

Report of the Independent Expert Panel

A Review of the NSW Heritage Act 1977

December 2007

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Glossary of abbreviations

CMA	Catchment Management Authorities
COAG	Council of Australian Governments
DA	Development Application
DCP	Development Control Plan
DECC	Department of Environment and Climate Change
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i>
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
EPI	Environmental Planning Instrument
HAMS	Heritage Asset Management Strategy
ICOMOS	International Council on Monuments and Sites
IDA	Integrated Development Assessment
IHAP	Independent Hearing and Assessment Panel
IHO	Interim Heritage Order
LEP	Local Environmental Plan
LEPRP	Local Environmental Plan Review Panel
LG Act	<i>Local Government Act 1993</i>
NPW Act	<i>National Parks and Wildlife Act 1974</i>
NRC	National Resource Commission
PIA	Planning Institute of Australia
RAAF	Royal Australian Air Force
RAHS	Royal Australian Historical Society
REP	Regional Environmental Plan
SEPP	State Environmental Planning Policy
SHI	State Heritage Inventory
TSC Act	<i>Threatened Species Conservation Act 1998</i>

Executive Summary

On 19 July 2007 the Minister for Planning, Frank Sartor MP, announced the appointment of an independent panel of experts to conduct a review of the NSW *Heritage Act 1977*. The last substantive review occurred in the early 1990s, prior to the major amendments to the Act in 1998 which established the State Heritage Register, amongst other reforms.

The Expert Panel has been asked to examine the Heritage Act under the following Terms of Reference:

1. Duplicative and overlapping provisions with other legislation (including at the national level);
2. Strengthening the integration of heritage provisions with the *Environmental Planning and Assessment Act* (both at the plan making and development control levels);
3. State heritage provisions and practice, including but not limited to:
 - a) improvements that can be made to the listing process;
 - b) alternatives to the listing process (e.g. heritage agreements);
 - c) the public benefit of outcomes;
 - d) the test for achieving State heritage status;
 - e) the role of the property owner or stakeholders and appeal rights;
 - f) the approval process for alterations to items on the SHR, including rights of property owners and stakeholders; and
 - g) resource and time efficiency.
4. The functions and constitution of the Heritage Council; and
5. Consideration of local heritage processes and whether they warrant improvement.

Public consultation was undertaken through advertising for and considering public submissions. A summary of the nature of the submissions and the key issues raised forms part of this report. A list of all submissions received is provided in Appendix A. The Expert Panel also met with the following key stakeholders:

- NSW Heritage Council
- Local Government and Shires Association
- Australia ICOMOS
- National Trust of Australia (NSW)
- Property Council of Australia
- NSW Urban Taskforce
- Department of Aboriginal Affairs
- Department of Environment and Climate Change

A total of 140 submissions from 126 parties were received from local government, special interest groups, professional and industry representatives, consultant firms, community and environment groups, government agencies and individuals. Most submissions provided extensive and diverse comments on the current operation of the Heritage Act as well as the local government heritage listing process and management approaches.

The key findings of the Expert Panel are as follows:

1) State Heritage Provisions and Practice

The Expert Panel considers that the State heritage processes are generally working well, and provide sufficient transparency and opportunities for landowners and affected parties to raise issues either during a nomination or a statutory application process. The Expert Panel does however make a number of recommendations aimed at improving the operation and fairness of the current system at the State level, including:

- Providing a more strategic and systematic framework in which to consider nominations to the State Heritage Register by setting a thematically based forward program;
- Calling for public nominations for listings in line with the thematic program and otherwise limiting public nomination to emergency listings only;
- Amending the Heritage Act to require to provide that items proposed for listing on the State Heritage Register must meet more than one of the heritage significance criteria, except where the place possesses a very high level of rarity and is clearly an outstanding item.
- Giving owners of places proposed for listing on the State Heritage Register a mandatory right for a Ministerial Review Panel or Commission of Inquiry prior to any decision to list an item;
- Better defining heritage curtilages.

The Expert Panel recognises that heritage agreements and similar mechanisms are important tools to support heritage conservation and should be put into wider use, but should not replace statutory listing.

2) Functions and Constitution of the Heritage Council

The role of the Heritage Council has changed considerably since its original establishment in 1977. At that stage, the Council was focused on the mainly reactive protection of places under threat and in the excavation of major archaeological sites. This role has evolved to include the setting of standards for heritage practice, assisting local government in heritage management and, more recently, in the proactive identification of heritage places through the State Heritage Register.

The Expert Panel believes that the constitution and to a lesser extent, functions, of the Heritage Council need to evolve to meet the challenge of effectively identifying, assessing and protecting the State's valuable heritage for the future. To this end, the Expert Panel suggests two alternative models for modifying the constitution of the Heritage Council, one retaining the existing membership but reducing the number of ex officio and organisationally-based members in favour of skills-based positions and the other modifying the size and composition of the Heritage Council to bring it more into line with other jurisdictions.

The Expert Panel also makes a number of other recommendations to improve the effectiveness and functioning of the Heritage Council.

3) Planning and Heritage

Heritage is integrated in the EP&A Act through both the plan making and development assessment systems. The Expert Panel's review indicates that in fact there is considerable integration of heritage in both these systems. However, the Expert Panel has identified a number of improvements that could be made to the way in which these systems are managed and implemented with respect to heritage at both the State and local level that could further strengthen the integration of heritage in the EP&A Act.

The Expert Panel believes that there are significant improvements that can be made to the way in which local heritage items are identified and assessed. There are also improvements that can be made to the development processes applying to local heritage items. These improvements are intended to dovetail with the spirit and intent of the NSW Government's draft planning reforms aimed at making the planning system at all levels more responsive, efficient and appropriate to achieving sustainable development outcomes.

The recommendations of the Expert Panel are wide-ranging and, amongst other matters, seek to:

- Provide for greater fairness and involvement of owners of proposed local heritage items in the listing process;
- Introduce "gateway criteria" against which proposals to list heritage items would need to be assessed. These gateway criteria relate to heritage and non-heritage matters;
- Remove the current duplication between the dual approval processes under S91A of the EP&A Act and s57 of the Heritage Act for development involving items listed on the State Heritage Register;
- Allow for greater use of exempt and complying development in relation to local heritage items and conservation areas, provided that such development does not affect their heritage significance.

4) Duplication and Overlapping Provisions in Legislation

The Expert Panel has noted that there are clearly areas within legislation where a complex set of interlocking and, in some instances, overlapping provisions have been created. In line with the NSW Government's objective of reducing 'red tape' and the regulatory burden created by it, the Expert Panel has identified a number of areas where reform could be undertaken and systemic processes improved. The two main findings of the Expert Panel are that:

- There is a need to consider undertaking a separate inquiry into the management of Aboriginal heritage in NSW having particular regard to the relationships between the Heritage Act 1977, the Aboriginal Lands Rights Act 1983 and the National Parks and Wildlife Act 1974;
- There is a need to clarify responsibility for managing natural heritage between the Heritage Council and the Department of Environment and Climate Change

5) Other Identified Issues

A range of other issues, which were generally outside of the Terms of Reference for the Inquiry, were raised with the Expert Panel through the submission process and during meetings with stakeholders. While the Expert Panel was not able to address every issue raised, it selected several key issues for further examination, particularly:

- Processes relating to the identification and management of state government heritage assets;
- Refocusing the system for the protection of archaeological heritage on heritage significance rather than compliance with the current broad definition of 'relic'.

A summary of all the recommendations of the Expert Panel is provided at the end of the report.

Introduction

On 19 July 2007 the Minister for Planning, Frank Sartor MP, announced the appointment of an independent panel of experts to conduct a review of the NSW *Heritage Act* 1977. The last substantive review occurred in the early 1990s, prior to the major amendments to the Act in 1998 which established the State Heritage Register, amongst other reforms. This Review is also being conducted in the context of a wider review of the planning system in NSW.

The Independent Expert Panel comprises:

- Ms Gabrielle Kibble AO (Chair), Former Director-General of Department of Planning and current Liverpool City Council Administrator
- Mr Michael Collins, Chair of the Heritage Council of NSW
- Mr John Whitehouse, Planning & Environmental Lawyer

The Expert Panel has been assisted by three technical advisors:

- Ms Nicola Gibson and Ms Helena Miller, MG Planning Consultants
- Dr MacLaren North, Futurepast Heritage Consulting

The Secretariat for the Inquiry was provided by:

- Ms Paula Poon, NSW Department of Planning

The Expert Panel has been asked to examine the *Heritage Act* under the following Terms of Reference:

1. Duplicative and overlapping provisions with other legislation (including at the national level);
2. Strengthening the integration of heritage provisions with the Environmental Planning and Assessment Act (both at the plan making and development control levels);
3. State heritage provisions and practice, including but not limited to:
 - a) improvements that can be made to the listing process;
 - b) alternatives to the listing process (e.g. heritage agreements);
 - c) the public benefit of outcomes;
 - d) the test for achieving State heritage status;
 - e) the role of the property owner or stakeholders and appeal rights;
 - f) the approval process for alterations to items on the SHR, including rights of property owners and stakeholders; and

- g) resource and time efficiency.
- 4. The functions and constitution of the Heritage Council; and
- 5. Consideration of local heritage processes and whether they warrant improvement.

Public consultation was undertaken through advertising for and considering public submissions. A summary of the nature of the submissions and the key issues raised forms part of this report. A list of all submissions received is provided in Appendix A.

In addition meetings were arranged with the following key stakeholders:

- NSW Heritage Council
- Local Government and Shires Association
- Australia ICOMOS
- National Trust of Australia (NSW)
- Property Council of Australia
- NSW Urban Taskforce
- Department of Aboriginal Affairs
- Department of Environment and Climate Change

These meetings provided an opportunity for the Expert Panel to discuss relevant issues with these stakeholders.

The Panel appreciates the assistance provided by all persons and groups who made submissions.

The Report is divided into five chapters. Chapters 1 to 4 deal with the terms of reference and Chapter 5 deals with other identified issues. The report also contains a summary of the full list of recommendations and summary of the submissions.

Summary of Submissions

The Expert Panel called for public submissions to assist its review. Public notices were placed in the Sydney Morning Herald, The Australian and Daily Telegraph on 30 August and 14 September respectively. The submission period concluded on 8 October 2007, however the Expert Panel continued to receive submissions until 1 November 2007.

A total of 140 submissions from 126 parties were received and they are grouped as follows:

- Government Departments/Public Agencies
- Local Governments
- Professional/Industries Organisations
- Consultant Firms
- Special Interest Groups
- Community/Environmental Groups
- Individual Submissions

Most submissions provided extensive and diverse comments on the current operation of the *Heritage Act* as well as the local government heritage listing process and management approaches. A summary of the key issues raised by stakeholders is provided below and a more detailed summary is provided in Appendix A.

Government Departments/Public Agencies

Ten government departments and public agencies provided submissions to the Review. Of these, all were from NSW except the Australian Heritage Council which advised that it did not wish to make a submission to the Expert Panel.

The NSW Heritage Council provided a very extensive submission addressing the range of issues that have arisen during its administration of the Act as well as a series of recommendations to improve the system.

Other agencies focused their submissions on issues relating to the administration of s170 Register and management of items on the Register. Overlapping with other legislations including the *National Parks and Wildlife Act 1974* and *State Records Act 1998*, were discussed in 60% of submissions.

Other issues discussed in government submissions were:

- delegation of approval authority to State agencies; and
- the constitution and functions of Heritage Council in terms of representation and heritage management.
- listing criteria – one suggestion was to list the heritage value of an item/place

rather than the item or place itself;

- problems with definitions of ‘moveable object’, ‘relics’, ‘structure’, and ‘works’;
- the need to consider an alternative or deemed listing process. Items identified as State significant in s170 Register should be listed in the SHR without additional assessment;
- maintenance costs for heritage items and the ability of the item to fulfill its technical or original functions should form part of the consideration for listing particularly for infrastructures such as timber bridges;
- clearer guidance is needed on permitted modifications to items listed on the State Heritage Register to assist owners to plan their resource allocation;
- concerns with the statutory time frame for s140 applications; and
- consideration could be given to a new model for heritage management similar to the set-up of the Catchment Management Authority (CMAs) and the Natural Resource Commission (NRC).

Local Government

A total of 39 parties made submissions to the Expert Panel in this group. 33 were from councils, four from Councillors and two from local government organisations.

Submissions from the 33 councils canvassed a wide range of issues. Some provided very extensive submissions while others focused on a few issues. The issues that are the focus of most submissions are:

- integration with the EP&A Act – many support the current separation of the Heritage Act and the EP&A Act, but believe the two Acts can be better integrated in their operation so as to ensure they are consistent and complementary.
- minimum standards of maintenance and repair – a number of councils suggested that a mechanism should be provided to enable local government to enforce minimum standards of repair and maintenance for locally listed items, similar to powers that exist for State listed items.
- local listing process – a number of submissions agree that the process could be streamlined. The lack of resources (both funding and expertise) is cited as the main reason for the unsatisfactory outcome of the listing process. Most councils hold the view that the listing of a heritage item under a Statutory Instrument provides ongoing certainty and consistency of protection. A few councils consider the current listing process (in LEP) is unnecessarily complicated resulting in uncertainty and lack of faith in the process.
- funding/resources – the lack of resources to complete inventory or update/review of heritage listing or undertaking research and technical know-how is a major concern, particularly to the regional and rural councils.
- alternatives to listing – most consider alternatives such as heritage agreement should be complementary to listing, not in place of listing. Heritage agreements are seen as time consuming and labour intensive and not necessarily suitable to

locally listed items.

- LEP template – some councils suggested that variations to the template should be allowed to reflect local conditions and accommodate local community expectations. Clarification of council's power to approve demolition of locally listed items or places and non-conforming uses, alterations and additions are required.
- owners' right – Some suggest there should be an external authority to review objections by owners and the decisions by councils to list.
- listing criteria – Although many consider the current criteria for listing are well recognised and an adequate measure, the view was expressed that there is a lack of emphasis to social significance and an over emphasis on architectural significance.

The submissions from the two local government organisations highlight the key issues concerning local governments, particularly the need for better guidance from the Heritage Council, funding concerns and difficulties associated with listing Aboriginal heritage items.

Four councillors made personal submissions to the Expert Panel. Three of the submissions focused on the local listing process, particularly on issues relating to heritage assessment/study; and heritage property owners' rights. Recommendations to improve the system were included. A new funding approach was also recommended for the Panel's consideration.

Professional/Industry Organisations

There are a total of 11 submitters in this group. Given the nature of the organisations in this group, the issues discussed in their submissions are broad-ranging and vary, and mainly reflect the expertise of each organisation. However, one issue that has been discussed in 10 out of the 11 organisations is the constitution and functions of the Heritage Council. In general, most support the current roles and functions of the Heritage Council. Some recommend broadening the composition of the Council to include others such as engineers.

The key issues raised in submissions from professional and industry organisations were:

- the local listing process – some consider the issues are related to administrative procedures rather than the Act. Listing should be proactive through a wider program of thematic and regional heritage studies rather than reactive. A regular mandatory review of heritage listing in LEPs should be incorporated into principal LEPs. A peer review of new listings is also suggested.
- alternatives to listing such as heritage agreements – many believe statutory listing provides a basis to appropriately manage conservation and development, and heritage agreements should not be an alternative to listing. Some recommend that heritage agreements be used in special cases where it is the best way to achieve a desirable outcome.

- heritage assessment/study – Undertaking regional and thematic heritage studies to bring the assessment of heritage up to the current level of historical and professional knowledge is considered of significant importance to many submitters. Periodic review of these studies should be carried out following their completion.
- listing criteria – The current criteria are considered adequate and listing should meet one or more of the criteria.
- integration with EP&A Act – Most support better integration with the EP&A Act, but integration should not diminish heritage protection.
- the IDA and s60 duplication process - Some raised concern regarding the potential duplication under the integrated development assessment process of the EP&A Act. One option is to allow the Heritage Council to nominate, during the IDA process, whether a separate s60 application is required.
- owners' right and roles – Although many consider the current appeal rights are adequate, some believe all stakeholders including community groups should have the right of appeal against decisions. One suggestion is for the Heritage Council to maintain a panel of experts to act as arbitrators when property owners dispute a council's decision to include or exclude a property from the LEP heritage list.
- resources available to the Heritage Office - many call for additional resources to the Heritage Office so as to allow it to undertake thematic studies and provide technical and funding assistances to local governments.

Consultants

19 submissions were received from consultant firms and individual consultants. The key issues that are discussed in many heritage consultants' submissions are:

- The Heritage Council and Heritage Office should remain independent in performing their roles. This would maintain public confidence in their ability to provide transparent advice and responses.
- More thorough research and analysis should be undertaken for existing and future heritage listings and more heritage significance information should be included on heritage inventory forms.
- There is no effective substitute for a system of heritage listing. Considerable scope is available for heritage agreements in the heritage management process. However, some form of independent heritage auditing process would be required to ensure all parties have met their obligations.
- Listing should include statement of significance or tangible evidence of the item/place's significance or suitable interpretation information.
- There is a need to provide for heritage listing information on s149 certificates, improve the State Heritage Inventory (SHI) database software, and prepare a standard Heritage DCP.

The main issues concerning the archaeology consultants are:

- The Heritage Act is essential to the maintenance of archaeology and heritage in the State.
- Many archaeological sites of State significance are not on the State Heritage Register. The provisions relating to relics in the Heritage Act offer the only statutory trigger. The guidelines offer an effective management strategy which assists all stakeholders.
- A major concern is the absence of one or more archaeological repositories.

Special Interest Organisations

The eight organisations in this group include four history/historical societies and four other organisations with different special interests. Issues discussed in these submissions include:

- the constitution and functions of the Heritage Council - historian be represented in the Council. Members should have relevant qualifications in an associated area and should not have vested interests that conflict with heritage values.
- listing criteria – it is suggested that consideration be given to simplifying the Heritage Data Form for use by members of the public, particularly the terminology, acronym and interpretation and definition of the listing criteria.
- Exempt development - some are concerned that private certification would allow a private certifier without heritage experience to issue certificate on heritage development.
- heritage assessment/study - more funding and resources should be made available to assist local governments to complete/update/review heritage studies.
- alternatives to listing – in general, heritage agreements should not replace listing, but as an addition to a listing. Conservation or heritage agreements should be individually tailored to meet the circumstances of relevant property.

These submissions also considered issues relating to the local listing process, including the need for effective consultation with owners and the need for additional funding to help councils in undertaking heritage studies.

Community/Environmental Organisations

This group of nine organisations is also of a diverse background. Generally their submissions reflected their area of interest. Most supported the local government's role in protecting local heritage items although two of the submitters were critical of the local listing process.

Four out of eight submissions also discussed the following issues:

- The composition and functions of the Heritage Council and Heritage Office - Heritage Council and Heritage Office should be independent and community representation should be included in Heritage Council. Heritage Office should provide more funding, resources, advice to councils to assist updating heritage inventories and records.
- The listing criteria – some suggest the listing criteria should address the issue of curtilage. New criteria should also be included to cater for ‘modern’ mid-20th century items.
- Heritage assessment/study - it is suggested the establishment of a hierarchy of state historical themes for research and expenditure priorities, based on the historic settlement patterns in NSW.
- Alternatives to listing - Heritage agreements are considered unworkable, unfair and will lead to demolition of items by some submitters.

Individuals

Of the 30 submitters in this group, 14 are heritage property owners, two are Members of Parliament, and 14 are not classified in any grouping.

Of the 14 heritage property owners, two support the current system while the remaining 12 are very critical of the current system, particularly the local heritage listing process.

A wide variety of other issues were mentioned in this group’s submission including:

- appropriate zoning for heritage items,
- the need for effective communication with the community during the listing process,
- restricting redevelopment potential of a destroyed heritage item,
- the need for the Heritage Office to focus on heritage promotion and education;

A more detailed summary of the submissions is provided in Appendix A.

Chapter 1 – State Heritage Provisions and Practice

A key aspect of this Review is the effectiveness, transparency and fairness of processes for the listing of places on the State Heritage Register and the processes for approving future works to those places. In this chapter, the Expert Panel considers both the listing processes for the State Heritage Register and the approval mechanisms, particularly as they relate to the following term of reference of this Inquiry:

3. *State heritage provisions and practice, including but not limited to:*
 - a) *improvements that can be made to the listing process;*
 - b) *alternatives to the listing process (e.g. heritage agreements);*
 - c) *the public benefit of outcomes;*
 - d) *the test for achieving State heritage status;*
 - e) *the role of the property owner or stakeholders and appeal rights;*
 - f) *the approval process for alterations to items on the State Heritage Register, including rights of property owners and stakeholders; and*
 - g) *resource and time efficiency.*

The Expert Panel has considered a range of options for improving the State and local heritage listing processes, to ensure improved integration with the planning system, that a rigorous and fair process is undertaken and that other legitimate issues are recognised within the listing process.

