NSW Heritage Act 1977)
- 17 on the National Heritage List (under EPBC Act 1999)
- 5 on the World Heritage List (through international agreement, UNESCO Convention concerning the Protection of the World's Cultural and Natural Heritage, 1972)

Each 'tier' has its own approvals regimes, although an agreement between state and federal government gives the state the approval role for works to nationally listed places. There is some confusion in the community about the status of the Register of the National Estate, however it is not of concern in the approvals processes.

Duplication also occurs for places of Aboriginal significance and for places of natural significance as listing can occur under both the Heritage Act and the National Parks and Wildlife Act.

The separate regimes and legislation do cause confusion, particularly for state and local listed items. The inability of the Heritage Act to deal with listing at a local level is actively detrimental to the recognition and appreciation of heritage in the local community. It also gives rise to the oft quoted 'only local' denigration and is used by some councils to justify not including items on local lists.

Conflicting provisions also occur between the Heritage Act and Commonwealth and NSW Disability as well as Access Legislation.

2 Strengthening integration of heritage provisions with EP&A Act (both at plan making and development control levels)

Discussion

Plan making

There is a lot of variation in the Local Environment Plans across NSW in terms of size of heritage schedules as well as content (in particular some include Aboriginal sites and natural sites, others do not). There is also variation in the consultation phase of listing and varying amounts of professional input. Guidelines are being prepared.

The model LEP provisions are seeking to address this, however some local variation is inevitable and desirable.

Development Control

Integration for items on the SHR through Integrated Development Applications (under EP&A Act) although Heritage Act still adds another approval layer. Applicants can choose to go down this route or to go first to the Heritage Council via a Section 60 and then to Local Council.

3 State Heritage provisions and practice,

(a) improvements that can be made to the listing process;

Discussion

The current process for listing at state level is long and detailed which means that it is unlikely that there will be a list in anyway representative of the state's heritage in the foreseeable future. It does however favour listing of places when that listing is supported by the owner. The process is also different from the de-listing process although the Act makes reference to delisting being the reverse process.

One suggestion for tackling the slow growth of the list is to concentrate on thematic studies. Another is that the process of listing should be separated from the management issues associated with listing. The delay is caused by lack of resources for the assessment of the proposals and the urgent desire by many sectors of the community to list in order to protect. The lack of faith in many LGAs exacerbates this problem. Timely completion of Section 170 Registers by government departments would also assist.

Matters relating to curtilage are not being fully addressed by the current listing methodology and there are many differing views on this. One method of dealing with this would be to introduce a 'buffer zone' (such as that used for World Heritage places) around a listing which defines an area outside the listed area where care must still be taken on development.

Recommendation/ Comment

The National Trust of Australia (NSW) favours the combination of the state and local lists into one state-wide list administered at the appropriate management level. State listings should be able to be made on the basis of local area heritage studies where items are noted as of 'state' significance and local listings should also be able to be made by the Heritage Council when upon assessment an item is not deemed to have reached the threshold for state listing but is considered to be of 'local' significance. Logically that model should apply nationally.

(b) alternatives to the listing process (eg heritage agreements);

Recommendation/ Comments

Heritage Agreements are already possible under the Act and their success is largely dependent on funding. This issue was raised by the Productivity Commission and it is the National Trust's view that a Heritage Agreement cannot replace listing and that, although a welcome addition to a listing, to succeed they need substantial funding attached to them and the Agreement would have to be registered with the land title.

(c) the public benefit of outcomes;

Discussion

The 'public good' aspects of conservation and preservation were argued extensively during the Productivity Commission Inquiry and heritage provisions are by nature often more concerned with the good of the wider community than an individual.

It is the National Trust of Australia (NSW)'s contention that heritage is not alone in this regard. In NSW many zoning restrictions fall into this category as do questions of amenity, design and protection of endangered species, tree protection and others.

Recommendation/Comments

The argument that public monies should therefore be spent on aiding individuals to contribute to 'public good' would encourage increased assistance for maintenance of listed places at whatever level of significance.

Consistency between the 'rules' for local and state listed places (and regional if that were to be reintroduced) should be made for approvals for 'adjoining development'.

(d) the test for achieving State heritage status;

Recommendation/Comments

The threshold for 'state' significance is such that many items that are of significance to more than a limited local area still don't make it to the list. Reintroducing 'regional' as a level with the approval process being addressed primarily by local government with advice from state is recommended. This needs to be considered with point 5 below.

While some items currently on the SHR may not meet the threshold as it is currently defined, many that do meet the criteria are not on the list. The combination of the lists as outlined above would remove some of the conflicts.

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

Discussion

This is again an issue dealt with by the Productivity Commission with regard to property owners, but stakeholder rights were not. There is considerable consultation during the listing process although there is no formal appeal process in relation to a listing decision by the Minister.

Recommendation/ Comments

There should be a right of appeal to the Administrative Decisions Tribunal from a decision to list or refusal to list an item on the State Heritage Register. The Tribunal is set up to deal with decisions of government agencies but also caters to the unrepresented litigant. It would be more appropriate to the kind of appeals brought by individuals or community groups seeking to protect a heritage item but who do not have the funds to go to Court. A developer would usually have more funds and therefore a greater advantage in a court situation. While the Land and Environment Court has the expertise in this area, Commissioners of the Court could be made available to sit on the Tribunal in heritage proceedings.

Appeals from decisions regarding applications for approval to alter a heritage item under s.59 and following from the Act could also be referred to the Tribunal rather than to the Minister or Court.