1.1 Current System

Responsibility for heritage in NSW is shared between the Heritage Council of NSW, the Heritage Office of the Department of Planning and local government. The Heritage Council and the Heritage Office are responsible for identifying, assessing and protecting items of State significance while local government is responsible for identifying, assessing and protecting items of local significance. In addition the Heritage Council and Heritage Office have a role in education including giving general and professional advice regarding heritage matters.

Heritage places and items of particular importance to the people of NSW are listed on the State Heritage Register. The Register was created in April 1999 by amendments to the Heritage Act 1977. The Heritage Act provides the statutory framework for the identification and conservation of items listed on the State Heritage Register.

The key to listing on the State Heritage Register is the level of significance. Only those heritage items that are of State significance are listed on the Register.

Heritage listing of State significant items can currently occur in one of two ways:

- Listing on the State Heritage Register, under the Heritage Act, through a nomination process conducted by the Heritage Office and the Heritage Council;
- Listing on a state agency Heritage and Conservation Register, under Section 170 of the Heritage Act, through a process run by the agency and endorsed by the Heritage Council. Items on a state agency's s170 Register may also be inscribed on the State Heritage Register.

1.1.1 State Heritage Register

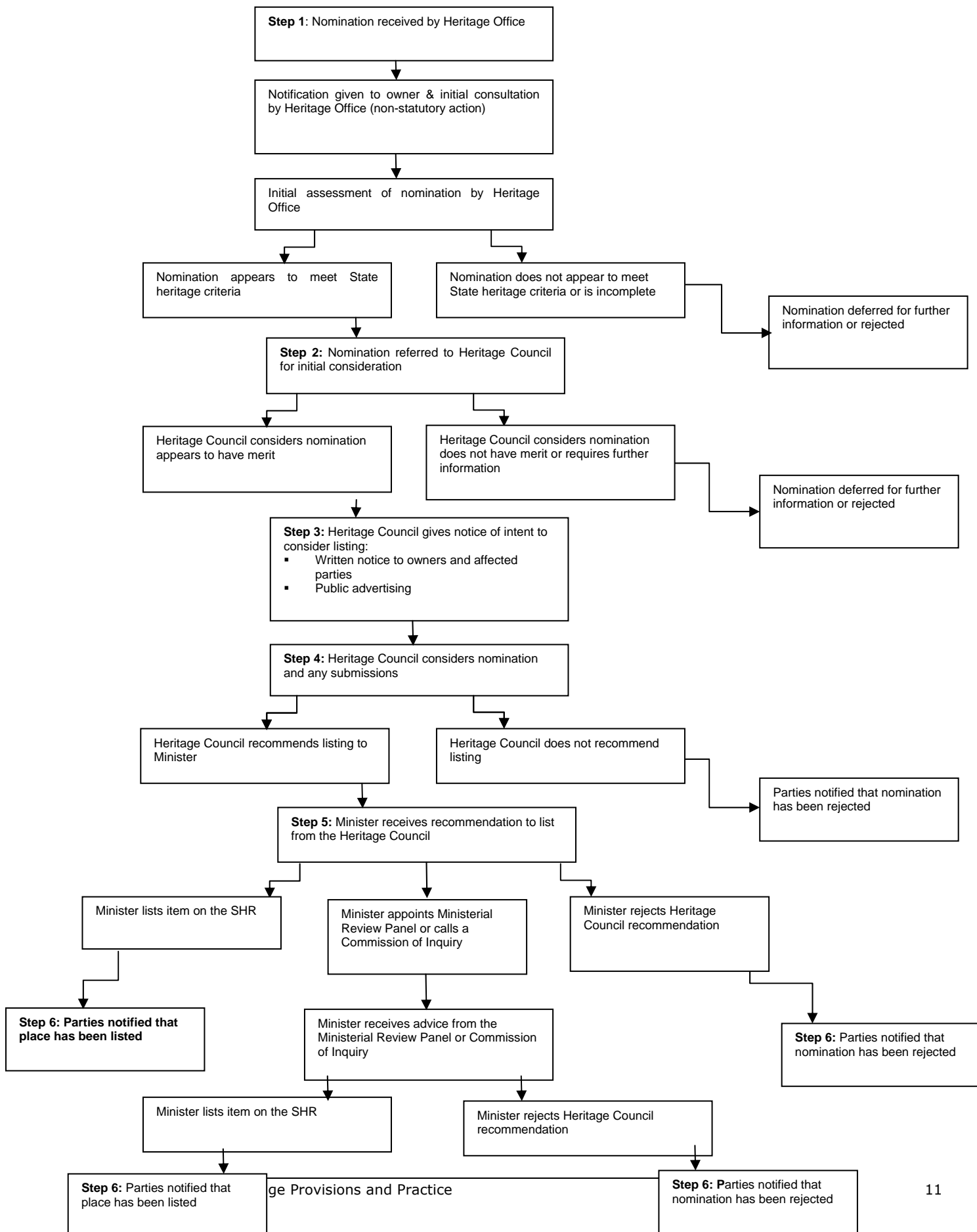
The State Heritage Register is a list of heritage places and items identified as demonstrating State level heritage significance, having been assessed against a series of seven heritage significance criteria. These criteria include matters such as importance in the cultural or natural history of NSW, special association with a person or group of importance to the cultural or natural history of NSW, aesthetic characteristics, ability to contribute to an understanding of NSW's cultural or natural history etc.

Under Section 32(2) of the *Heritage Act* a nomination for the State Heritage Register may be made by the Minister, the Heritage Council, a local council or a property owner. However in practice nominations are also open to members of the public or community organisations. The Heritage Council has confirmed the acceptability of this approach notwithstanding the provisions of the Act as the Heritage Council itself is able to nominate such items.

The process for listing on the State Heritage Register is set out below¹ and primarily comprises six main steps:

1. Nomination;
2. Consideration by the Heritage Council;
3. Advertising and negotiation;
4. Formal consideration and recommendation;
5. Ministerial consideration and decision; and
6. Inclusion on State Heritage Register and gazettal.

¹ See Heritage Act Sections 31 to 38.



Large Provisions and Practice

The process for delisting (removal) of an item is set out in Section 38 of the *Heritage Act* but generally mirrors that of the listing process. An item may however only be delisted on the basis that it is not of State heritage significance and following a recommendation to this effect from the Heritage Council.

Generally any works to an item, including alterations and demolition, listed on the State Heritage Register require approval from the Heritage Council under Section 60. However, if the works are only minor in nature with minimal impact on the heritage significance of the place, they may be exempted from this requirement.

1.1.2 State Agency Heritage and Conservation Register

The alternate way that state heritage items can be listed is by State Agencies under Section 170 of the *Heritage Act* on a Heritage and Conservation Register. This process is addressed in detail at Chapter 6.

1.1.3 Heritage Council

The Heritage Council is responsible for keeping the State Heritage Register² as well as the State Heritage Inventory, which is an amalgamated database of all statutory heritage listings in NSW.³ The Heritage Council was established under the *Heritage Act* to provide advice and recommendations to the Minister who is charged with approving the listing of items on the State Heritage Register and who can also put in place heritage orders, known as interim heritage orders, that prevent the demolition of items of potential heritage value until an assessment of significance has been made. The Heritage Council also considers applications to make major changes to listed items (Section 60 approvals). The Heritage Council is advised by a series of expert panels on a range of subjects including aboriginal heritage, archaeology, incentives, interpretation, religious property etc.

The constitution and functions of the Heritage Council are discussed in Chapter 2.

1.2 Improving State heritage processes and practice

The Expert Panel has identified a range of issues in relation to existing State heritage processes and practice. These issues have also been canvassed in many of the submissions received from local government, owners of heritage items, professional organisations and consultants in response to this review of the *Heritage Act*. The main issues identified by the Expert Panel and raised in public submissions in relation to State heritage include:

- Tests for achieving State heritage status;

² Heritage Act Section 31

³ Heritage Act Section 21(1)(e)

- Identification and protection of heritage curtilages;
- Stakeholders Involvement and appeal rights;
- Improvements to the listing / delisting process;
- Alternatives to the listing process; and
- Development Approval processes.

These issues, together with the Expert Panel's consideration of possible responses, are discussed below.

1.2.1 The test for achieving State heritage status

The *Heritage Act* defines State heritage significance as:

*in relation to a place, building, work, relic, moveable object or precinct, means significance to the State in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.*⁴

Much of this definition is derived from the Australia ICOMOS *Charter for the Conservation of Places of Cultural Significance* (the Burra Charter), which defines cultural significance as:

*aesthetic, historic, scientific, social or spiritual value for past, present or future generations*⁵

Heritage Significance Criteria

When assessing the potential State heritage significance of a place, the values of the place are tested against the following set of seven heritage significance criteria⁶:

- a) *an item is important in the course, or pattern, of NSW's cultural or natural history;*
- b) *an item has strong or special association with the life or works of a person, or group of persons, of importance in NSW's cultural or natural history;*
- c) *an item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in NSW;*
- d) *an item has strong or special association with a particular community or cultural group in NSW for social, cultural or spiritual reasons;*
- e) *an item has potential to yield information that will contribute to an understanding of NSW's cultural or natural history;*
- f) *an item possesses uncommon, rare or endangered aspects of NSW's cultural or natural history;*

⁴ Heritage Act Section 4A

⁵ Australia ICOMOS (1999) *Charter for the Conservation of Places of Cultural Significance* (Burra Charter) Article 1.2

⁶ The criteria are determined by the Heritage Council and the criteria are published in the Government Gazette. Heritage Act Section 4A.

- g) *an item is important in demonstrating the principal characteristics of a class of NSW's*
- *cultural or natural places; or*
 - *cultural or natural environments.*

This system was established in 1998 at the time of the creation of the State Heritage Register and reflected a move away from a more basic system which previously assessed items simply against the categories of historical, social, aesthetic or technical/research significance, supplemented with two “degree” criteria of rarity and representativeness. The present criteria reflect discussions held at the Council of Australian Governments (COAG) in 1997, which sought to refine and standardise heritage significance criteria across Australia,⁷ to facilitate systemic rigour and comparative analysis. This forms part of the goal of having an integrated national heritage policy at all levels of government in Australia. The responsibility for progressing these actions passed to the Environment Protection and Heritage Council, as a national level cross-jurisdictional body.⁸

Despite this goal, each Australian jurisdiction still maintains a set of different, but generally overlapping, heritage significance criteria. In some instances, these criteria are defined in the legislation⁹ or regulations¹⁰, while in others they are established by policy.¹¹ All significance criteria systems broadly cover the following general categories for the significance of a place:

- Historical significance – important to the history of the jurisdiction
- Social significance (sometimes specifically including spiritual significance) – important to one or more social groups
- Aesthetic significance (except Tasmania) – the item has exceptional aesthetic qualities
- Technical significance (sometimes expressed as creative achievement) – the item is important for its technical characteristics or for its creative/innovative characteristics
- Research significance – the item presents substantial opportunities to generate new knowledge of the past through study
- Associative significance (except Victoria) – the item is closely associated with an important person or event
- Rarity – the item is unique or rare for one or more qualities
- Representativeness – the item represents an outstanding example of a class of items or places

⁷ Minutes of the COAG Meeting of 7 Nov 1997. “Environmental Reform”
<http://www.coag.gov.au/meetings/071197/index.htm#environmental>

⁸ http://www.ephc.gov.au/heritage/int_nat_policy_herit.html

⁹ E.g. ACT HERITAGE ACT 2004 - SECT 10; South Australia HERITAGE PLACES ACT 1993 - SECT 16; Tasmania HISTORIC CULTURAL HERITAGE ACT 1995 - SECT 16

¹⁰ Commonwealth EPBC Regulations 2000 Section 10.01 (National heritage criteria) and 10.03A (Commonwealth heritage criteria)

¹¹ NSW, Victoria (<http://www.heritage.vic.gov.au/page.asp?ID=67>) and the Northern Territory (<http://www.nt.gov.au/nreta/heritage/ntregister/pdf/nominationform.pdf>)

Some other jurisdictions add categories specifically for indigenous value¹² or different sorts of natural value.¹³ The NSW criteria are almost identical in intent and wording to the Commonwealth heritage criteria, however the Commonwealth includes a specific criterion for indigenous significance.

The Expert Panel notes that the existing heritage significance criteria are succinct and broadly consistent with the national approach to assessing heritage significance. It does not consider that additional criteria are warranted at this stage.

The Expert Panel considers that listing based upon meeting only one of the seven available criteria should generally be avoided unless the place possesses a very high level of rarity and is clearly an outstanding item and its significance is unquestionable in the community's mind. Generally listing should require a place to meet more than one of the criteria for heritage significance. As stated, the experience is that the overwhelming majority of nominations for State significance will meet the test of multiple criteria, so the requirement for multiple criteria will avoid the possibility of facetious or borderline nominations.

The Expert Panel therefore is of the view that the Heritage Act should be amended to provide that items proposed for listing on the State Heritage Register must meet more than one of the heritage significance criteria, except where the place possesses a very high level of rarity and is clearly an outstanding item.

1.2.2 Identification of Heritage Curtilages

Where a place is to be listed on the State Heritage Register it is necessary that an appropriate heritage curtilage be defined for the item so that the extent of the item is clear and not in doubt. Curtilage means:

*the area of land occupied by a dwelling and its yard and outbuildings, actually enclosed or considered as enclosed.*¹⁴

In heritage conservation terms, the curtilage of a heritage item is the area of land necessary to protect the heritage significance of the item. This will become the area of land listed and thus subject to statutory control under the *Heritage Act*¹⁵ and all works within that curtilage are subject to the approval of the Heritage Council (subject to minor exemptions). The Heritage Council has, in the past, issued guidelines on how to define heritage curtilages.¹⁶

The Expert Panel considers that the issue of curtilages can become problematic for several reasons. At the listing stage, the curtilage must be adequate to protect and encompass all of the values of the place to be protected, however it should not be so

¹² The Commonwealth and the ACT

¹³ ACT and Northern Territory

¹⁴ curtilage. (n.d.). Dictionary.com Unabridged (v 1.1). Retrieved August 30, 2007, from Dictionary.com website: <http://dictionary.reference.com/browse/curtilage>

¹⁵ Heritage Act Section 27(a) for places subject to interim heritage orders and Section 32(3)(a) for places listed on the SHR.

¹⁶ NSW Heritage Office and Department of Urban Affairs and Planning (1996). *Heritage Curtilages*. Sydney, NSW Government.

extensive as to impose unnecessary restrictions on areas which do not contain significant values. The issue can become even more difficult when a heritage item is on land which has previously been subdivided and where parts of the larger site are now in multiple ownerships, some of which may not contain any physical evidence of the heritage item or associated past uses. An example would be a large house or farm which has been subdivided, such that the main house is on one lot, and former grounds, paddocks and, potentially, former outbuildings, are located on different lots and in different ownerships. Where a proposal is made to list the main house as a heritage item, the question arises as to whether any of the other lots should be included in the heritage listing. The issue can similarly arise in relation to new subdivision proposals. In such cases a heritage item may be located on a large lot, where some of the land has redevelopment potential and the conservation of the main item is contingent on the raising of funds through subdivision, land sales and/or redevelopment.

The Expert Panel considers that, in general, the legal heritage curtilage of a heritage item should be restricted to the legal lot boundary on which it is located. In some cases, the curtilage may in fact be smaller than the lot boundary, if not all land is required for the conservation of the heritage values of the place. Where a curtilage could potentially extend to land in other ownerships, the Expert Panel is of the view that the curtilage should not be extended to those lots, unless they contain critical physical evidence relating to the main heritage item and the preservation of that secondary lot is *essential* to the conservation of the main heritage item. In such cases full consultation with the second landowner should occur prior to listing.

As a matter of general principle, the Expert Panel considers that it is unreasonable that a property adjoining a heritage item should be burdened by the imposition of a heritage curtilage unless the landowner of the affected property has agreed.

The Expert Panel believes that it is critical that the Heritage Council explicitly consider the heritage curtilage of a place at the same time it considers the significance of the place, as a key element of the heritage listing process. No places should be listed on the State Heritage Register without the definition of a clear curtilage and those places on the State Heritage Register without a curtilage should be reviewed as a matter of course.

The Expert Panel is also of the view that the identification of land within the curtilage of a heritage item should not be viewed as precluding appropriate development within that curtilage. Rather it considers that, provided that the proposed development is consistent with a conservation management plan or a heritage agreement that applies to the land, appropriate development should be allowed within a heritage curtilage.

1.2.3 Owner's involvement and appeal rights

At present, owner involvement is undertaken throughout the listing process including upon nomination, during consideration of the listing, during consideration by a Ministerial Review Panel or Commission of Inquiry (where established) and when listed or rejected. While there is no formal legal appeals process under the Heritage

Act, the Expert Panel is of the view that the State Heritage Register listing process provides sufficient opportunities for consultation, stakeholder appearances, representation and administrative review.

Section 33(2) of the *Heritage Act* allows submissions to be made on any matter, but specifically identifies the following issues which may form the basis of submissions:

- Not meeting the threshold for State significance
- The item's long-term conservation is not necessary
- Listing would render the place incapable of reasonable economic use
- Conservation would place undue financial hardship on the owner.¹⁷

This section of the Act guides owners and affected parties towards issues that should be raised during the process. In particular it points to the potential economic impacts of heritage listing and provides owners or affected parties who consider that they will be negatively affected by listing a statutory opportunity to raise such matters during the consideration of the nomination. In addition they have a range of non-statutory opportunities to raise such issues with the Heritage Office, the Heritage Council or the Minister to ensure these matters are considered in deliberations.

It is noted that the appointment of a Ministerial Review Panel or a Commission of Inquiry into a recommendation by the Heritage Council for listing is entirely discretionary for the Minister. These provisions in section 34 of the *Heritage Act* replaced earlier provisions where an owner could trigger automatically a Commission of Inquiry into a listing process.

The Expert Panel considers the rights of affected owners should be increased to provide that the Minister shall appoint either a Ministerial Review Panel or a Commission of Inquiry into a recommendation for listing if so requested by an owner.

The Expert Panel believes that the current process provides ample opportunities for the airing and consideration of issues by the Heritage Office, the Heritage Council and the Minister. However, the recommendation of the Expert Panel for a mandatory right for an owner to seek a Ministerial Review Panel or Commission of Inquiry would strengthen the rights for owners to ensure full consideration of their views prior to listing. A further judicial review would add additional time and expense to the process while not providing any substantial additional benefit in terms of the rights of property owners.

1.2.4 Improvements to the listing / delisting process

The Expert Panel considers that a range of improvements can be made to the process of listing and delisting items on the State Heritage Register. These should be designed to reduce the backlog and bottlenecks caused by large numbers of

¹⁷ *Heritage Act* Section 34(2)

nominations, ensure nominations are considered in a timely fashion with respect to other planning objectives and to improve the rigour of nominations.

The nomination process

Section 32 of the Heritage Act provides that nominations for listing on the State Heritage Register can be initiated by the Minister, the Heritage Council, an owner of the item or the local council. As a matter of practice, the present nomination system is open to anyone, which has led to a large number of nominations from individuals and community groups. The current approach has resulted in many nominations which are of poor quality, contain inadequate information, or are made primarily as strategic moves to thwart development or other planning objectives. The open public nature of the nomination process has also led to a backlog of several hundred unprocessed nominations within the Heritage Office, although the Expert Panel notes that there has recently been a tightening of administrative procedures in an attempt to improve quality.

The public nomination process has undoubtedly broadened the range of listings received by the Heritage Council. However, while there is clearly a role for public participation in the nomination process, the Expert Panel has concerns regarding the current unfocused open approach.

The Expert Panel considers that given the significant backlog of State Heritage Register nominations, the Heritage Council should, in consultation with the Director General of the Department of Planning, set a thematically based forward program, to be agreed with the Minister, to determine the order in which nominations or types of nominations should be progressed. Such a program should be prepared on an annual basis.

The Expert Panel is of the view that this approach would provide a more strategic and systematic framework in which to consider nominations. It would also reduce the number of nominations and provide both the Heritage Council and the Minister adequate time and resources to thoroughly consider nominations.

With the introduction of a thematically based forward program, the Heritage Council could call for nominations from the public provided that such nominations were in keeping with the identified theme. Public nominations would otherwise be limited to “emergency” nominations only.

The requirement to prepare a thematic forward program of nominations should be added as a function of the Heritage Council under the *Heritage Act* and it may be appropriate to amend Part 3A of the *Heritage Act* to formalise this process, consistent with the process contained in the Environment Protection and Biodiversity Conservation Act (EPBC Act).

Timeframes

Under Section 38 of the Heritage Act the Heritage Council currently has 30 days in which to decide whether to recommend listing of an item from the closing of submissions. Similarly under Section 34 the Minister has 14 days from the date of

receiving a recommendation from the Heritage Council to decide whether to list an item or alternatively refer the matter for advice to a Ministerial Review Panel or a Commission of Inquiry. In reality, there are many instances where such timeframes have not been able to have been met, especially because of other broader issues which have impacted on consideration of the listing.

The Expert Panel considers that these, and potentially other, timeframes for the consideration of State Heritage Register nominations are currently inadequate and do not recognise many of the complexities involved in determining whether an item should be listed. Instead, the Expert Panel considers that all time limits for decisions under the Heritage Act should be removed except where they are required to protect a person's private rights. In these circumstances timeframes should be retained however care should be taken to ensure these statutory timeframes are adequate, realistic and able to be met.

Emerging and emergency issues affecting heritage places would still be addressed through the use of interim heritage orders and Section 136 orders.

The delisting process

Arrangements for the removal of an item from the State Heritage Register (or "delisting") are set out in Section 38 of the Heritage Act. These procedures generally mirror the process of listing, in terms of consultation, advertising and consideration of submissions. They vary from the listing process however, in that an item may only be removed from the State Heritage Register on the basis that it is not of State heritage significance (i.e. does not meet the significance criteria). The recommendation from the Heritage Council to remove the item from the State Heritage Register is also required.

The Expert Panel considers that the current requirements for delisting ignore a range of important issues which may have bearing on the conservation of a place. It is of the view that the Minister should be able to consider the same range of non-heritage factors for a delisting as he is able to consider in deciding whether to list an item¹⁸. These matters include:

- that the item is not, or is no longer, of State heritage significance,
- that the long-term conservation of the item is not necessary,
- that the listing renders the item incapable of reasonable or economic use, or
- that the listing is demonstrably causing undue financial hardship to the owner, mortgagee or lessee.

Further the Expert Panel considers that the Minister should have the power to direct the Heritage Council to consider these factors prior to making a recommendation to him on whether the item should be removed from the State Heritage Register. This better mirrors the listing process and provides the Heritage Council with the ability to consider these issues. However, the Expert Panel believes that the final decision to

¹⁸ As per Section 33(2) of the Heritage Act

delist an item from the State Heritage Register should appropriately rest with the Minister following consideration of the recommendation from the Heritage Council.

The recommended process for delisting is particularly important for the group of sites that were placed on the State Heritage Register in 1998 (previously subject to Permanent Conservation Orders). These items should be reassessed, having regard to the expanded considerations, to determine whether they should remain on the State Heritage Register as a matter of course.

1.2.5 Alternatives to the listing process

Voluntary heritage agreements were raised in many submissions to the Expert Panel. Owners of State significant items may be eligible to receive benefits from the State government through a heritage agreement. These benefits include land tax relief in the form of lower land taxes on the basis of a “heritage valuation” of the land, payment of stamp duty and council rates.

Many submissions, primarily from individuals, were in favour of the use of voluntary agreements in preference to, and as an alternative to, statutory heritage listing. Conversely, many submissions from local government indicated that heritage agreements were useful tools in addition to, but not in place of, listing.

The Expert Panel notes that the use of voluntary heritage agreements as a basis for listing was extensively canvassed by the Commonwealth’s Productivity Commission in its recent Heritage Inquiry.¹⁹ The Commission concluded that the universal use of voluntary agreements would be impractical, but that expanding the use of agreements would be useful as a tool to support conservation “where the existing [listing] system imposes unreasonable costs on private owners”.²⁰ The use of voluntary agreements as a basis for listing was not supported by the NSW Government in its submission to the Productivity Commission, nor by the Heritage Chairs and Officials in their formal response to the Productivity Commission’s final report.²¹ The Expert Panel further notes that the Commonwealth Government was itself wary of the notion of the consideration of “unreasonable costs” in the context of heritage conservation.²²

The Expert Panel notes that a range of different types of voluntary agreements are available within the planning system, including ‘heritage agreements’ under the *Heritage Act*,²³ ‘conservation agreements’ under the *National Parks and Wildlife Act*²⁴ and ‘planning agreements’ under the *Environmental Planning and Assessment Act*.²⁵

¹⁹ Productivity Commission (2006). Conservation of Australia's historic heritage places - final report. Melbourne, Australian Government.

²⁰ Ibid. Pp XXVIII-XXX

²¹ Australian Heritage Chairs and Officials (2006). Response by the Chairs of the State and Territory Heritage Councils of Australia to the Productivity Commission’s Final report. Pg 9.

²² Commonwealth Of Australia (2006). *Commonwealth Government Response To The Productivity Commission Inquiry Into The Conservation Of Australia’s Historic Heritage Places*. Department Of Environment And Water Resources. Pp 4-5.

<http://www.environment.gov.au/heritage/publications/pubs/productivity-commission-report.pdf>

²³ Heritage Act Sections 39-46

²⁴ NPW Act Section 69A-69KA

²⁵ EP&A Act Sections 93F-93L

Five places are presently the subject of heritage agreements under the *Heritage Act*.²⁶ These include the RAAF Stores Depot at Dubbo and the Tempe House Estate at North Arncliffe.

While the Expert Panel considers that voluntary agreements provide useful tools for encouraging conservation or providing conservation incentives in the absence of other mechanisms, the use of voluntary agreements as the sole conservation mechanism is likely to only be useful in cases where items do not meet the threshold of State significance and government wishes to see the item conserved. This may include items such as vegetation or landscape elements, or contributory elements within a wider conservation zone or on the edge of a heritage curtilage that might not otherwise be conserved.

The Expert Panel agrees with the submissions received from a range of local councils and council staff that the negotiation of individual agreements with a large number of landholders would not be efficient or practicable. If the agreements were to require legal review, this would potentially place high costs on individual landowners and on the councils. The administrative burden of making and managing several hundred heritage agreements in a local government area would not be efficient and would likely lead to greater inconsistency. Given this, the Expert Panel does not consider that voluntary agreements are a viable basis for heritage listing, but rather, can be used on occasions as a useful adjunct to listing.

The Expert Panel considers that voluntary agreements represent important tools to support conservation efforts and should continue to be used where appropriate.

1.2.6 Development approval processes

Approvals processes for works to items on the State Heritage Register are dealt with in Part 4 of the *Heritage Act* and are generally referred to as “Section 60 approvals”. An applicant who wishes to modify or undertake certain works to an item on the State Heritage Register is required to seek the consent of the Heritage Council. In general terms, the Heritage Council becomes a consent authority for a place once it is listed on the State Heritage Register, in addition to the local council. Works to places on the State Heritage Register are Integrated Development, unless the works are being undertaken on behalf of the Crown. The issue of Integrated Development is dealt with in Chapter 3 on Planning and Heritage.

A range of exemptions to allow affected landowners to carry out minor works and routine maintenance²⁷ also exist, ranging from maintenance and cleaning through to restoration works and changes of use.²⁸ The Heritage Council provides delegations and a broader set of exemptions to state agencies that have the expertise to deal appropriately with their heritage properties (e.g., Historic Houses Trust, Sydney Harbour Foreshore Authority and Sydney Water).

²⁶ Pers comm. Cameron White NSW Heritage Office

²⁷ Made under Heritage Act Section 57(2) and published in the Government Gazette.

²⁸ NSW Heritage Office (2006). *Standard Exemptions For Works Requiring Heritage Council Approval (Heritage Information Series)*. NSW Heritage Office, NSW Government.

Consent is not required for works which fall under these exemptions however some exemptions do require notification to the Heritage Office. The written concurrence of the Heritage Office is required before works may commence. The process for exempt works is therefore in effect a “mini-application” albeit one with significantly lower requirements in terms of costs and documentation than a full Section 60 application. The Expert Panel considers that more extensive use of delegations can be made and that a system of exemptions should be introduced for approval of minor works to local heritage items (refer Chapter 3 for further detail).

The Expert Panel also notes that the approvals process generally involves significant consultation with affected parties, particularly owners and/or development proponents, before and during the formal application process. The Act requirements for public advertising of applications which will “materially affect” the significance of a heritage item provide a degree of public scrutiny of the heritage approvals process. Heritage Council procedures allow the applicant to address the Heritage Council at a meeting where an application is considered, in circumstances where refusal is recommended or where the recommendations of the assessing officer are not supported by the applicant.²⁹ Presentation to the Heritage Council is at the discretion of the Chair of the Heritage Council. The Expert Panel notes that in some circumstances, it may be appropriate to allow stakeholders other than the applicant to make a presentation to the Heritage Council on Section 60 applications.

In the event that an applicant is dissatisfied with a determination by the Heritage Office (under delegation) or the Heritage Council, there are several appeal mechanisms:

- Appeal to the Minister (in relation to a Section 60 application); or
- Appeal to the Land and Environment Court (for integrated development, or if the decision was made by a local council acting under delegated authority).

Where an appeal is made to the Minister, he may call a Commission of Inquiry, if deemed necessary. The applicant, Heritage Council and any party that made submissions on the original application have the right to appear at the Inquiry.³⁰ The Minister’s determination of an appeal in this circumstance is final and no subsequent appeal rights exist.

Most applications under the *Heritage Act* fall within the scope of integrated development, with the exception of Crown development applications. For integrated development, the Land and Environment Court is generally the appeals body. The Expert Panel considers that the Land and Environment Court is the appropriate mechanism for hearing appeals in such circumstances, as it was established to deal with all planning and environment related matters. The Land and Environment Court

²⁹ Heritage Council of NSW (n.d.). Presentations to the Heritage Council. NSW Heritage Office, NSW Government.

³⁰ Heritage Act Sections 71 and 72

is also the hearing body with respect to any prosecutions for breaches of the *Heritage Act*.³¹

The Expert Panel understands that to date no appeals under Section 70 have been made either to the Minister or to the Land and Environment Court. Given that there appears to be little use of the existing appeals mechanisms, the Expert Panel considers that there is no compelling reason to change the existing or to introduce additional appeal mechanisms.

1.3 Conclusion

The Expert Panel considers that the State heritage processes discussed in this chapter are generally working well, and provide sufficient transparency and opportunities for landowners and affected parties to raise issues either during a nomination or a statutory application process. The Expert Panel does however consider that a number of these processes should be refined, as outlined above, particularly to ensure better integration between the Heritage Council's program and the strategic planning objectives for the State.

The Expert Panel considers that there is opportunity to improve the operation of the current system at the State level and the proposed recommendations set out below are targeted to this end.

1.4 Proposed Recommendations

- 1 To provide a more strategic and systematic framework in which to consider nominations and to assist in reducing the significant backlog of State Heritage Register nominations, the Heritage Council and the Director General of the Department of Planning should set a thematically based forward program. The program would be agreed with the Minister and include the order in which nominations or types of nominations would be progressed.
- 2 The thematic program would be prepared on an annual basis and would set time limits for formal nominations to be made by the Heritage Council to allow sufficient time and resources for these nominations to be considered.
- 3 A new function could be added to the Heritage Council under Section 21(1) of the *Heritage Act* "to prepare a thematic forward program of proposed nominations for the State Heritage Register to be agreed by the Minister".
- 4 With the introduction of a thematically based forward program, the Heritage Council should call for nominations from the public provided that such nominations were in keeping with the identified theme. Public nominations should otherwise be limited to "emergency" nominations only.

³¹ *Heritage Act* Section 158. Minor matters can be brought before a Local Court.

- 5 The Heritage Act should be amended to provide that items proposed for listing on the State Heritage Register must meet more than one of the heritage significance criteria, except where the place possesses a very high level of rarity and is clearly an outstanding item.
- 6 Owners of places proposed for listing on the State Heritage Register should have a mandatory right for a Ministerial Review Panel or a Commission of Inquiry prior to Ministerial decision on a proposed listing.
- 7 Other than the above, no additional appeals mechanism is required in the process for considering a nomination for the State Heritage Register.
- 8 Heritage curtilages should in general be restricted to the legal lot boundary on which the heritage item is located, or to a smaller portion of land within that lot boundary.
- 9 Where a heritage curtilage encompasses land outside of a lot boundary, that land should only be listed if it is essential for the conservation of the first item. In such cases full consultation with the second landowner should occur prior to listing.
- 10 The use of a heritage agreement to protect non-core curtilage land could be considered rather than statutory listing on the State Heritage Register.
- 11 Development within the curtilage of a heritage item that is consistent with the conservation management plan or heritage agreement for that item should be allowed.
- 12 If there are properties presently listed on the State Heritage Register without curtilages these should be reviewed and an appropriate curtilage identified and approved by the Heritage Council.
- 13 No items should be listed on the State Heritage Register without explicitly defined curtilages. This includes items to be listed as a whole from a state agency S170 Heritage and Conservation Register.
- 14 Timeframes for the nomination process under Sections 33(d) and 34(1) of the Heritage Act should be removed.
- 15 The Minister's reasons for delisting an item from the State Heritage Register should be broadened under Section 38 to include the following additional matters:
 - *that the items is not, or is no longer, of State heritage significance,*
 - *that the long-term conservation of the item is not necessary,*
 - *that the listing renders the item incapable of reasonable or economic use,*
or

- *that the listing is demonstrably causing undue financial hardship to the owner, mortgagee or lessee.*
- 16 Section 38 of the Heritage Act should be amended to enable the Minister to direct the removal of a listing from the State Heritage Register if he considers that the item meets one or more of the above criteria. The proposed amendment to the Act should give the Minister the powers to delist an item having considered the recommendations of the Heritage Council.
 - 17 The Heritage Office should be directed to reassess items transferred onto the State Heritage Register from the former system of Permanent Conservation Orders, to determine if those items meet the criteria for State significance. Those items which do not meet the criteria should be automatically removed under savings and transitional provisions to an Amendment Act.
 - 18 The use of heritage agreements and similar mechanisms are recognised as an important tool to support heritage conservation and should be put into wider use, in conjunction with statutory listing.
 - 19 The use of exemptions under Section 57(2) of the Heritage Act could be expanded for minor works and other applications that will not impact upon significance.
 - 20 For applications relating to items listed on the State Heritage Register, the current appeals process to the Land and Environment Court is appropriate and should continue.

Chapter 2 – The Functions and Constitution of the Heritage Council

This chapter examines the functions and constitution of the Heritage Council as required by the terms of reference.

2.1 Current Situation

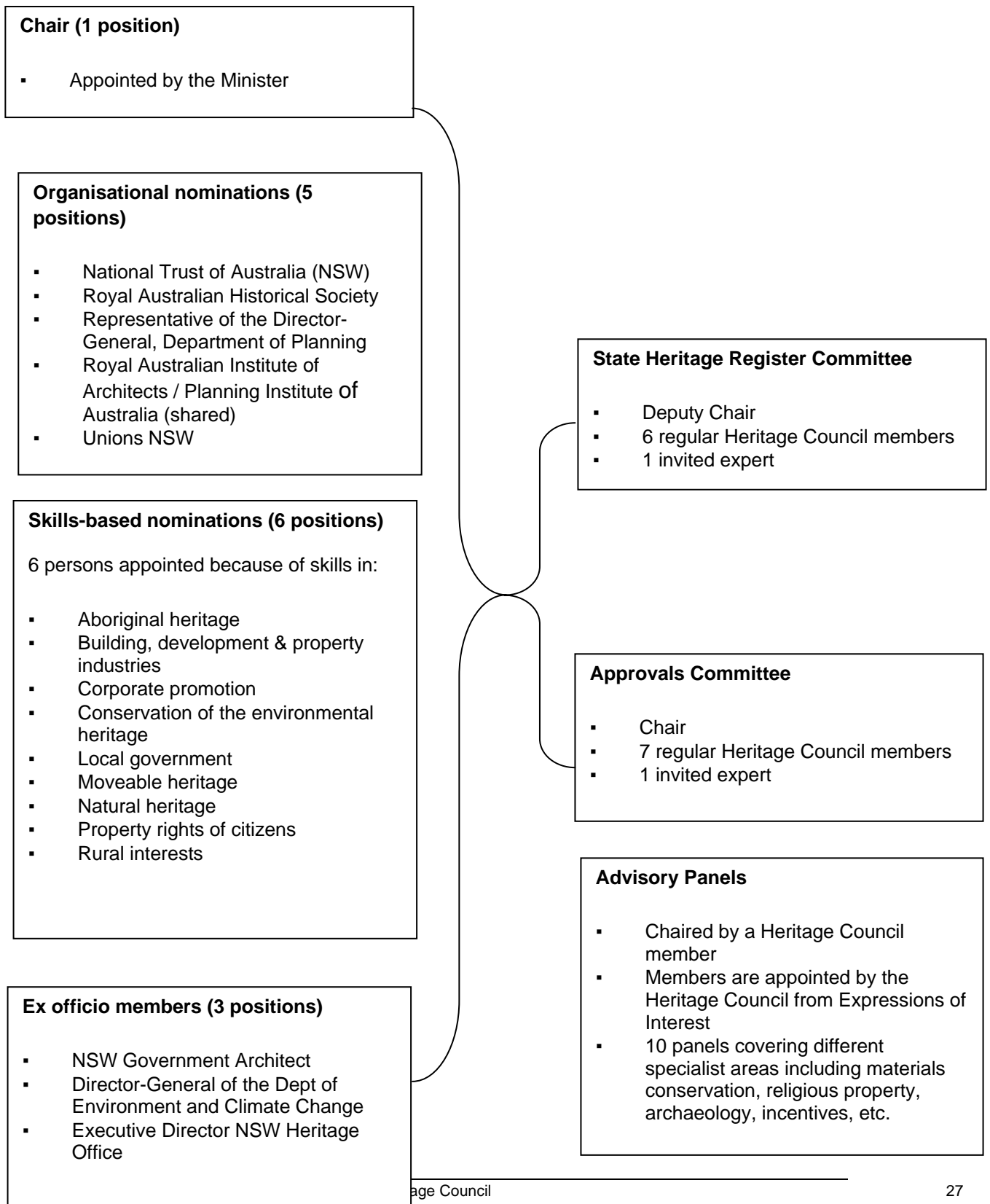
The Heritage Council of NSW was established in 1977 with the introduction of the Heritage Act. It consists of 15 members including the Chair. Three members are ex officio while the remainder are appointed by the Minister based on nominations from a number of stakeholder groups or on the basis that the individuals possess relevant skills and experience from a specific list. The stakeholder groups were involved in the initial establishment of heritage legislation in NSW in the 1970s and some of these groups remain closely involved in the mainstream of heritage debate (e.g. National Trust) while others are now less involved with heritage issues outside of the Heritage Council (e.g. Unions NSW).

Alternates may be appointed, although it has been a number of years since this last occurred.

Two committees, the State Heritage Register Committee and the Approvals Committee, together with a number of Advisory Panels have been established to assist the Heritage Council in its deliberations.

Figure 2 below illustrates the present composition of the Heritage Council and its key committees.

Figure 2: Current structure and composition of the Heritage Council & Committees



2.1.1 Existing Membership

Chairperson

The Chair of the Heritage Council is appointed by the Minister. There are no specific criteria for the appointment of the Chair. Based on a review of past versions of the Heritage Act,³² this seems to have been the case throughout the existence of the Act.

In most other jurisdictions, the Minister or Governor appoint the Chair from within the membership of the Council once it is established.³³ Tasmania and Western Australia are similar to NSW in that the Chair is a Ministerial appointment with no specific criteria for holding the office. By contrast, the Commonwealth stipulates the Chair must have “substantial experience or expertise concerning heritage”.³⁴

Specified Groups

- National Trust of Australia (NSW)
The National Trust remains the peak community-based non-governmental organisation for heritage conservation in NSW. All Australian jurisdictions, with the exceptions of the Commonwealth Australian Heritage Council and the South Australian Heritage Council have seats specifically designated for the National Trust. The National Trust serves an important function as a community-based advocacy organisation. The National Trust maintains policies, personnel and expert panels which provide it with an ability to review proposals which affect heritage places to advance advocacy in relation to such matters.
- RAHS
The Royal Australian Historical Society (RAHS) serves as a central focus point and support network for local historical societies and provides a conduit to the activities of small, community-based historical societies around the State. Only NSW reserves a seat specifically for the RAHS on its Heritage Council.
- RAIA/PIA
The Royal Australian Institute of Architects (RAIA) and Planning Institute of Australia (PIA) are national professional bodies that provide accreditation to members and act as advocates on matters pertaining to architecture and planning. The organisations have shared a seat on the Heritage Council since its inception and in practice the groups alternate representation every three years.³⁵ No other Australian jurisdictions reserve a seat on the Heritage Council for these groups specifically, although architecture and planning are typically identified in skills-based position criteria.

³² 1977, 1992 and 1998 versions of the NSW Heritage Act.

³³ E.g. Heritage Conservation Act (NT) Sect 10; Heritage Act 2004 (ACT) Sect 17(2); Queensland Heritage Act 1992 (Qld) Sect 11(1); Heritage Places Act 1993 (SA) Sect 5(4); Heritage Act 1995 (Vic) Schedule 1 Section 1(1)

³⁴ Australian Heritage Council Act (Cth) 2003 Section 7(2)

³⁵ Pers comm. Cameron White, NSW Heritage Office, September 2007. This has not been verified against past membership lists.