Further, it is suggested that community stakeholders should have a right to take part in appeal proceedings concerning heritage items. Where the court battle is between a council and a developer, the community, which may also have a stake in the outcome, will not necessarily be able to put forward the evidence it wishes to have before the appeal body. This means the issues before the court may be narrow and not take into account wider concerns. There should be a provision in the Heritage Act providing a right of participation to a community body with a sufficient interest in the heritage item in appeal proceedings.

(f) the approval process for alterations to items on the State Heritage Register, including rights of property owners and stakeholders;

Discussion

The current process involves either an Integrated Development Application or a Section 60 as discussed above. Around 95% of applications are dealt with under delegated authority by the Heritage Office. Office staff meet with applicants and objectors. There is also the opportunity to address the Heritage Council.

Appeal rights exist for the applicant although not for other stakeholders. IDAs can be appealed to the L&E Court and Section 60s to the Minister.

State government developments should be subject to IDA provisions. There would be advantage in removing Section 60 applications (although that has an effect on income to the HO) or changes could be made to the appeals procedures. Section 60s should also be appealed to the L&E Court.

EP&A 'complying development' provisions should be applied to the Heritage Act also.

(g) resource and time efficiency

Discussion

The question of whether the task of compiling a comprehensive list of the State's important places is realistic should be considered. Many people cry for 'certainty' so they can predict which items and places the community is going to worry about what happens to them but this is virtually impossible. However increased resources for the assessment process would aid the growth of the current list. The use of existing Local Heritage Studies would also assist as described above.

The public consultation phase of listing is made complex by the mistrust and fear of listing by many in the community. This distress over listing is exacerbated by the linking of significance to management regimes.

One way of tackling the paucity of the list may be to consider thematic studies. Getting groups to nominate doesn't alter the time necessary to assess the nominations.

Guidelines for nominations should be strengthened and perhaps defined by the Act. This should improve the quality of material put forward but may not.

4 The functions and constitution of the Heritage Council

Discussion

Issues such as whether the Council should be a decision making or an advisory body should be considered in the light of comparisons with other jurisdictions. There are clearly arguments from both sides. It is of particular relevance to the listing process where independence from political influence would be an advantage in the public perception of the decisions made. The Heritage Council currently 'makes recommendations' to the Minister only.

Recommendation/Comment

The addition of a clause in the Act providing that the Heritage Council is not subject to the control and direction of the Minister or any public servant in performing its listing and conservation functions, would strengthen its independence. Similar clauses can be found in legislation for statutory bodies which have to perform functions where probity and independence are important.

Currently 12 of the 15 members of the Heritage council are decided by the Minister with six being nominees from defined groups (including the National Trust) and six with 'suitable qualifications' in specific areas. The other three members are the Government Architect, the Director General of Department of Environment and Climate Change and the Executive Director of the Heritage Office. Alternates for all members should be reintroduced for all members, not just for the ex-officio positions.

The National Trust of Australia (NSW) feels that the Heritage Council currently operates well and that the main areas of concern are the current inability of the Council to comment on local issues of a vexatious or contentious nature. We believe that there is therefore undue pressure being brought to bear to include items in the SHR in the mistaken community belief that it is a 'safer' option regardless of the applicability of the criteria for listing at State level. The Heritage Council should be able to add items of local significance as described above.

Although a subsidiary issue to the question of the functions and constitution of the Heritage Council, the independence and 'arms length' nature of the Heritage Office should be considered again.

5 Consideration of local heritage processes and whether they warrant improvement

Discussion

The main area of concern in the administration of the Heritage Act is in the listing provisions. Of particular concern is the differing listing regimes at local level and the 'threshold' for listing at State level. Listing at local level is governed by the EP&A and at state level by the Heritage Act.

Currently the inability of the state agency to actively comment on local items or to ensure listing at local level is to the detriment of local items and is a cause of tremendous frustration and dissatisfaction for active community groups and individuals.

Recommendations/ Comments

A 'common list' under the Heritage Act with differing management responsibilities would assist in streamlining nominations, assessment and management provisions. The decision about on the appropriate consent authority for each development should be therefore based not only on level of significance, but level of complexity and degree of change proposed.

The other critical issue is the separation under the Act of 'listing' of an item or place and 'management' of that item or place. This is especially problematic when it comes to 'de-listing' when an item must, for whatever reason, be demolished.

The National Trust of Australia (NSW) does not believe that delisting is an appropriate response to economic hardship. Listing, and delisting should be based on merit and significance only.

The reintroduction of 'regional' significance as a category with responsibility for management at state level would satisfy those places that are obviously of significance to more than a local population but are not necessarily of significance to the state.

6 Other matters

Archaeology

The definition of an archaeological relic being over 50 years old takes no account of the significance of the item. It also takes no note of the overall site in which a relic is found. It simply deals with the individual item.

The key issue though in dealing with the provisions of the Act in relation to archaeology is the lack of a repository to put items once they have been excavated. Another is that interpretation requirements of approvals are not policed in any way.

Compliance

Approvals for change to listed places usually is given subject to conditions such as quality of repair but that is not monitored during the works and there are no checks after work is completed. When works are carried out with approvals under the Act the Compliance, Occupation and Final certificates should not be issued without formal sign off from the appropriate agency that conditions of approval under the Heritage Act are complied with.

Exemptions from Building Regulations

In other parts of the world it is possible to apply for a 'relaxation' of the building regulations when works are carried out to listed properties. Many older buildings do not comply with modern regulation and often circumstances forcing compliance can cause damage to the significance of a place.

An applicant should be able to apply, under the Heritage Act, for relaxations and exemptions as appropriate to the place.