- **Unions NSW**

The union movement was a major force in the early establishment of heritage legislation in NSW and elsewhere in Australia.³⁶ The Green Bans movement, in conjunction with advocacy of groups like the National Trust highlighted the need to establish heritage legislation in the mid 1970s and have been used occasionally since to protect heritage places. The reservation of a seat for the trade union movement on the Heritage Council stems from a period in Government policy which stipulated that all government boards would have a seat reserved for a union representative. This is no longer government policy. Queensland is the only other state to reserve a Heritage Council seat for trade unions.

Government Representatives (ex officio positions)

The Act provides for four government positions to be on the Heritage Council, three of which are ex officio:

- Representative of the Director-General of Department of Planning
- The Government Architect
- The Director-General of the Department of Environment and Climate Change (DECC)
- The Executive Director of the Heritage Office (previously Director of the Heritage Office)

The Planning representative, Government Architect and DECC representative have been provided for since the Act's inception. The position for the Director of the Heritage Office was created in 1996, with the establishment of the Heritage Office as a separate agency.

Skills-based representatives

The remaining six positions on the Heritage Council are skills-based positions, where individuals are appointed in their own right due to their expertise in areas including:

- Aboriginal heritage,
- the building, development and property industries,
- corporate promotion,
- the conservation of the environmental heritage,
- local government,
- moveable heritage,
- natural heritage,
- the property rights of citizens,
- rural interests.

³⁶ Burgmann, M. and V. Burgmann (1998). Green bans, red union : environmental activism and the New South Wales Builders Labourers' Federation. Sydney, UNSW Press. See also Munday, J. (1981). Green bans & beyond. Sydney, Angus & Robertson.

This list was substantially amended in 1996 but remains unchanged from that time. The major changes in the 1996 amendments were:

- Local government position changed to a skills-based position rather than a nomination from the Minister for Local Government
- Skills added for skills based representation in the areas of Aboriginal heritage, corporate promotion, moveable heritage, natural heritage and rural interests.

2.1.2 Size and Tenure

As noted above, the Heritage Council presently has 15 members, having grown from 11 members in 1977, to 12 by 1992, and reaching its present size with the 1996 amendments to the Act. The growth reflects the addition of the Director Heritage Office and the addition of new skill sets based on the expanded brief of the Council at that time.

As shown in Table 1, NSW has quite a large Council compared to all other jurisdictions except Tasmania.³⁷

Table 1: Comparison of Heritage Councils in Australia

Jurisdiction	# members	Tenure (years)	Notes
NSW	15	3	Up to three terms in total
Commonwealth	7 / 2 associates	3 / 1	Up to two terms in total
ACT	11	3	One term only
Northern Territory	9	3	No limit on reappointment
Queensland	12	3	One term only
South Australia	7 to 9	3	No limit on reappointment
Tasmania	15	3	No limit on reappointment
Victoria	10	3	No limit on reappointment
Western Australia	9	5	No limit on reappointment

The tenure of membership on Heritage Councils across Australia is 3 years, with the exception of Western Australia, where tenure is 5 years. 5 of the 9 jurisdictions in Australia have no term limits and the other 4 (including NSW) limit appointments to 1 to 3 terms. The NSW system allows for up to 3 terms of 3 years, or 9 years of membership in total.

³⁷ A review of the Tasmanian *Historic Cultural Heritage Act* in 2005 stated that 15 was too large a Council and recommended it be reconstituted as a body of 7 to 9 members, however this recommendation was not adopted. (Godden Mackay Logan P/L (2005). *Tasmanian Heritage Act Review: A report prepared for Heritage Tasmania and the Department of Parks, Tourism, Heritage and the Arts*. Sydney, Godden Mackay Logan P/L. Pp 9-10.)

2.1.3 Sub-committees

Section 21A of the Heritage Act gives the Heritage Council broad powers to establish committees to assist it in the exercise of its functions. The Heritage Council presently has two major committees: the Approvals Committee and the State Heritage Register Committee. The Council is also supported by several Advisory Panels, comprised of experts in various fields (e.g. archaeology, religious property, maritime heritage, technical building, fire and safety etc) which are appointed administratively and have no statutory or decision-making powers. These Advisory Panels appear to provide an appropriate additional resource capability to the Heritage Council and are not further discussed here.

The Approvals Committee and the State Heritage Register Committee deal with the bulk of the statutory work of the Council including approvals and listings or delisting of items on the State Heritage Register. These two committees have been granted delegated authority under section 169(3) of the Heritage Act, with Ministerial consent, to exercise the relevant functions of the Heritage Council. The membership of the two Committees is split with roughly half of the Heritage Council serving on one Committee and half on the other. This arrangement has been in place since 1998, when a large number of subcommittees and their functions were absorbed. In 2006, the Heritage Council began appointing non-Heritage Council members to these two committees³⁸ to bolster the range of skills and experience available to assist with deliberations.

Presently, the Heritage Council meets in full session every two months and the two major Committees meet monthly. It is not uncommon for the Heritage Council to convene special meetings to consider matters of importance and/or of major community interest.

2.2 Alternative Models for Heritage Council Membership

The Expert Panel has considered the existing constitution of the Heritage Council and whether it warrants reform. The Expert Panel believes that there is a need to reform the constitution of the Heritage Council and has considered two possible models:

Model 1 – Minor modification to the existing arrangements

This model would retain the existing membership of the Heritage Council at 15 members but would reduce the number of ex officio and organisationally-based members in favour of skills-based positions. The four positions for the Executive

³⁸ Allowable under Heritage Act section 21A (2). The new members include Mr Michael Clarke (engineer), appointed to the State Heritage Register Committee and Ms Diane Jones (architect) to the Approvals Committee. Ms Jones was a member of the Heritage Council in the 1990s.

Director Heritage Office, Government Architect, Director General of the DECC and Unions NSW would be recommended for abolition. The Expert Panel's reason for the removal of these positions is as follows:

- Executive Director of the Heritage Office - Now that the Heritage Office has been merged back into the Department of Planning, an obvious duplication exists in terms of the representative of the Director-General of Planning and this position, as both are now officers of the same of the Department.

The Expert Panel does not believe that it is necessary to have two representatives of the Department of Planning on the Heritage Council. Instead, it considers that the Director-General of Planning (or the Director-General's representative from the Department) should represent the Department on the Council. Under these arrangements, the Director-General would have the option of selecting the Executive Director of the Heritage Office as the Department's representative on the Council.

- Government Architect – As this is strictly a profession-identified position, coupled with the position designated for the RAIA (refer discussion below), there is the potential for (and indeed currently exists) duplication of architectural skills on the Council. Other Australian jurisdictions which have the position of “Government Architect”³⁹ do not have an ex officio position allocated to that role on their Heritage Councils. The Expert Panel believes that this ex officio position could therefore be eliminated and replaced with a skills-based position.
- Director-General of DECC – The Expert Panel has considered the issue of duplicative and overlapping legislation and practices with respect to Aboriginal and natural heritage in Chapter 4. The Expert Panel is of the view that the areas of legislative and administrative overlap should be removed. If this is the case, a position for the Director-General of DECC on the Heritage Council is no longer warranted.
- Unions NSW - The abolition of a seat reserved for Unions NSW, in favour of a skills-based seat is considered reasonable given that Government policy does not necessarily require specific positions for Unions NSW on Government bodies.

In place of these positions, Model 1 would provide a separate position for the PIA as well as three additional skills-based nominations. As noted above, at present the RAIA and PIA share one position alternately every three years however they are both core professional bodies representing professions which are closely involved in State Heritage matters and therefore it could be argued that both organisations should be represented on the Heritage Council. Providing separate positions for both professional bodies would achieve this.

³⁹ E.g. Victoria, Northern Territory, Queensland.

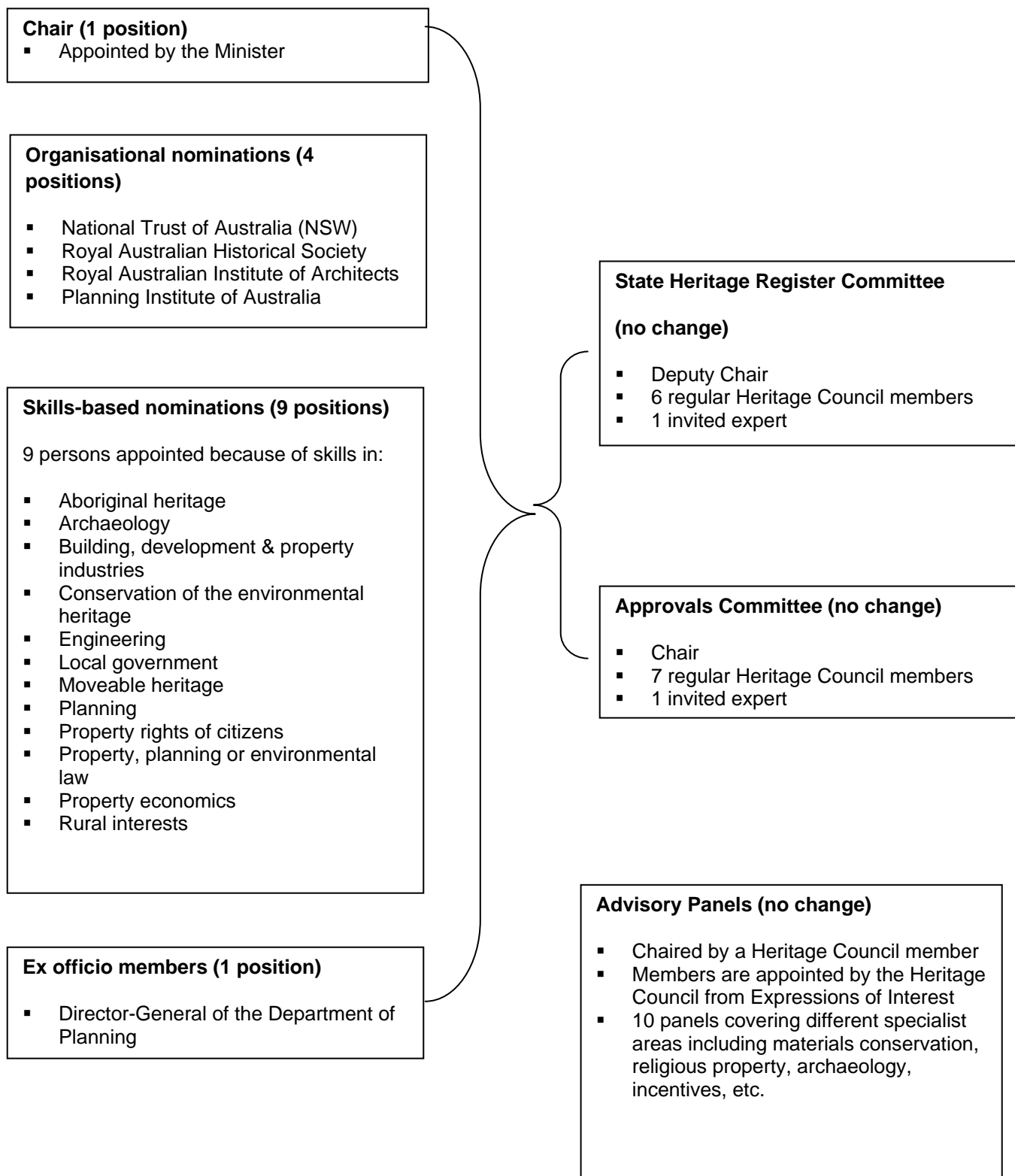
Model 1 further provides for the removal of the skills-based categories of corporate promotion and natural heritage, both of which have never been explicitly drawn upon. Instead, five additional skill areas are proposed from which members can be drawn:

- archaeology,
- architecture,
- engineering,
- planning
- property economics, and
- property, planning or environmental law,

The Expert Panel is of the view that these skill areas have significant bearing on the routine business of the Heritage Council and would assist in ensuring the Heritage Council has an appropriate range of skills to meet future challenges. In particular, the major advantage to skills-based appointments is that they allow a great deal of flexibility in the mix of skills and individuals on the Heritage Council. It allows specific skill areas to be targeted where there is a perceived lack and also allows for individuals to be nominated in circumstances where they might not receive an organisational nomination. Skills-based nomination makes it much easier to ensure an adequate and balanced representation of skills, perspectives and experience.

Model 1 is shown in Figure 3 below.

Figure 3: Proposed Heritage Council Model 1 – 15 members



Model 2 – Substantial modification to the Heritage Council

This model seeks to modify the size and composition of the Heritage Council to bring it more into line with other jurisdictions. Accordingly, this model would reduce the size of the Heritage Council to 9 members and remove all ex officio and organisationally based positions. As with Model 1, this Model would involve the removal of the skills categories of corporate promotion and natural heritage and include instead the skills categories of archaeology, architecture, engineering, property/planning/environmental law, and property economics. All positions, including the Chair, would be drawn from this expanded list of skill-based positions.

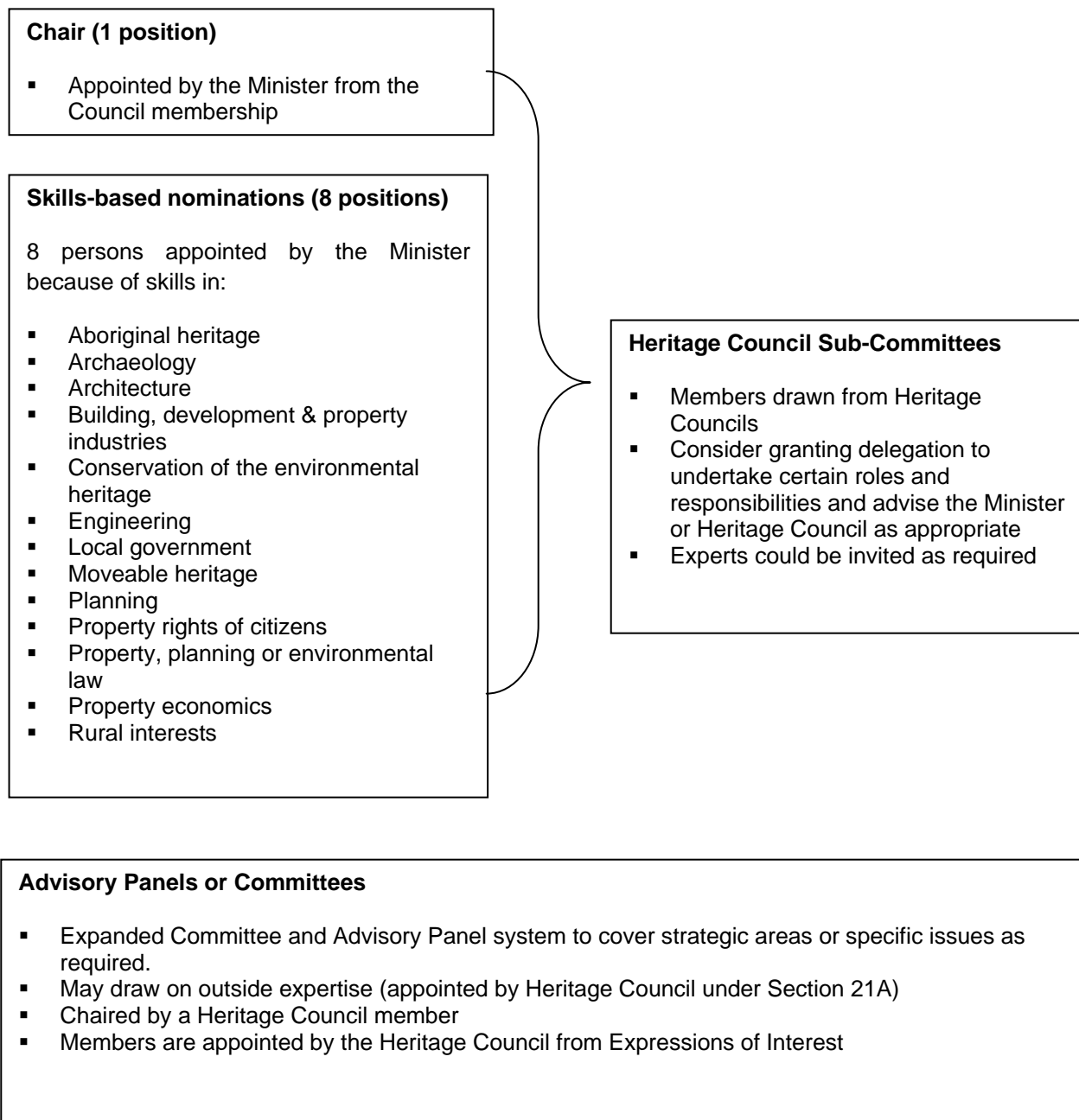
The Expert Panel believes that this option has considerable merit for the following reasons:

- the representation of organisations and industry bodies on the Heritage Council does not of itself bring value to the work of the Heritage Council. It is the skills and experience of individuals that makes the greater contribution. The Expert Panel does not believe there is a compelling reason for organisations or industry representatives to sit on the Council; and
- the existing 15 member Council is much larger than other jurisdictions in Australia, apart from Tasmania.

The Expert Panel considers that a 9 member Heritage Council could devolve itself into a smaller sub-committee or sub-committees as required to undertake some or all of the duties of the Heritage Council in relation to specific responsibilities or roles. These sub-committees could replace the existing committees if required.

Model 2 is shown in Figure 4 below.

Figure 4: Proposed Heritage Council Model 2 – 9 members



2.3 Other Changes to Heritage Council Membership

Alternate Members

There are concerns that the use of alternates in the past has contributed to inconsistent decision-making, where the mix of Council members could change unpredictably from meeting to meeting. The Expert Panel believes that it is not practical to have a process of alternate members except in certain circumstances. The Expert Panel considers that the Minister should be able to appoint an 'acting member' to fill in for a member who has been approved to take a leave of absence by the Minister, for a period of up to six months. If the member requires an absence for a longer period, they would be required to resign and the position filled as per the arrangements to fill casual vacancies.⁴⁰ This is similar to the provision that exists in the Queensland Heritage Act.⁴¹

Tenure

As noted above, the NSW system allows for up to 3 terms of 3 years, or 9 years of membership in total, however the Expert Panel believes that term limits are not necessary and they should be removed. This does not mean that the membership of the Council should remain static. The rotation of new members onto the Heritage Council is an important part of ensuring it has the right mix of skills and remains an energetic forum for new ideas. To encourage this, the Expert Panel believes a system of staggered appointment of members should be introduced, with say one third of the Council being replaced in favour of new members every three years.

2.4 Powers

The Heritage Council has a range of powers that it may exercise in its own right, or may exercise subject to Ministerial approval. The major powers the Council may exercise without Ministerial approval include administering the State Heritage Register, the determination of applications for works to items on the State Heritage Register or subject to Interim Heritage Orders and the issuing of excavation permits for work affecting relics. There are also a host of minor powers, some of which are little-used.

The present split of powers provides a reasonable balance between the Minister as the principal agent of Government and the Heritage Council as the expert body. Key functions, such as approvals for works to heritage places, rest with the Council and this is consistent with the planning approval functions of other entities such as the Department of Planning and local government. In cases of very significant development, it is likely that development would fall within Part 3A of the EP&A Act,

⁴⁰ Heritage Act Section 12

⁴¹ Queensland Heritage Act 1992 Section 16

thus exempting it from approval under the Heritage Act and making the Minister the determining authority. Given this power, there seems little need to change the approvals functions of the Heritage Council.

The power to list items on the State Heritage Register or declare interim heritage orders is also a power reserved for the Minister. The Heritage Council can only recommend a State Heritage Register listing or interim heritage order. The Panel sees no reason to alter this arrangement. Balance is further brought to the system due to the fact that the Heritage Council Chair (or the Minister) may declare an emergency “stop work” order to restrict harm to a place which is not on the State Heritage Register, under section 136 of the Act. This is a short term order lasting up to 40 days and the Heritage Council is obliged to further investigate the matter during this period, to determine if an interim heritage order should be placed on the site. This provides an adequate mechanism to stop immediate harm to a previously-unlisted heritage place, and the short term nature of the order does not require a special appeals mechanism.

The Panel does however note that there is no emergency “stop work” power for unauthorised works to items which are the subject of an IHO or State Heritage Register listing, and recommends that such a power be added to the Act, to be exercised by the Minister or Heritage Council Chair on similar terms to the existing section 136 orders.

2.5 World, National & Commonwealth Heritage

Issues of World, National and Commonwealth heritage will continue to involve State heritage authorities. This is particularly the case with World Heritage, where a policy position has been adopted by the Commonwealth Government that for places to be nominated for the World Heritage List they must be already listed at the appropriate subsidiary jurisdictional levels. For example, the Sydney Opera House was sequentially listed on the State Heritage Register and National Heritage List in preparation for its nomination for, and recent listing on, the World Heritage List.

State based heritage authorities also have responsibilities to coordinate and respond to listing nominations and referrals under the Commonwealth Environment Protection and Biodiversity Conservation Act. In this regard, the Heritage Office acts as the coordinating agency for a whole-of-government response on behalf of NSW. Scope exists under the EPBC Act for a bilateral agreement to be formed between the State and the Commonwealth⁴² which accredits the heritage assessment and approvals processes for World, National and Commonwealth heritage items, which particularly has the potential to streamline approvals processes. Given these responsibilities, the

⁴² Environment Protection and Biodiversity Conservation Act 1999 (Cth): for World Heritage – sections 46 & 51; for National heritage – sections 46 & 51A; for Commonwealth heritage – sections 33 & 34F

Expert Panel feels it may be appropriate to formally recognise this role within the functions of the Heritage Council.

2.6 Conclusion

The role of the Heritage Council has changed considerably since its original establishment in 1977. At that stage, the Council was focused on the mainly reactive protection of places under threat and in the excavation of major archaeological sites. This role has evolved to include the setting of standards for heritage practice, assisting local government in heritage management and, more recently, in the proactive identification of heritage places through the State Heritage Register. The Expert Panel believes that the constitution and to a lesser extent, functions, of the Heritage Council need to continue to evolve to meet the challenge of effectively identifying, assessing and protecting the State's valuable heritage for the future. The following proposed recommendations seek to address this challenge.

2.7 Proposed Recommendations

- 1 The Minister could consider the following options for potential reform to the Heritage Council constitution:

Model 1 – Minor modification to the existing arrangements

- Retain the existing size of the Council at 15 members
- Reduce the number of ex officio and organisationally-based members in favour of skills-based positions
- Remove the positions for the Executive Director Heritage Office, Government Architect, Director General of the DECC and Unions NSW
- Provide a separate position for the Planning Institute of Australia
- Remove the skills-based categories of corporate promotion and natural heritage
- Add new skills-based categories for archaeology, architecture, engineering, general historian, property/planning/ environmental law and property economics from which the Minister can choose the appropriate balance for the Heritage Council.
- Remove the present term limits

Model 2 – Substantial modification to the Heritage Council

- Reduce the size of the Heritage Council to nine members
- Remove all ex officio and organisationally based positions
- Remove the skills-based categories of corporate promotion and natural heritage

- Add new skills-based categories for architecture, archaeology, engineering, general historian, property/planning/environmental law and property economics
 - Fill all positions from an expanded list of skills-based positions
 - Minister to select the Chair from amongst the nine appointed members
- 2 Allow the Heritage Council to devolve itself into a smaller sub-committee or sub-committees as required to undertake some or all of the duties of the Heritage Council in relation to individual matters. These sub-committees could replace the existing committees if required.
 - 3 The need for the appointment of Alternate Members under Section 13 of the Heritage Act could be removed altogether, as there are concerns that the use of alternates in the past has contributed to inconsistent decision-making, where the mix of Council members could change unpredictably from meeting to meeting.
 - 4 The Heritage Act could be amended to enable the Minister to appoint an ‘acting member’ to fill in for a member who has been approved to take a leave of absence by the Minister, for a period of up to six months.
 - 5 If a member is to be absent from the Heritage Council for a period longer than six months, then they would be required to resign and the position filled as per the arrangements to fill casual vacancies.
 - 6 Section 9 of the Heritage Act could be amended to remove time limits on membership tenure.
 - 7 The Minister could consider appointing members for varying terms to ensure appropriate rotation.
 - 8 Consideration should be given to amending the Heritage Act to provide for emergency “stop work” powers for unauthorised works to items which are the subject of an IHO or State Heritage Register listing. This power should be exercised by the Minister or Heritage Council Chair on similar terms to the existing section 136 orders.
 - 9 A bilateral agreement could be formed under the EPBC Act between the State and the Commonwealth which accredits the heritage assessment and approvals processes for World, National and Commonwealth heritage items. It may be appropriate to formally recognise this role within the functions of the Heritage Council.
 - 10 A new role for the Heritage Council could be inserted in Section 21 of the Heritage Act, which is “to advise the Minister on matters relating to places listed on the World, National or Commonwealth Heritage Lists”.

- 11 The Minister could consider progressing discussions between the NSW Government and the Commonwealth regarding a bilateral agreement to accredit NSW heritage approvals processes for World, National and Commonwealth heritage items within NSW.

Chapter 3 - Planning and Heritage

This chapter examines the relationship between heritage and the planning system in New South Wales, particularly as it relates to the two following terms of reference of this Inquiry:

2. *Strengthening the integration of heritage provisions with the Environmental Planning and Assessment Act (both at the plan making and development control levels);*
5. *Consideration of local heritage processes and whether they warrant improvement.*

3.1 Current System

The statutory heritage system in NSW is essentially a two-tiered system with State significant heritage items listed on the State Heritage Register and other heritage items listed in schedules to local environmental plans (LEPs). The *Heritage Act 1977* is primarily concerned with items of State significance, providing the statutory framework for their identification and conservation. The *Environmental Planning and Assessment Act 1979* (EP&A Act) has a much broader ambit, being concerned with planning and development across the State.

As noted elsewhere in this report, responsibility for heritage in NSW is shared between local government, the Heritage Council of NSW and the Heritage Office of the Department of Planning. Local government is responsible for identifying, assessing and protecting items of local significance, while the Heritage Office and the Heritage Council are responsible for identifying, assessing and protecting items of State significance.

Local Government's role in protecting local heritage is significant. There are over 20,000 individual items listed in LEPs compared to 1,500 listed on the State Heritage Register.⁴³ Councils are involved in investigating, assessing and protecting heritage resources through the preparation of LEPs, through development control, through strategic planning and through heritage promotion and education.

Under the EP&A Act, the identification and protection of heritage is provided for through plan making (Part 3) and development assessment (Parts 3A, 4 and 5). The EP&A Act is silent on the processes for assessing the significance or acceptability of impacts to local heritage items. Standards for these matters are principally drawn

⁴³ www.heritage.nsw.gov.au

from the guidelines and practices established by the NSW Heritage Office (part of the Department of Planning) and the Heritage Council of NSW.

The current arrangements for the integration of heritage provisions with the EP&A Act are as follows:

Plan Making

Part 3 of the EP&A Act is concerned with the preparation of environmental planning instruments (EPIs). There are three levels of EPIs – State Environmental Planning Policies (SEPPs), Regional Environmental Plans (REPs) and LEPs. There are also a number of other inter-related tools that support EPIs, including Section 117 directions (to guide the preparation and scope of LEPs), development control plans (DCPs) and regional strategies.

Many of the SEPPs and REPs across the State include listings of heritage items as well as other provisions relating to heritage.

Local heritage items are afforded statutory protection under LEPs prepared by councils. LEPs also contain specific provisions for the protection and use of the listed heritage items and many also contain provisions relating to development in the vicinity of heritage items.

The Ministerial Section 117 Direction No 9 (dated 30 September 2005) requires that LEPs contain provisions to facilitate the conservation of items of heritage significance.

Recently, the Standard Instrument (Local Environmental Plans) Order 2006 (the “Standard LEP template”) was made which includes mandatory heritage provisions intended to form the basis for standardising and improving heritage management across the State.

Integration of heritage in plan making under the EP&A Act is further provided for under Part 5 of the Heritage Act. This Part contains provisions relating to the preparation of EPIs in respect of heritage matters generally as follows:

- Section 82 - the Heritage Council may request the Director-General of the Department of Planning or a council to prepare an EPI for land to which an IHO applies or a listing on the State Heritage Register.
- Section 83 – requires that the Heritage Council be consulted where an EPI is proposed affecting land to which an IHO applies or a listing on the State Heritage Register.
- Section 84(1) – where an EPI applies to land containing an item of environmental heritage, councils must make sure that LEPs contain provisions that protect the item.

- Section 84(2) – the Heritage Council may issue guidelines to councils regarding provisions under LEPs to facilitate the identification, conservation and management of heritage items.

Development Assessment

In NSW the assessment and determination of development proposals is governed by the provisions of Parts 3A, 4 and 5 of the EP&A Act as follows:

- Part 3A - for major projects of regional or State significance which require an approval from the Minister for Planning;
- Part 4 - for other proposals which require consent, usually by the local council but by the Minister in limited circumstances. Under Part 4, minor or routine development may also be complying development approved by accredited certifiers;
- Part 5 - for proposals which do not fall under Part 4 or Part 3A. These are often infrastructure proposals approved by local councils or State agencies which are undertaking them.

Minor proposals for development can be exempt from development approval, while other proposals are prohibited under various planning instruments.

The main area of integration in the development assessment system is provided for when applications are submitted as Integrated Development Applications (IDA) under Division 5 (sections 90-93B) of the EP&A Act. Under these provisions, councils are required to verify State agency requirements for development as part of the development consent. In the case of the Heritage Council, this relates to approvals required under Section 57(1) of the Heritage Act for any works etc affecting land to which an interim heritage order (IHO) or a listing on the State Heritage Register apply.

For major projects under Part 3A of the EP&A Act, an approval under Section 57, or an excavation permit under Section 139, of the Heritage Act 1977, is not required. Instead, heritage matters are addressed through the Director-General's requirements for the project application or concept report.

Under Part 5 of the EP&A Act heritage matters are similarly addressed through the Director-General's requirements for the preparation of an Environmental Impact Statement. Separate approval is still required under Section 57(1) of the Heritage Act for any works etc affecting land to which an IHO applies or listing on the State Heritage Register.

3.2 Improving heritage processes in the planning system

The Expert Panel has identified a range of issues with respect to the relationship between heritage and the planning system. These issues are also canvassed in the

many submissions received from local government, owners of heritage items, professional organisations and consultants. The main issues identified by the Expert Panel and raised in public submissions include:

- the adequacy of local heritage processes including heritage studies and the heritage assessment process at the local level, including assessment criteria;
- the process for identifying and listing local heritage items;
- the rights and obligations of property owners;
- the validity of existing heritage schedules in local environmental plans;
- the identification of, and controls applying to, conservation areas;
- integrated development for State Heritage Register items;
- development assessment and heritage items;
- the role of heritage and planning agreements at the local level;
- heritage provisions in SEPPs and REPs

These issues, together with the Panel's consideration of possible responses, are discussed below.

3.3 Local Heritage Processes

At present there is significant variation in the nature and comprehensiveness of heritage provisions in LEPs across the State. This has occurred over a long period of time, during which standards and community expectations have changed. The Standard LEP template was introduced to provide a simpler and more standardised approach to local plan making across the State. This includes those provisions relating to local heritage protection.

However, the Expert Panel has identified a range of issues with respect to the identification, protection and development of local heritage items and places as provided for under LEPs. These are discussed below.

3.3.1 Local Heritage Studies

Items of local heritage significance are listed through heritage schedules contained in LEPs. Items for listing are initially considered in a heritage study. A heritage study identifies and assesses heritage items that reflect the key historical themes for an area. It also makes recommendations on policies the local council should adopt to protect and conserve the identified heritage items.

Heritage studies are resource intensive and time consuming often costing upwards of \$70,000⁴⁴ and taking years to complete. Because heritage studies are costly many smaller or regional councils do not have sufficient resources to fund their preparation.

⁴⁴ NSW Heritage Office, Department of Planning (2007) "Eight Suggestions on How Local Councils Can Promote Heritage Conservation", pg 10

In addition, whilst the NSW Heritage Office has developed criteria and guidelines to help councils investigate heritage significance and in some instances provide funding, the level of rigour and quality of heritage studies vary considerably.

A decision to list an item is based on an assessment of significance, generally carried out through an LGA wide heritage study but occasionally undertaken for individual items particularly when precipitated by a development proposal. There are detailed guidelines on how to determine the significance of an item contained in *Assessing Heritage Significance*⁴⁵ and in *Investigating Heritage Significance Draft Guidelines*⁴⁶.

These guidelines include criteria on how to determine the significance of an item. An item is considered to have local significance if it meets one or more of the criteria. In Chapter 1 the Expert Panel considered the issue of whether meeting just one criterion is sufficient to warrant listing on the State Heritage Register. The Expert Panel concluded that listing based upon meeting only one criterion should generally be avoided unless the place possesses a very high level of rarity and is clearly an outstanding item and its significance is unquestionable. Generally listing should require a place to meet more than one of the criteria for heritage significance.

The Expert Panel considers that this argument is equally applicable at the local level. If a proposed listing is only able to meet one of the criteria then this brings into question whether the item actually warrants listing at all. The item's significance must be unquestionable and outstanding to warrant listing on the basis of one criterion only. The requirement for multiple criteria will avoid the possibility of facetious or borderline nominations.

Whilst the criteria in general are accepted as a reasonable basis for determining local heritage significance, the interpretation of these criteria depends on the level of training and experience of those undertaking the assessment. The Expert Panel is of the view that at the local level those undertaking the assessment do not always have an appropriate level of training or experience and often approach the assessment from a position of advocacy and even self interest.

Determining what items have heritage significance and what items should be listed inevitably involves a degree of subjectivity. There are numerous instances where heritage experts have expressed contrasting views about the significance of an item. It is not surprising then that there are often strongly differing views in the community generally about the value of heritage items.

The Expert Panel accepts that the assessment criteria developed by the Heritage Office are a reasonable basis for determining the significance of an item. As provided

⁴⁵ NSW Heritage Office (2001), "Assessing Heritage Significance"

⁴⁶ NSW Heritage Office (2004), "Investigating Heritage Significance – Draft Guidelines"

for under the Burra Charter, the initial assessment of the significance of a heritage item should continue to be undertaken separately from consideration of other factors.

The variability in the quality of heritage studies needs to be addressed. The Heritage Office has recognised this issue and provides some financial and technical assistance to those councils with limited resources. The assistance of the Heritage Office is valuable and should continue as a priority. However, the Expert Panel believes that lack of funding is only part of the reason why there is this variability in quality. A number of submissions raised concern that many heritage listings seem to be based on “drive by” or other simplistic assessments rather than proper professional evaluation under the criteria. The Expert Panel agrees with this view and believes that many listings based on such drive by assessments may not be valid if subject to greater rigour of assessment.

Australia ICOMOS (International Council on Monuments and Sites) in its submission to the Expert Panel has recommended that thematic and regional studies should be undertaken to improve comparative analysis and thus the quality and reliability of individual assessments. The Expert Panel supports this view and considers that the Heritage Council could explore opportunities to work with individual councils or regional groups of councils in undertaking such studies.

3.3.2 The Listing Process

The LEP translates the recommendations of the heritage study into a statutory document which lists the heritage items identified in the heritage study for protection. It also contains specific provisions to guide councils when considering the future of listed heritage items.

An item of heritage significance may be listed in both an LEP and on the State Heritage Register if it is considered to be of both local and State significance. The majority of the State’s local councils have State listed heritage items in their LEPs.

There is considerable disparity amongst councils between the number and types of items listed and the quality of heritage studies upon which listings are based. The extent to which items of local significance are listed in LEPs appears largely to depend on the resources and development pressures of individual councils. Further, many listings date back more than 15 years and were undertaken before detailed heritage assessment guidelines were available.

Subsequent to the preparation of a heritage study, the process for determining what items are listed in an LEP is not standardised. There are no criteria for determining whether recommendations for listing in a study are accepted or rejected by councils and a council’s decision-making process is discretionary. There is no obligation for independent review. It is often difficult for property owners and the general public to understand how such decisions are made.

Many councils consult affected property owners early on in the assessment process and continue to liaise with them regarding possible listing. However, some councils do not consult property owners about proposals to list their properties until a draft LEP is publicly exhibited. There is no obligation to consult property owners during the heritage study phase and therefore the decision to list an item is often taken without particular consideration being given to the owner's concerns or intentions. Similarly, there are no appeal rights given to owners to the listing of their properties.

Equally, the final decision to list is for the local council, whose decision-making may be motivated by politics rather than being based upon an impartial professional assessment of the place.

Of particular concern to the Panel are proposals for LEPs to list items as a means of blocking or defeating development applications. Generally the Department of Planning does not permit such rezonings.

Further, concern has been raised in some submissions that councils are listing items as a means of stopping development in areas where the issue is one of local amenity rather than the significance of the particular place or building. Further, many listings in LEPs have limited factual information to support their listing, leading to criticism that listings are often opportunistic rather than based on rigorous assessment.

The current process of listing items through an LEP is cumbersome and time consuming, largely because the process of preparing LEPs in itself is both these things. Also, LEPs are often delayed because there is disagreement between councils and the State Government about matters which are non heritage related.

The Expert Panel has identified a number of possible courses of action that could be considered to improve the listing process:

a) Up front consultation with owners

By not involving owners from the outset of the assessment process, an adversarial environment is often created. A more collaborative and educative approach with owners would in all likelihood lead to greater support to the listing of items and potentially remove some of the misconceptions about heritage listing. This view is supported in a number of the submissions received from councils.

The Expert Panel is similarly of the view that owners should be consulted early on in the heritage assessment phase and nomination of items for listing should only be allowed once consultation has occurred. Consultation with owners should continue throughout the LEP preparation process.

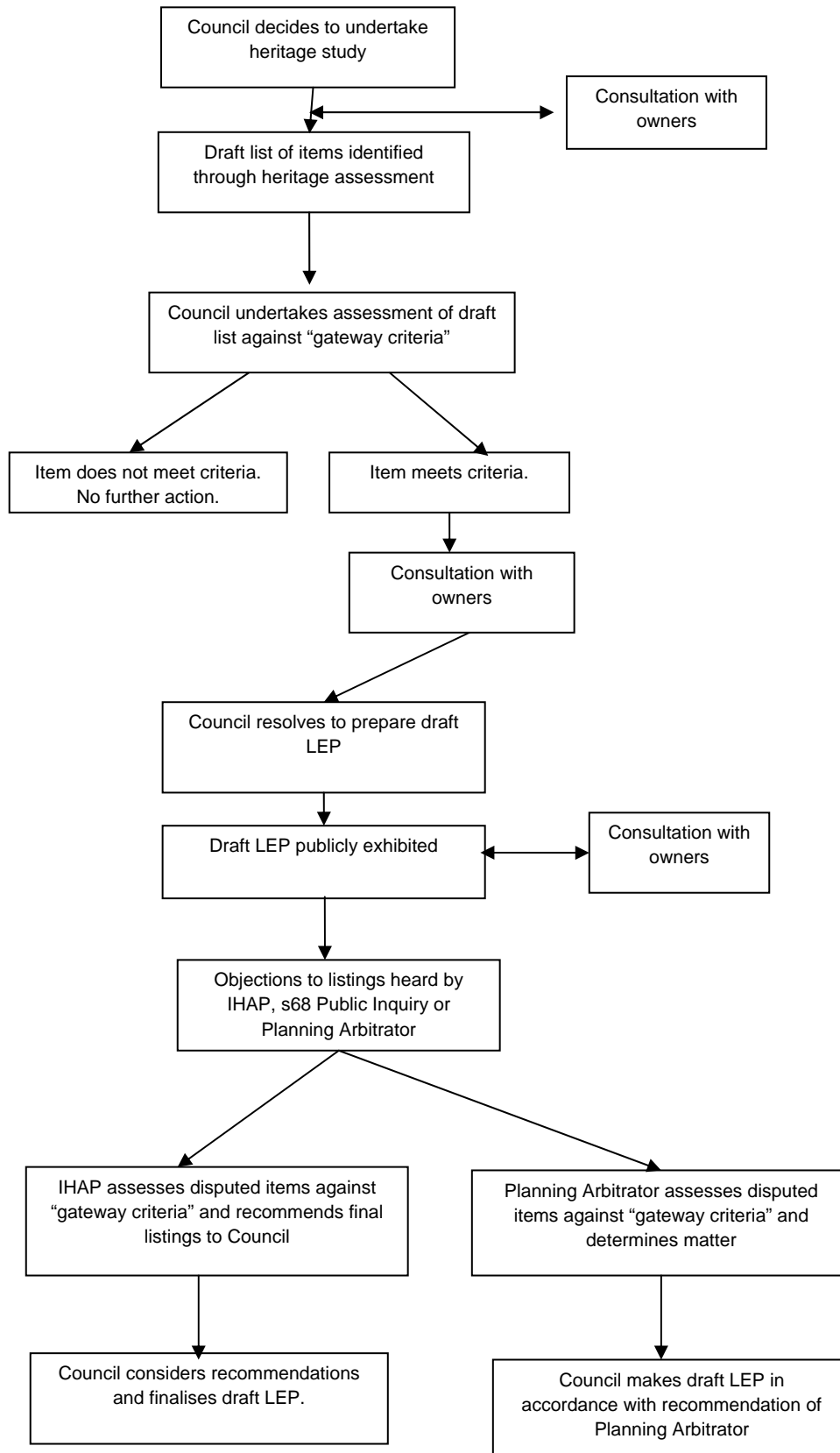
Where owners continue to object to the listing of their property after exhibition of the draft LEP, the Expert Panel considers that it is of the view that one of three options should be considered:

- (a) the establishment of an Independent Hearing and Assessment Panel (IHAP) to consider the objection and make a final recommendation to the Council regarding whether the item should be listed or not. In accordance with the approach of IHAPs on other planning matters, their role would be advisory only.
- (b) the establishment of a Public Inquiry under Section 68(1) of the EP&A Act to similarly consider the objection and report to the Council on whether the item should be listed or not. S68 Inquiries are also advisory.
- (c) the appointment of a planning arbitrator to determine the matter⁴⁷. In this case, the decision of the planning arbitrator would be binding on the Council.

The consultation approach is shown in Figure 5.

⁴⁷ The draft Planning Reforms have suggested that a system of planning arbitrators be established to deal with small development matters, including DA refusals.

Figure 5: Proposed Process for Assessment and Listing of Local Heritage Items



The Heritage Council in its submission to the Expert Panel has indicated its support for the involvement of independent panels in determining LEP heritage schedules where there is an outstanding dispute or objection⁴⁸.

b) Gateway criteria

The assessment criteria for heritage listings do not include consideration of non heritage matters, for example, broader planning considerations, whether the listing is supported by the owner, and the likelihood of the item being maintained. Initial consideration of the significance of an item without consideration of these matters is consistent with the process described in the Burra Charter which states:

The cultural significance of a place and other issues affecting its future are best understood by a sequence of collecting and analysing information before making decisions. Understanding cultural significance comes first, then development of policy and finally management of the place in accordance with the policy.

One of the concerns with the local listing process as it currently stands, however, is that while there are considerable resources invested in assessing the significance of items, a corresponding focus on the subsequent policy development and management does not always occur. This is contrary to the Burra Charter which specifically states that policy development is needed to ensure consideration of other factors affecting the future of a place such as the owner's needs, resources, external constraints and its physical condition. By not addressing these issues, there is no means of affording the long term conservation of the item. In other words, there needs to be a level of confidence that an item that is to be listed has a reasonable chance of survival.

The Expert Panel believes that whilst heritage studies should continue to focus on the assessment of heritage significance, councils should be required to assess proposed heritage listings against "gateway criteria" which address a broader range of issues suggested as follows:

- the heritage significance of the item (as assessed against Heritage Office criteria and tests of authenticity and integrity);
- compatibility with planning controls and planning goals for the area;
- owners' views;
- the implications for the economic use of the land;
- community regard for the item;
- whether there are measures in place to ensure long term conservation; and
- whether there is a design solution to ensure long term conservation.

⁴⁸ Submission No 98 – Heritage Council of NSW

These gateway criteria should also be used to guide decision-making by an IHAP where constituted to hear objections to listings by owners of proposed heritage items. However, the Expert Panel is of the view that an owner's objection to a listing should only be one of the criteria to be considered by the IHAP and should not in itself be a reason for refusal. Provided that this approach was adopted, an owner's right of appeal, to say the Land and Environment Court regarding the listing would not seem warranted.

The Expert Panel considers that gateway criteria should be prepared by the Department of Planning and issued in a circular to all councils.

c) LEP Streaming

Currently the process of adding, removing or changing a heritage schedule in an LEP is time consuming and administratively inefficient. The NSW Government's recently announced draft planning reforms propose a system of LEP streaming to help expedite plan making and remove unnecessary red tape. Under these reforms once a draft LEP has passed through an initial evaluation it can be streamed according to its relative simplicity or complexity.

The purpose of placing LEPs into different streams is to ensure that the level of assessment, process, referral and consultation reflects the type and complexity of the LEP. The system of streaming LEPs has the ability to enable many minor and site specific LEPs to be made without final sign off by the Minister, provided that the LEP is consistent with the proposal as agreed at the gateway.

From a heritage perspective, LEP streaming has the potential to make the process of listing heritage items simpler and more efficient, provided that the gateway criteria have been met. Similarly, it will also simplify the process of de-listing items which no longer have heritage significance.

3.3.3 Local Environmental Plans

Standardising Provisions in LEPs

Along with the listings of local items in a heritage schedule, LEPs contain provisions relating to the protection and development of heritage items. Many LEPs also contain provisions relating to development in the vicinity of heritage items.

At present there is significant variation in the nature and comprehensiveness of heritage provisions in LEPs across the State. This has occurred over a long period of time, during which standards and community expectations have changed. As discussed in Chapter 3, the Standard LEP template was introduced to provide a simpler and more standardised approach to local plan making across the State. The Standard Instrument contains provisions that:

- require development consent to demolish or alter a heritage item, disturb or excavate an archaeological site or place of Aboriginal significance, erect a building on, or subdivide, land where there is a heritage item or in a heritage conservation area;
- exempt certain minor development from requiring consent subject to the consent authority's agreement;
- enable the consent authority to require the preparation of a heritage impact statement where development is proposed to a heritage item, within a conservation area or within the vicinity of either of these;
- enable the consent authority to require the preparation of a heritage conservation management plan for a heritage item prior to granting consent;
- require consultation with the Heritage Council and/or local Aboriginal communities for development on archaeological sites and places of Aboriginal significance (not including items on State Heritage Register);
- require consultation with the Heritage Council for the demolition of State significant items (except those items on State Heritage Register or subject to interim heritage order);
- allow development of a heritage item for any purpose provided that it achieves the conservation of the item.

Another recent change to the plan making system has been the establishment of the LEP Review Panel (LEPRP) to independently review proposed LEPs. These proposals are reviewed at an early stage of development to ensure that LEPs are being pursued strategically and not in a piecemeal fashion.

The Expert Panel considers that the heritage provisions in the Standard LEP template provide adequate protection mechanisms for heritage items and Conservation Areas and the inclusion of additional provisions or further detailed controls on local heritage is not warranted. Indeed, the Standard instrument still provides considerable scope for council discretion in the application of the controls, for example, in determining what minor matters do not require development consent or if a heritage impact statement is required.

However, as noted above, the Expert Panel is of the view that further guidance to councils is needed to assist them in preparing LEPs which include heritage items. The Expert Panel considers that Heritage LEP Guidelines should be prepared and issued as a matter of priority. The Heritage Council in its submission has similarly recommended that guidelines be prepared which address the following:

- How to prepare a heritage study, including model study brief
- Carrying out a thematic history
- Involvement of the community in the study process
- How to assess heritage significance consistently
- Consideration of Aboriginal, built and natural heritage
- Conservation Areas

- Preparation of a draft heritage LEP
- Use of model heritage LEP provisions
- Integration of heritage as part of wider planning for the area
- Community involvement in the draft LEP process
- Assessing community comment and objections to listing
- Finalising the draft LEP

The Expert Panel considers that the guidelines should also ensure that owners of possible heritage items are involved in the LEP process from the outset and that any objections to listings are considered by an IHAP or planning arbitrator prior to a final decision being made on listings, as discussed in Section 3.3.2 above.

The Heritage LEP Guidelines should not only provide guidance on the identification of items and LEP preparation but also include advice to councils to assist them in the application of discretionary matters as provided for under the Standard LEP Template. The Guidelines should be prepared jointly by the Department of Planning and the Heritage Council.

Zoning and Land Use Controls

One significant issue relating to local planning and heritage is the frequent mismatch between land use zonings/development controls and listed heritage items. The planning controls often create an expectation of development potential significantly greater than is feasible given the requirement to protect the particular heritage item. Further, planning controls often allow for significant development potential in the vicinity of heritage items which may create unacceptable impacts on the item.

A number of submissions indicated that there is a need to consider existing and proposed planning controls when listing items. Australia ICOMOS in its submission noted that one of the principles of a sound State heritage system is that heritage must be fully integrated into the planning and environment system and that, *inconsistencies between heritage provisions and other planning controls such as land use zoning should be eliminated*⁴⁹. The Heritage Council also noted in its submission that:

Where strategic planning does not adequately consider the area's heritage resource, inappropriate zonings and development controls can be applied to heritage items, areas within which items are located and conservation areas which create a conflict between long term development and heritage objectives.

In some instances it may be untenable to list an item because the planning controls applying to the area are clearly in conflict with the long term preservation of the item.

⁴⁹ Australia ICOMOS, Submission No 121 dated 4 October 2007

There needs to be a practical understanding of how surrounding development and future planning intentions will affect a heritage item.

A further consideration is whether there is a design solution that enables the item or adjoining land to be redeveloped in accordance with the permissible controls. It should not be automatically assumed that an item of environmental heritage cannot be redeveloped for a more intensive purpose simply by virtue of its listing.

However, it is not only the zoning and relevant development standards that determine the development capability of a site. There are other overlays that need to be considered, for example, whether a site contains native vegetation or is subject to salinity. The heritage values of a site are only one such overlay.

In deciding whether to list a local item, Councils should have particular regard for the planning goals for the area and the recommendations contained in regional and sub regional strategies. The gateway criteria discussed in Section 3.3.2 are also intended to guide decision-making during the strategic planning phase.

Section 149 Certificates

Landowners are frequently unaware of the implications of developing in the vicinity of a heritage item and are not notified either on Section 149 certificates or otherwise of this issue.

Councils should ensure that Section 149 certificates identify if a property is listed as a local heritage item, or is located in a conservation area or in the vicinity of a local heritage item or conservation area. This will help ensure that potential property owners are made aware up front of the heritage values and implications for development.

The gateway criteria discussed in Section 3.3.2 are intended to guide decision-making during the strategic planning phase.

Outdated LEPs

There are a number of LEPs containing heritage items that were made more than 15 years ago before the Heritage Council assessment criteria were issued. The heritage studies on which these listings are based, if indeed they exist at all, are often rudimentary and without statements of significance for individual items. It has been reported that only 32% of councils have prepared statements of significance for all heritage items in existing LEPs.⁵⁰

⁵⁰ NSW Heritage Office, Department of Planning, "Heritage Incentives Program 2006-2008: Local Government Heritage Management Program Summary Heritage Strategy Report for 2006-07", Outcome 2

There is no obligation on councils to review their LEP listed heritage items even when the basis for listing many items is often unclear. The current condition and circumstances of items is frequently unknown and unless subject to redevelopment there is no mechanism in place to check whether the item's listing is still valid.

The Expert Panel considers that existing heritage schedules in LEPs should be reviewed in tandem with the standard LEP adoption. If existing heritage studies and inventories are recent and based on sound analysis, councils could be exempted from reviewing their schedules. If not, councils would need to provide new evidence and statements of significance to support listings or otherwise remove items.

To overcome this situation arising in the future, the Expert Panel considers that existing items listed on heritage schedules should be reviewed on a regular basis, preferably at least every five years. This review would consider the current condition and circumstance of each item and identify items that no longer meet the criteria for local heritage significance. The Expert Panel further considers that additional items should only be added to existing lists where there is a strong and compelling case to do so.

Identifying items in LEPs

The Expert Panel is aware that some heritage schedules, particularly in older LEPs, do not provide details of the exact extent and location of items. This creates difficulties when trying to determine whether and to what degree the heritage provisions in an LEP may apply to an item.

In general, it should be possible to identify the exact location and extent of a heritage item. Each item identified for inclusion in an LEP should be identified preferably by a plan showing the exact extent and location of the item on a cadastral base. If this is not possible, then the item should be identified by means of real title details.

The Expert Panel's discussion in Chapter 1 on appropriate curtilages for State Heritage Register listed items applies similarly to the issue of curtilages for local items.

However, in some instances it may be preferable to be less precise in identifying items particularly in the case of sensitive Aboriginal heritage.

Clarify Status of Heritage Items in LEPs

Heritage items listed in an LEP are not restricted to items of local significance. Many LEPs also identify items considered to have State or regional significance. These items may or may not also be listed on the State Heritage Register. This is confusing and suggests State involvement when this is not necessarily the case.

A number of submissions have recommended that the ranking of heritage items according to local, regional or State significance should be simplified rather than made more complex. This view is shared by the Expert Panel. State heritage significance should only relate to those items which are listed on the State Heritage Register and the remainder of heritage items should be listed in LEPs without a corresponding ranking. If this change were made, the provision in the Standard LEP requiring the referral of proposals involving demolition of State significant items (but not including items listed on the State Heritage Register or subject to an IHO) to the Heritage Council could be removed.

The collective significance of heritage items on local, regional, State and national levels can be documented on the Heritage Council's State Heritage Inventory.

3.3.4 Conservation Areas

Conservation areas identified in either LEPs or DCPs offer an additional means of protecting local heritage. A conservation area can comprise a precinct, streetscape, suburb, landscape, town or group of buildings that has particular heritage values which distinguish it from other places and from its surroundings.⁵¹

Conservation areas tend to be viewed by affected owners as less of an imposition than individual listings and as a result they generally receive fewer objections. Where an entire precinct has particular heritage values, Conservation areas provide an effective means of protecting these values in a holistic way.

Often conservation areas have been used to address broader local amenity concerns rather than specific historic values. However, a heritage conservation area should be "more than a collection of individual heritage items, or an area of character and pleasant amenity".⁵² A conservation area must demonstrate heritage significance with distinctive and contributory components, and be based on sound analysis and fieldwork.

Whilst conservation areas ensure the protection of the historic character and identity of places, this should not mean that they cannot accommodate change. Conservation

⁵¹ Heritage Council of NSW, "Guidelines for the Identification and Management of Change in Heritage Conservation Areas", Revised Draft 5 August 2007, unpublished, p. 9

⁵² Ibid

areas are often viewed as inhibitors to the growth of urban areas however this need not be the case – good planning and good design are the key to balancing communities’ expectations in terms of preserving areas that they cherish and meeting targets for growth.⁵³ The Heritage Council has acknowledged that most conservation areas can accommodate some level of development.⁵⁴ Conservation areas should not be used to keep development densities artificially low.

In some conservation areas the development controls can be unnecessarily prescriptive and onerous. Most development in a conservation area requires a development application (DA) to council, often accompanied by a heritage impact statement or similar. Given that the emphasis in conservation areas is on protecting the streetscape and built form as viewed from the public domain, in general it is unreasonable to apply the same level of control and scrutiny to the internal fabric of a building or to those parts of a site that are removed from public view. Unless a heritage assessment has been undertaken which clearly demonstrates that the internal fabric or other parts of a property not visible from the street have particular heritage significance, then standard development control requirements should apply. This extends to allowing exempt and complying development to be undertaken in conservation areas (refer discussion below).

The Expert Panel considers that whilst conservation areas play an important role in ensuring significant historic areas are protected, a greater degree of rigour is needed when identifying conservation areas and when determining the level of development control necessary.

The Heritage Council is in the process of preparing guidelines for the identification and management of change in conservation areas. These guidelines should provide guidance on identifying conservation areas, appropriate development standards, and standard exemptions for minor works.

Conservation areas should only be designated as such where there are clear heritage values associated with them. Areas with high amenity or other distinguishing characteristics worthy of retention, but not historically significant, should be dealt with through Character Statements.

The Expert Panel further considers that a model Heritage DCP should be developed to guide development in conservation areas.

New LEPs which propose conservation areas should be accompanied by an appropriate level of analysis in support of the designation. This information should inform a council’s assessment of the proposed conservation areas against the “gateway criteria” discussed in Section 3.3.2.

⁵³ Ibid, p.47

⁵⁴ Ibid

Exempt and Complying Development in Conservation Areas

The question of whether exempt and complying development should be allowed in relation to heritage items and Conservation Areas is discussed below.

3.4 Development Assessment

Most development affecting a heritage item, whether it involves altering or adding to an item, changing its use, or otherwise impacting on the item through development, requires the preparation of a DA by the proponent and assessment of the application by the relevant council. The development assessment process is generally determined by provisions under the EP&A Act and in the relevant LEP.

Most development involving local heritage items requires development consent, although in some LEPs councils have the discretion not to require consent where the works are considered minor with little or no impact on the heritage significance of the item.

Councils may require that DAs applying to local heritage items be accompanied by a heritage impact statement which assesses the potential impact of the development on the item and recommends measures to minimise any impact. Often applicants may also be required to prepare conservation management plans which detail measures that are to be put in place to ensure the conservation and management of the item.

The requirement for heritage impact statements may also extend to development in the vicinity of a heritage item or development within a conservation area.

The development assessment process for local heritage items differs from State Heritage Register listed items and those which are subject to an IHO. The development assessment process for these items is discussed in below. In general, DAs for local heritage items do not require the involvement of the Heritage Council.

3.4.1 Integrated Development Applications

Approval from the Heritage Council is required when making changes to a heritage place listed on the State Heritage Register, covered by an interim heritage order or when excavating any land in NSW where there is the potential to disturb an archaeological relic.⁵⁵ The consent of the relevant council is also required to the making of such changes.

⁵⁵ Exemptions are available for certain minor activities which have minimal impact on the heritage significance of the item. The exemptions only reduce the need to obtain approval from the Heritage Council but not development approval from the local council.

In an effort to streamline the development process where approvals were also required from other agencies the integrated development provisions were introduced into the EP&A Act in 1997. This was to enable councils to confirm all State Agency approval requirements under the one development consent.

As noted above, under the integrated development provisions DAs involving development that requires an approval under Section 57 of the Heritage Act, are referred to the Heritage Council for its “general terms of approval” (if any) or refusal of the proposal. Despite the integrated development provisions, a separate application to the Heritage Council under Section 57 must still be submitted and a separate approval issued.

As many submissions have pointed out, this system has resulted in a duplication of process. Whilst there is general support for the integration of the consent/approvals arrangements, the need for a separate approval from the Heritage Council is questionable. This view is generally supported by the Heritage Council in its submission to the Expert Panel.

The Expert Panel considers that for DAs for items listed on the State Heritage Register, the dual approval processes under S91A of the EP&A Act and s57 of the Heritage Act should be removed. Approval for development of State Heritage Register listed items and land subject to an IHO, should occur under the IDA process. This process provides for better integration of council and Heritage Council issues. Closer alignment of the Heritage Council’s “general terms of approval” with council conditions of consent would also improve the integration of both agencies’ requirements.

The Expert Panel notes that Heritage Council general terms of approval need to be better aligned with Council conditions of development consent.

An alternative proposition where approval has already been provided under s60 of the Heritage Act is to prevent a consent authority from refusing the subsequent DA on heritage grounds. The Expert Panel considers that this is reasonable provided that the development is the same as that for which the s60 approval has been granted.

Section 90(2) of the EP&A Act excludes development by the Crown from the IDA process, meaning that State government assets listed on the State Heritage Register are excluded from this process. If the changes to the dual development approval processes recommended above are implemented, consideration should be given to extending this process to State government assets listed on the State Heritage Register. Allowing for the IDA provisions to apply to State government heritage items would not only reduce red tape but also provide for a more effective integration of heritage issues in the planning process.

3.4.2 Development Application Requirements

As noted above, councils generally require that DAs relating to heritage items or proposals in the vicinity of heritage items be accompanied by a heritage impact statement. The Heritage Council advises that heritage impact statements should address the following:

- why the item is of heritage significance
- what impact the proposed works will have on that significance
- what measures are proposed to mitigate negative impacts and
- why more sympathetic solutions are not viable.⁵⁶

The Heritage Council encourages councils to require such a statement and sees them as a logical extension to a statement of environmental effects. It also notes that *where the work is minor, or involves an item of local significance, the [Statement of Heritage Impact] can be based simply on a statement of significance or a conservation policy.*⁵⁷

The Expert Panel acknowledges that heritage impact statements are important in documenting the heritage significance of a building or place and in helping tailor development solutions which are cognisant of heritage values. However, the Expert Panel is of the view that in many if not most cases a simple statement rather than a consultant report is all that is necessary.

Further, the Expert Panel believes that the responsibility for assessing the impact of a development may have on the heritage significance of a building or place should more appropriately rest with the council. Commonly, what occurs at present is that the heritage impact statement is presented by the applicant to justify the proposal rather than to provide an independent evaluation of the project.

For “mum and dad” builders and owners undertaking alterations and additions to heritage items, the cost of engaging a heritage consultant to prepare a heritage impact statement is often prohibitive and comes on top of the many other costs associated with preparing a DA. For small developments involving local heritage items, it may be sufficient to provide the council with any available information on the item’s history, including photos and other documentary evidence, together with a description of any changes that have been made to the item. This information can be used by the council in helping it assess the proposal’s impact on heritage significance. Further, the Expert Panel believes that for small developments a simple pro forma could be developed to enable owners and builders to prepare their own heritage impact statements.

⁵⁶ NSW Heritage Office and Department of Urban Affairs and Planning, “Statements of Heritage Impact”, 1996, p.2

⁵⁷ Ibid

The Expert Panel considers that the Heritage Council's *Statements of Heritage Impact Guidelines* should be revised to include guidance on:

- how heritage impact statements should be tailored to the scale of development;
- the circumstances under which development involving local heritage items should be exempt from the requirement to prepare a heritage impact statement;
- developing a simple pro forma to enable owners and builders to prepare their own heritage impact statements; and
- alternative documentation that can be supplied to councils for small scale developments to determine heritage impact.

Ideally, the responsibility for assessing the potential impact of a development on the heritage significance of an item should rest solely with the council following an independent assessment by the council's own heritage expert or one engaged on council's behalf. This would obviate the need for applicants to submit heritage impact statements, although there would still need to be a mechanism to ensure that the heritage significance of the building or place was properly factored into the proposed development.

3.4.3 Exempt and Complying Development

In general, most development involving an item of environmental heritage or within a conservation area, requires the consent of the local council regardless of how minor such development might be. Exempt development (minor works not requiring consent) and complying development (works that can be undertaken provided that prescribed standards are met and are accredited by a certifier) generally do not extend to heritage items and conservation areas. Some LEPs enable councils to exempt minor works to heritage items from the need for consent but this power is discretionary.

The Heritage Council has issued standard exemptions that apply to all items listed on the State Heritage Register. The purpose of the standard exemptions is to clarify for owners, the Heritage Office and local councils what kind of maintenance and minor works can be undertaken without needing Heritage Council approval. This ensures that owners are not required to make unnecessary applications under the Heritage Act for minor maintenance and repair.

The State Heritage Register exemptions encompass a range of activities including changes of use, restoration and non significant fabric. Whilst there are limitations on the extent of these activities, there is still a reasonable amount of latitude given to those activities not requiring approval. For example, an exemption applies to the alteration of a building involving the construction or installation of new fabric or services provided that this work will not adversely affect the heritage significance of the item and the Director-General of the Department of Planning has agreed that this is the case.

There is no such approach to development of local heritage items and in conservation areas. At present, there are legislative impediments to applying the exempt and complying development provisions of heritage items/areas, notably:

- Section 76A of the EP&A Act prohibits complying development on land containing an item of environmental heritage item listed on the State Heritage Register or under a planning instrument or subject to an IHO;
- Clauses 16 and 17 of the Standard LEP template prohibit items of environmental heritage, State Heritage Register items or places subject to IHOs from the application of complying and exempt development;
- SEPP 60 – *Exempt and Complying Development* contains similar provisions and also prohibits exempt and complying development within a heritage conservation area that is identified as such in an environmental planning instrument applying to the land.

The Expert Panel is of the view that exempt and complying development needs to be reformed to reasonably apply to development of local heritage items and in conservation areas. Minor development which does not impact on the heritage significance of an item or conservation area and which would otherwise be considered exempt or complying development should not as a matter of course require council consent. As part of the recently announced planning reforms, consideration is being given to the adoption of a mandatory default code for exempt and complying development. The Expert Panel considers that this code should include appropriate exempt and complying development standards for developments in heritage areas. Where a proposal does not comply with these requirements it would be subject to the local DA process.

Given that such exemptions can apply to State Heritage Register items, the Expert Panel believes it is reasonable that exemptions for local heritage items and conservation areas should be similarly allowed.

3.5 Agreements and Planning Incentives

Heritage agreements have been identified as an alternative to the listing of items. As discussed in Chapter 3, the Heritage Act enables the Minister for Planning to enter into a heritage agreement with the owner of a State listed item. A similar provision could be made under the EP&A Act for councils and owners to enter into a heritage agreement either in place of, or supplementary to, the listing of an item.

Heritage agreements between owners and councils could provide greater flexibility and promote tailor made solutions for particular circumstances. They would also provide greater certainty for owners regarding an item's future use and development. At the same time, heritage agreements are likely to be costly for both owners and councils and may not necessarily lead to a simpler process or be easier to manage. There is also the issue of what happens to a heritage agreement when the property is sold, the works are completed and/or at the conclusion of the agreement.

The concerns regarding the potential costs and complexities of heritage agreements appear valid. Heritage agreements should be seen as an adjunct to listing rather than as an alternative. However, heritage agreements are useful tools in helping achieve the conservation of items in a way that is mindful of owners' concerns and intentions. They can also provide the basis for determining appropriate exemptions.

The EP&A Act could be amended to make provision for councils to enter into heritage agreements for local heritage items, similar to the provisions that apply to heritage agreements for State listed items. These provisions would specify what matters could be included in a heritage agreement, varying and terminating agreements, measures to address breaches of heritage agreements, financial assistance and the like. Heritage agreements would run with the land and would not be able to be suspended under Section 28 of the EP&A Act.

Section 93F of the EP&A Act enables councils to enter into voluntary planning agreements with developers for a range of public purposes, including public amenities and the conservation of the natural environment but not local heritage. This would seem unreasonable given the clear public benefits that stem from protection of significant heritage places.

The Expert Panel considers that the scope of planning agreements should be broadened to include heritage items. This will involve expanding the definition of "public purpose" to include the protection and enhancement of heritage items.

A number of submissions have raised the issue of planning incentives such as bonus heritage floor space schemes and excluding the gross floor area of heritage items from floorspace ratio calculations. The Expert Panel notes that such schemes may be particularly useful in city and town centres but have less applicability in residential

areas. Other possible incentives include waiving DA fees, allowing non permissible uses in heritage items, and local heritage grants.

The Expert Panel believes that planning incentives provide a valuable tool in encouraging owners and developers to retain and enhance local heritage items. Planning incentives could be explored within the context of preparing the Heritage LEP Guidelines discussed above, for inclusion in the standard LEP template as “optional” provisions. Streamlining the development approval system for heritage items is also likely to provide significant benefits to owners and developers.

3.6 Heritage Provisions in SEPPs and REPs

The current planning reforms being considered by the NSW Government recognise that there is a need to review and rationalise the number of SEPPs and REPs to simplify planning controls and to incorporate SEPP and REP provisions into Standard LEPs wherever feasible. The Expert Panel supports these initiatives and considers that the heritage provisions in these instruments should be similarly reviewed to remove overlap and ensure effective rationalisation across the three levels of plan making.

The NSW Government has recently prepared regional strategies for Metropolitan Sydney, the Lower Hunter, the Far North Coast, the Illawarra, the South Coast, the Mid North Coast (draft), the Central Coast (draft) and the Sydney Canberra Corridor (Draft). Each of these strategies includes consideration of regional heritage issues and includes strategies to ensure important heritage is protected. These strategies, along with sub regional strategies, are intended to guide local planning.

Unlike the regional strategies, many of the existing REPs have been prepared in an ad hoc manner and in response to particular pressures in a region. The Expert Panel believes that the regional strategies provide a more effective tool to guide local planning, particularly in that they will provide appropriate regional planning frameworks for the identification and protection of heritage at the local level.

One of the initiatives the NSW Government is considering is enabling SEPPs to be prepared for issues of regional significance, thereby allowing for the removal of REPs from the plan making system altogether. Removing this middle layer of plan making would greatly simplify the system and would provide for greater alignment with the current delineation of State and local heritage listings.

3.7 Minimum Standards of Maintenance and Repair

The majority of submissions received from local government raised concerns that Councils have limited powers to protect heritage items from deliberate neglect or to enforce minimum standards of maintenance and repairs. This contrasts with Part 6,

Division 5 of the Heritage Act which allows the regulations (*Heritage Regulation 2005*) to impose minimum standards of maintenance and repair to a State Heritage Register listed item. These requirements relate to weather protection, prevention and protection from fire, security, and essential maintenance and repair. The Heritage Act also allows the Heritage Council to issue orders and to take any necessary action to ensure that orders are complied with.

Councils have asked that the same provisions for minimum standards for maintenance and repair be applied to local heritage items. They do not believe that there are sufficient powers under with the EP&A Act or Local Government Act 1993 that enable them to direct an owner to maintain and repair a local heritage item.

Whilst the Expert Panel acknowledges the difficulties faced by Councils in protecting local items from deliberate neglect, it does not support introducing similar powers as are available under the Heritage Act for State Heritage Register listed items for the following reasons:

- the powers to impose minimum standards of maintenance and repair for State Heritage Register listed items reflect the importance of such items as having significance for the State. A similar level of significance clearly does not apply to local items;
- the Expert Panel does not believe that the deliberate neglect of local items is widespread;
- the introduction of minimum standards of maintenance and repair may impose considerable financial burdens on owners of local heritage items. This contrasts with State Heritage Register listed items where financial assistance is often available and owners may be corporate or community entities.

Changes to the Heritage Act or EP&A Act to enable councils to impose minimum standards of maintenance and repair for local items are therefore not supported by the Expert Panel.

3.8 Conclusion

Heritage is integrated in the EP&A Act through both the plan making and development assessment systems. The Expert Panel's review indicates that in fact there is considerable integration of heritage in both these systems. However, the Expert Panel has identified a number of improvements that could be made to the way in which these systems are managed and implemented with respect to heritage at both the State and local level that could further strengthen the integration of heritage in the EP&A Act.

The Expert Panel believes that there are significant improvements that can be made to the way in which local heritage items are identified and assessed. There are also improvements that can be made to the development processes applying to local

heritage items. These improvements are intended to dovetail with the spirit and intent of the NSW Government's draft planning reforms aimed at making the planning system at all levels more responsive, efficient and appropriate to achieving sustainable development outcomes.

3.9 Proposed Recommendations

- 1 Owners of proposed heritage items should be consulted at the outset of the heritage assessment process and subsequently during the preparation and exhibition of the LEP.
- 2 Where owners continue to object to the listing of their property following exhibition of the draft LEP, the Expert Panel is of the view that one of three options should be considered:
 - a) the establishment of an Independent Hearing and Assessment Panel (IHAP) to consider the objection and make a final recommendation to the Council regarding whether the item should be listed or not;
 - b) the establishment of a Public Inquiry under Section 68(1) of the EP&A Act to similarly consider the objection and make a final recommendation to the Council regarding whether the item should be listed or not; or
 - c) the appointment of a planning arbitrator to determine the matter. In this case, the decision of the planning arbitrator would be binding on the Council.
- 3 Gateway criteria should be established to guide councils in their decision-making on listing heritage items and identifying conservation areas, and to guide IHAPs when hearing objections to listings. The Expert Panel considers that the gateway criteria should address the following issues:
 - the heritage significance of the item (as assessed against Heritage Office criteria and tests of authenticity and integrity);
 - compatibility with planning controls and planning goals for the area;
 - owners' views;
 - the implications for the economic use of the land;
 - community regard for the item;
 - whether there are measures in place to ensure long term conservation; and
 - whether there is a design solution to ensure long term conservation.

- 4 In deciding whether to list a local item, Councils should have particular regard for planning goals for the area and the recommendations contained in regional and sub regional strategies.
- 5 The Department of Planning could prepare a circular to issue to all councils detailing the gateway criteria and how they should be applied.
- 6 The Expert Panel supports the aims of the draft Planning Reforms to streamline the LEP making system, particularly as this will improve the process of listing and de-listing of heritage items.
- 7 Heritage LEP Guidelines should be prepared by the Department of Planning jointly with the Heritage Council. These Guidelines should support the Standard LEP template in striving for greater standardisation and clarity of controls across the State.
- 8 The Heritage Council should continue to provide support to local government through dedicated programs. Particular emphasis should be given to educating council staff, councillors and local heritage professionals in the appreciation and application of the heritage listing criteria.
- 9 Regional and thematic heritage studies could be used to improve comparative analysis and therefore the quality and reliability of individual assessments. The Heritage Council could explore opportunities to work with individual councils or regional groups of councils in undertaking such studies.
- 10 Councils should be encouraged to identify if a property is listed as a local heritage item, or is located in a conservation area, or in the vicinity of a local heritage item or conservation area on Section 149 certificates. This will ensure that potential property owners are made aware up front of the heritage values and implications for development.
- 11 Councils should review existing heritage schedules in LEPs as part of the Standard LEP adoption. Where there is insufficient background information to support existing listings, councils should be required to provide new evidence and statements of significance to support listings or otherwise remove items. Councils may be exempted from reviewing their schedules where existing heritage studies and inventories are recent and based on sound analysis.
- 12 Councils should be required to review heritage listings in LEPs on a regular basis, preferably at least every five years, to consider the current condition and circumstance of each item and identify items that no longer meet the criteria for local heritage significance. However, this should not necessarily be seen to be an opportunity for major expansion of heritage lists but rather to identify any anomalies
- 13 Items should only be designated as having State significance where such items are listed on the State Heritage Register. All other items should be listed in

- LEPs without a corresponding ranking. If this approach is adopted, the provision in the Standard LEP requiring the referral of proposals involving demolition of State significant items (but not including items listed on the State Heritage Register or subject to an IHO) to the Heritage Council could be removed.
- 14 A model Heritage DCP should be developed to guide development in conservation areas. The model DCP could provide for the designation of conservation areas only where there are clear heritage values associated with them. Areas with high amenity or other distinguishing characteristics worthy of retention, but not historically significant, should be dealt with through Character Statements.
 - 15 The Minister should consider removing the duplicative processes for development approval under S91A of the EP&A Act and S57 of the Heritage Act by either:
 - a) Exempting development from the requirement to obtain approval under s60 of the Heritage Act if approval has already been granted under S91A of the EP&A Act, or
 - b) For development which has already been approved under s60 of the Heritage Act prior to seeking approval under S91A of the EP&A Act, preventing a consent authority from refusing the subsequent DA on heritage grounds provided that the development is the same as that for which the S60 approval has been granted.
 - 16 The Heritage Council's general terms of approval should be structured to match more closely with councils' conditions of consent, particularly in terms of timing, for example, prior to issue of construction certificate, prior to issue of occupation certificate etc.
 - 17 The EP&A Act could be amended to enable State Government agencies to use the IDA provisions in relation to development of State Heritage Register listed assets.
 - 18 The Heritage Council's *Statements of Heritage Impact Guidelines* should be revised to provide guidance on:
 - how heritage impact statements should be tailored to the scale of development;
 - the circumstances under which development involving local heritage items should be exempt from the requirement to prepare a HIS;
 - developing a simple pro forma to enable owners and builders to prepare their own heritage impact statements; and
 - alternative documentation that can be supplied to councils for small scale developments to determine heritage impact.

- 19 As proposed in the draft Planning Reforms, consideration should be given to amending the EP&A Act, standard LEP template and SEPP 60 to enable exempt and complying development to be undertaken in relation to items of environmental heritage and conservation areas.
- 20 As part of the mandatory default code proposed for exempt and complying development proposed in the draft Planning Reforms, consideration should be given to including appropriate exempt and complying development standards specifically tailored for local items of environmental heritage and conservation areas. Where a proposal does not comply with these requirements it would be subject to the local DA process.
- 21 The EP&A Act could be amended to make provision for councils to enter into heritage agreements for local heritage items, similar to the provisions that apply to heritage agreements for State listed items.
- 22 To assist councils wishing to enter into agreements with owners, the Heritage Office of the Department of Planning could issue Heritage Agreement Guidelines together with a standard heritage agreement template.
- 23 The definition of “public purpose” under Section 93F of the EP&A Act could be amended to include “the protection and enhancement of heritage items”. This would enable councils and developers to enter into planning agreements that provided for the conservation of heritage items.
- 24 In preparing the Heritage LEP Guidelines, possible planning incentives could be explored that could be included in the standard LEP template as “optional” provisions.
- 25 The current review of existing SEPPs and REPs should include a review of the heritage listings and heritage provisions in these instruments, particularly with a view to removing any overlap, providing for effective rationalisation of controls, and incorporating heritage provisions and listings into LEPs wherever appropriate.
- 26 Regional and sub regional strategies should guide heritage policy formulation at the local level, particularly in balancing heritage and broader planning goals.

Chapter 4 – Duplicative and Overlapping Provisions with Other Legislation

New South Wales has had in force a suite of comprehensive heritage legislation since the 1970s, which has encompassed the protection of Aboriginal, built and archaeological heritage. This system has progressively been refined and, in some areas, expanded. The last major change to the system was in 1998, with the establishment of the State Heritage Register replacing the previous system of Permanent Conservation Orders.

However, the introduction of new legislation, including the establishment of the comprehensive Commonwealth heritage regime which came into effect in 1999, has led to a complex set of interlocking and, in some instances, overlapping provisions. It is a key objective of the Government to reduce duplicative and overlapping provisions wherever possible, particularly where those provisions form an unnecessary regulatory burden.

This chapter examines the relationship between the *Heritage Act*, other State and Commonwealth legislation identifying duplication, contradictory and/or overlapping provisions.

The following legislation is the focus of this Chapter:

- *Heritage Act 1977* (NSW)
- *Environmental Planning and Assessment Act 1979* (NSW)
- *National Parks and Wildlife Act 1974* (NSW)
- *Threatened Species Conservation Act 1998* (NSW)
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

4.1 Relationship between the Heritage Act and other legislation

The NSW *Heritage Act* is the main legislation for the protection of what is broadly termed the “environmental heritage” of the State, which includes “those places, buildings, works, relics, moveable objects, and precincts, of State or local heritage significance”.⁵⁸ At inception in the 1970s, the Act was primarily concerned with establishing the Heritage Council, providing a process for protecting significant heritage items under threat and managing future change to those items, through the system of Permanent Conservation Orders, and for protecting archaeological relics. Since that time this brief has been progressively expanded to include the management of State-owned heritage items⁵⁹, the management of natural, Aboriginal

⁵⁸ *Heritage Act* Section 4

⁵⁹ *Heritage Amendment Act 1987*

and moveable heritage⁶⁰ and the establishment of the concept of “State” and “local” heritage significance.⁶¹ In this way the Act formalised the different levels of heritage significance with related, but differing, assessment criteria and allocated the appropriate level of governmental responsibility for managing items at both levels. Over time various powers and functions under the Act have been delegated to appropriate levels of government including local government and some State agencies.⁶²

In parallel to expansion of the Heritage Act other legislation has also been expanded in areas of core responsibility. The *National Parks and Wildlife Act 1974* (NPW Act) now provides the principal framework for managing Aboriginal heritage, as well as aspects of natural heritage, in conjunction with the *Threatened Species Conservation Act 1998* (TSC Act). Heritage has been introduced as a consideration for local government through the *Environmental Planning and Assessment Act 1979* (EP&A Act)⁶³ and the *Local Government Act*⁶⁴ 1993 (LG Act), and local government now has a responsibility to manage heritage at the local level (refer discussion in Chapter 3).

The Commonwealth has also introduced significant legislation which can affect heritage matters at a State and local level. The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides the framework for managing World, National and Commonwealth heritage, as listed on the respective lists under that Act. Often these items are also listed on the State Heritage Register and/or under a local planning instrument, creating the requirement for a layered series of approvals when works are proposed which will affect a listed area or item.

In terms of the relationship between the Heritage Act and the various other New South Wales Acts, the Heritage Act provides the overarching framework for managing most non-indigenous heritage items. Some local governments (and State agencies) have been delegated a range of powers under the *Heritage Act*. This has provided additional authority to deal with certain types of local heritage matters, above and beyond those responsibilities which councils already exercise under the planning powers of the EP&A Act.

4.2 Areas of legislative responsibility

The following table lists the principal Acts which provide protection or control of heritage matters in New South Wales:

⁶⁰ Heritage Amendment Act 1996

⁶¹ Heritage Amendment Act 1998

⁶² Heritage Act Section 169. For examples, the Dept of Environment and Climate Change and the Sydney Harbour Foreshore Authority have delegated authority to approve a broad range of works to State Heritage Register listed items within their ownership or area of control (up to the level of “material affectation”). Some local councils have delegated authority to make Interim Heritage Orders over local heritage items or to approve minor works to State Heritage Register listed sites or to archaeological relics.

⁶³ EP&A Act Section 76A, 121S

⁶⁴ LG Act Section 89 & 142

Act	Key areas of heritage responsibility	Administering agency
<i>Heritage Act 1977</i> (NSW)	<ul style="list-style-type: none"> • Establishes Heritage Council and State Heritage Register • Establishes concept of State and local heritage significance • Establishes approvals processes for works to items on State Heritage Register, subject to an IHO and archaeological relics • Establishes framework for heritage agreements • Establishes State-based protection for shipwrecks • Requires State agencies to keep Heritage and Conservation Registers 	<ul style="list-style-type: none"> • NSW Heritage Office (Department of Planning) • Delegations of some powers to selected local governments and state agencies
<i>Environmental Planning and Assessment Act 1979</i> (NSW)	<ul style="list-style-type: none"> • Establishes basis for planning system • Provides framework for developing environmental planning instruments • Establishes development approvals processes and considerations • Establishes frameworks for planning agreements 	<ul style="list-style-type: none"> • NSW Dept of Planning • Local government
<i>National Parks and Wildlife Act 1974</i> (NSW)	<ul style="list-style-type: none"> • Establishes reserve system including National Parks, Historic Sites and Aboriginal places • Provides broad protective regime for Aboriginal objects • Establishes approvals processes for works to Aboriginal places or objects • Establishes framework for conservation agreements 	<ul style="list-style-type: none"> • NSW Department of Environment and Climate Change (DECC)
<i>Threatened Species Conservation Act 1998</i> (NSW)	<ul style="list-style-type: none"> • Establishes framework for protecting threatened flora and fauna 	<ul style="list-style-type: none"> • DECC
<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)	<ul style="list-style-type: none"> • Establishes National Heritage List and Commonwealth Heritage List • Establishes framework for managing World Heritage places in Australia • Establishes “matters of national environmental significance” • Establishes approvals frameworks for matters of national environmental significance • Allows for the development of bilateral agreements with the States and Territories 	<ul style="list-style-type: none"> • Commonwealth Department of Environment and Water Resources

4.3 Areas of overlap

Overlapping and duplicative provisions in legislation can place essentially similar requirements on a particular party, activity or place, but provide minimal additional protection, while imposing a significant regulatory burden. This leads to unnecessary costs and systemic inefficiencies which can have knock-on costs and effects.

The Expert Panel has identified a range of areas within the heritage and planning systems applying in New South Wales where currently such overlap exists. In some cases, this overlap may be able to be resolved administratively, while in other areas legislative change may be required.

4.3.1 Overlap with the planning system

The major area of overlap between the Heritage Act and the EP&A Act is in the integrated development provisions. This issue was raised in a number of submissions to the Expert Panel and is discussed in detail in Chapter 3.

4.3.2 Overlap in the management of Aboriginal heritage

The Heritage Council and the DECC have overlapping responsibilities for Aboriginal heritage. Local Aboriginal Land Councils also have a specific statutory role to protect Aboriginal heritage under the *Aboriginal Land Rights Act* 1983. Both the *Heritage Act* and *NPW Act* provide mechanisms for managing and protecting Aboriginal heritage and set up frameworks for statutory approvals processes. Aboriginal heritage places can be listed on the State Heritage Register under the *Heritage Act* and “Aboriginal objects” and “Aboriginal places” are protected under the *NPW Act*. Archaeological sites can also contain both “relics” protected under the *Heritage Act* and “Aboriginal objects” protected under the *NPW Act*.

The Expert Panel notes that the legal requirements and processes for statutory applications in relation to places with multiple values under the *Heritage Act* and *NPW Act* are quite different and the present arrangements can be time consuming and costly in terms of compliance.

The Expert Panel has examined these issues at some length in Chapter 5 of this report and has received detailed submissions from the DECC, the Department of Aboriginal Affairs and the Heritage Council on the issues surrounding the management of Aboriginal heritage and avenues for their resolution. The Expert Panel believes these issues are of sufficient complexity to warrant a separate inquiry by government.

4.3.3 Overlap in the management of natural heritage

The scope of the *Heritage Act* extends to encompass natural heritage, but in practice has been rarely used to manage or protect natural places rather it has focuses on built heritage and cultural plantings / gardens. Only 50 places are presently listed on the State Heritage Register as “landscape” heritage places,⁶⁵ with the majority of these being gardens or other constructed landscapes rather than truly “natural” areas. The vast majority of protection for natural heritage in NSW is provided through the reserve system established under the *NPW Act* or through the *TSC Act*, both

⁶⁵ Based on a search of the State Heritage Register using the criterion “Landscape” under “Item Type”.
http://www.heritage.nsw.gov.au/07_subnav_04.cfm

administered by the DECC. The Expert Panel notes, as did the Heritage Council in its own submission, that the Heritage Council and Heritage Office have minimal expertise in this area. Natural heritage was not an issue raised in any substantive way in the submissions to the Expert Panel.

The Expert Panel is also aware, anecdotally, of natural heritage places being nominated for the State Heritage Register in circumstances where those places are already identified and protected through the reserve system, or under the *Threatened Species Conservation Act 1995*. The Expert Panel is concerned that nominations under the *Heritage Act* are being used inappropriately as an act of “last resort” in circumstances where parties may be aggrieved about the outcomes under other legislation. In such circumstances, the Expert Panel questions the ability of the Heritage Council to adequately address the issues associated with natural places due to lack of expertise on the Council or within the Heritage Office and further notes that the heritage significance criteria used under the Act are not suited to dealing with the largely scientific questions of protecting natural areas.

While the Expert Panel accepts that there may be some limited circumstances where the *Heritage Act* may provide protective mechanisms that may be otherwise lacking for natural places, it notes that the *Heritage Act* is not generally well suited to the protection of natural heritage places.

4.3.4 Overlap in the management of World, National and Commonwealth Heritage places

Works affecting places on any of the lists under the *EPBC Act* are subject to referral to the Commonwealth Department of Environment and Water Resources and, if the proposed works are deemed to be a “controlled activity” under that Act, the works require consent from the Commonwealth.

Powers exist under the *EPBC Act* for the Commonwealth to enter into a bilateral agreement with a State where the Commonwealth accredits the State’s assessment procedures and/or approvals regimes for places protected under the *EPBC Act*. This arrangement has the potential to greatly reduce the complexity and regulatory burden on parties wishing to undertake activities that may affect the heritage values of a World, National or Commonwealth heritage place.

NSW and the Commonwealth have entered into a bilateral agreement with respect to the assessment regimes under the EP&A Act (Parts 3A, 4 and 5) for projects in NSW that include deemed “controlled actions” under the *EPBC Act*.⁶⁶ It is also possible to obtain Commonwealth accreditation of the State’s approval processes, so that both assessment and approval can be made under State legislation. The Expert Panel considers that the NSW Government should pursue a bilateral agreement in relation

⁶⁶ NSW Department of Planning (2007). Commonwealth Environmental Protection and Biodiversity Conservation Act 1999 - Guide to implementation in NSW (May 2007). NSW Department of Planning, NSW Government.

to approvals processes with the Commonwealth as soon as practicable. This will reduce another area of regulatory duplication within NSW and will not require substantial legislative change to achieve.

4.4 Conclusion

The Expert Panel has considered areas of overlap and duplication between the Heritage Act and other Commonwealth and State legislation. There are clearly areas within legislation where a complex set of interlocking and, in some instances, overlapping provisions have been created. In line with the NSW Government's objective of reducing 'red tape' and the regulatory burden created by it, the Expert Panel has identified a number of areas where reform could be undertaken and systemic processes improved.

The recommendations outlined below are therefore targeted at removing overlap and simplifying the existing system.

4.5 Proposed Recommendations

- 1 Consideration should be given to undertaking a separate inquiry into the management of Aboriginal heritage in New South Wales having particular regard to the existing requirements of the Heritage Act 1977, the Aboriginal Land Rights Act 1983 and the National Parks and Wildlife Act 1974. (Refer also discussion in Chapter 5.)
- 2 The Minister should consider undertaking discussions with his ministerial colleague responsible for DECC, to determine the agency best suited to manage natural heritage including consideration of nominations of natural places for the State Heritage Register, advice to the Minister and the processing of statutory applications for natural heritage matters.
- 3 The NSW Government should pursue a bilateral agreement with the Commonwealth under the EPBC Act which accredits the State's approval regimes under the EP&A Act and Heritage Act for development which includes a "controlled action".

Chapter 5 – Other Identified Issues

A range of other issues, which were outside of the Terms of Reference for the Inquiry, were raised with the Expert Panel through the submission process and during meetings with stakeholders. While the Expert Panel was not able to address every issue raised, it has selected several key issues for further examination. Some of these issues will require a more detailed analysis outside of the scope of this Inquiry.

5.1 Archaeological provisions under the Heritage Act

Archaeological heritage is protected through two mechanisms under the *Heritage Act*. Archaeological places which meet the criteria for State heritage significance can be listed on the SHR, although this accounts for a relatively small number of places. The vast majority of archaeological heritage is protected through the “relics provisions” under Division 9 of the Act, which protects all archaeological “relics” throughout NSW. A “relic” is defined as:

any deposit, object or material evidence:

- a) *which relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and*
- b) *which is 50 or more years old.*⁶⁷

The relics provisions of the Act require that an excavation permit must be obtained in order to “disturb or excavate any land knowing or having reasonable cause to suspect that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed”.⁶⁸ To obtain an excavation permit, an applicant is required to prepare an Archaeological Assessment and a “Research Design”, which sets out the methodology and rationale for the proposed excavation. The preparation of these reports in addition to the excavation itself can have a substantial time and cost impost on a project and in many circumstances does not appear to result in any tangible benefit to the community.

The Expert Panel is concerned that the present wording in the Act does not adequately define archaeological heritage and that the broad definition of a relic captures too many items, many of which would not generally be considered as part of the State’s archaeological heritage. Some such items date from as recent as 1957. The definition of a ‘relic’ was amended in 1987 and it is noted that prior to that date the timeframe for relics was limited to material in existence prior to 1900. Other than this minor change in definition, the procedures relating to relics have not been substantially altered since formulation of the Act, although powers were added in 1998 to enable the Heritage Council to grant exemptions from the requirement for approval to certain types of relics or certain classes of activity.

⁶⁷ Heritage Act Section 4

⁶⁸ Heritage Act Section 139

The Expert Panel considers that it was not the original intent of the Act to capture such a broad range of potential “relics”; rather, the intent was to ensure archaeological places of significance to the State were recognised and investigated. The nature of archaeological heritage is such that it is not typically identified without in-depth research such as that undertaken for an Archaeological Assessment or in the preparation of an area-wide Archaeological Management Plan. The result of this is that archaeological heritage is only likely to be identified when there is the potential for it to be impacted upon by development during excavation and removal, or when development is redesigned to retain and/or incorporate significant archaeological features. While it is recognised that this has been successfully achieved in some instances, the process is often both protracted and costly.

The Expert Panel considers that the current system for the protection of archaeological heritage should be reviewed and as a minimum, the definition of “relic” should be reformulated to link to the concept of heritage significance. More specifically the Expert Panel considers that a relic should not just be defined as being more than 50 years old, rather the definition should make specific reference to the place having stated or potential heritage significance at a State level in order that it fall under the provisions of Division 9.

Further, the Expert Panel considers that there may be merit in replacing the definition of relic altogether, with a term such as “archaeological object” and a broader term of “archaeological site” which recognises that individual archaeological relics gain much of their significance from their context, rather than from their individual characteristics. This would bring the archaeological provision in the *Heritage Act* into closer alignment with the existing regime under the *NPW Act*, which protects “Aboriginal objects” and “Aboriginal places” and is similar to the regime used in Victoria.⁶⁹ A change of this nature would also require amendment to the definition of a “movable object” under the Act, as that definition presently cross references the definition of a “relic”.

The Expert Panel considers that refocusing the system for the protection of archaeological heritage on heritage significance rather than compliance with the definition of ‘relic’ would reduce the regulatory burden on the community and business and better direct the efforts of the Heritage Council and Heritage Office towards conserving important archaeological places.

5.2 Aboriginal heritage and the NSW Heritage Act

Amendments undertaken to the *Heritage Act* in 1996 brought Aboriginal heritage under the area of responsibility of the Heritage Council where prior to that point Aboriginal heritage matters had been managed principally under the *NPW Act*. The *NPW Act* protected ‘Aboriginal objects’ (previously referred to as ‘Aboriginal relics’) and ‘Aboriginal places’. The 1996 amendments added ‘aboriginal heritage’ as one of the specialist skill sets to the Heritage Council membership and, since that time, an Aboriginal person has represented the interests of Aboriginal people on the Heritage

⁶⁹ Heritage Act 1995 (Vic) Section 3 – defines “archaeological relic” and “archaeological site”

Council. In addition since 1998 the NSW Heritage Office has also employed an Aboriginal Heritage Officer.

The impetus for adding Aboriginal heritage considerations to the *Heritage Act* came from a growing recognition of the heritage significance of contemporary and, what had generally been deemed “European” places, to Aboriginal people. These places included mission sites, government institutions and, most notably, the Day of Mourning Site in Sydney.⁷⁰ It had become apparent that there was a gap in the way places of contemporary Aboriginal significance were managed. In response the 1998 changes to the *Heritage Act* allowed places of Aboriginal heritage significance to be added to the State Heritage Register. To date, nine places have been listed for their significance to Aboriginal people. These places are:

1. Brewarrina Aboriginal Mission Site, Brewarrina
2. Brewarrina Fish Traps, Brewarrina
3. Burra Bee Dee Mission, Coonabarabran
4. Day of Mourning Site (Cyprus-Hellene Club), Sydney
5. Grave of Yuranigh, Molong
6. Hill 60/ Illowra, Port Kembla
7. Knuckey's Store, Wellington
8. Tranby, Glebe
9. Ulgundahi Island, Maclean

The State Heritage Inventory⁷¹ also records 44 Aboriginal heritage places listed under local planning instruments. This is, however, a tiny fraction of the total 1,500+ items on the SHR and 20,000+ local heritage listings in NSW. It is also considered highly likely that the many places presently listed on various statutory lists will have as-yet-unidentified Aboriginal heritage values.

The Expert Panel is of the view that the addition of Aboriginal heritage to the *Heritage Act* addressed an important gap in heritage management practice. The ability to list Aboriginal heritage places on the SHR provides both a symbolic valuing of Aboriginal heritage at the same level as the best examples of non-Aboriginal heritage, as well as acting as a practical mechanism for protecting places that might not previously have been captured under the *NPW Act*.

The Expert Panel has however identified a range of issues with respect to the ongoing identification and management of Aboriginal heritage places, which are beyond its scope to fully address. Many of the issues were raised in submissions from the Department of Environment and Climate Change and the Department of Aboriginal Affairs, both which have major responsibilities for Aboriginal heritage in

⁷⁰ Also known as the Cypress-Hellene Club, and the site of the first Aboriginal land rights meeting in the 1930s. This site is now listed on the SHR as SHR Item #773 for its contemporary social significance to Aboriginal people. It had originally been overlooked for heritage value as it was not considered to have architectural significance in initial heritage studies. See http://www.heritage.nsw.gov.au/07_subnav_01_2.cfm?itemid=5045005 for the full SHR listing details.

⁷¹ A database kept by the Heritage Council which amalgamates heritage listings from the SHR, local planning instruments and state agency Heritage and Conservation Registers

NSW.⁷² Having regard to the submissions the Expert Panel has formed the view that the NSW Government should initiate a broad, separate investigation into the management of Aboriginal heritage. The issues identified below represent some, but do not purport to represent all, of the issues that require investigation. The issues associated with Aboriginal heritage identified by the Expert Panel and raised in submissions include:

- Suitability of existing ‘significance’ assessment criteria for Aboriginal places;
- Overlap between the Heritage Act and National Parks and Wildlife Act when managing places of multiple values and archaeological heritage;
- The status of gazetted ‘Aboriginal places’ under the NPW Act and the relationship, if any, with the State Heritage Register;
- The relationship between the Heritage Council, its Aboriginal Heritage Advisory Panel and the Aboriginal Cultural Heritage Advisory Committee established under the NPW Act;
- Aboriginal representation on the Heritage Council;
- The identification of Aboriginal heritage items for the purposes of local and regional planning;
- Balancing the need to identify places of Aboriginal heritage value for planning and development while recognising cultural sensitivities regarding disclosure of such information;
- The role of Local Aboriginal Land Councils and other indigenous organisations in the management of Aboriginal heritage places;

5.3 State government heritage and the Section 170 Register

The 1987 amendments to the *Heritage Act* introduced the requirement for State agencies to maintain a register of assets with heritage significance, known as a ‘Heritage and Conservation Register’. These registers are required under Section 170 of the Act. The rationale behind this requirement was to encourage the proactive identification of heritage assets in State ownership and to enable the State to demonstrate leadership in heritage conservation.

In 2005, the requirements on State agencies were further refined through the publication of the State Agency Heritage Guide, which sets out mandatory guidelines under Section 170A of the Act. The guidelines require each agency to prepare a Heritage Asset Management Strategy (HAMS) (essentially a strategic plan for heritage management within the agency) and a S170 Register. The HAMS was required to be completed by 2006 and the S170 Registers by 2009. The majority of State agencies have complied with the HAMS requirement and many agencies are on track to complete their S170 Registers by 2009. The Expert Panel is however concerned that some large asset-owning agencies may have difficulty in completing their registers by 2009.

The Expert Panel agrees with the general concept that agencies should be responsible for identifying and managing heritage assets within their care and

⁷² Department of Environment and Climate Change (Submission 106); Department of Aboriginal Affairs (Submission 120 & 120A)

control. The Expert Panel is however concerned about cases where infrastructure agencies in particular have large numbers of an asset type that are similar in function and significance, and where those assets may require significant work or change to maintain current operational standards. This concern relates particularly to historic infrastructure assets, such as reservoirs, roads, schools and electrical installations, where the function of the asset as part of the State's infrastructure is often a key aspect of its significance. These assets may also present ongoing management issues in terms of contamination, their continuing fitness for purpose and safety to workers and the public. Such matters must be taken into consideration at the same time as consideration of heritage significance.

To address these issues the Expert Panel considers that nominated agencies should undertake a thematic approach to the investigation of their heritage assets, to identify classes of asset which may share a similar function and history (e.g. local schools, timber bridges etc). Within those classes, the agency should undertake a thematic assessment of heritage assets to identify a representative stock of assets which reflect the emerging history of the infrastructure (roads, schools, sub stations, etc) to the State. These assets would then be placed on the S170 Register, and perhaps the State Heritage Register, while the remaining assets would be identified as having been assessed, but not listed for specific reasons. Under this approach, agencies would identify a representative sample of asset classes for conservation, rather than attempting to conserve all examples of similar asset types.

The primary advantage of this approach is that a regional and functionally-based assessment process would be implemented, rather than one constrained by artificial administrative boundaries such as local government areas. In some instances, it may be advantageous for agencies in a similar sector to cooperate in the assessment of their joint assets. In such circumstances, where an agency has assessed its assets at this strategic level and has made an organisational commitment to conserve identified representative examples, there should be no need for these assets to be subsequently listed under local planning instruments.

Further, where an agency has undertaken such a strategic assessment and it has been endorsed by the Heritage Council, local councils should not have the power to list assets which the agency (in agreement with the Heritage Council) has declined to list. This would prevent the situation where a council may wish to list a poor example of an asset type merely because it is within its local government boundary, without understanding the context of the asset in the agency's wider asset pool. This prohibition on listing would however only apply as long as the asset is within government ownership. If the asset is disposed of it should be treated as any other private sector asset.

The Expert Panel considers that state agencies are charged with managing their heritage asset portfolios in accordance with their responsibilities under the Heritage Act. Whilst the Heritage Council is required to generally oversight and educate agencies on these responsibilities, it should not be overly prescriptive in its dealings with agencies that have other important public sector responsibilities. The Expert Panel notes that it is the Heritage Council's ambition to transfer delegations and

exemptions on heritage management to agencies as soon as possible having regard to the resources available within each agency.

The Expert Panel is similarly of the view that where agencies demonstrate that they have identified their significant assets and have good internal procedures for managing the significance of those assets, they should be given delegated responsibility to self-approve most works. The Heritage Council's recently approved set of delegations and exemptions to Sydney Water is an exemplar for all State agencies.

The Expert Panel also notes that section 90(2) of the EP&A Act currently prevents development by the Crown being dealt with as integrated development. This provision means that any work to a State agency asset that is listed on its Section 170 Register currently requires a separate section 60 approval. This matter is considered in detail in section 3.4.1 of this report.

5.4 Additional Funding For Local Heritage

Many of the submissions received by the Expert Panel raised concerns about the need for additional funding and other financial incentives to assist owners and others to conserve heritage particularly in relation to local heritage. At present there are a range of funding programs and incentives available from both the State and local governments. Some examples include:

NSW Heritage Grants (administered by the NSW Heritage Office)

- Community strategic project grants
- Aboriginal heritage project grants
- Kick start grants (State and local items)
- Local government heritage management grants (local items)
- Historical research and local archive project grants
- Special purpose grants (emergency)
- Conservation documents and management reports (State items)
- Heritage advice cash back funding (State items)
- Conservation management plans (State items)
- Land tax and local rate rebate grants (State items)
- Works projects (State items)
- On ground interpretation works (State items)

Local Government grants

- Local heritage funds small grants and loans (local items)

Other grants / funding

- NSW Environmental Trusts program (natural environment projects)
- Railcorp (railway heritage projects)
- Royal Australian Historical Society (small grants program)
- Community Heritage Grants Program (administered by National Library of Australia)
- etc.

Since its inception in 1977, the NSW Heritage Grants Program has offered approximately \$2.3M of financial assistance annually. In 31 years of operation (1977 to 2007) this amounts to funding of around \$71.3M that has been offered to assist in the conservation of heritage across NSW.

In 2008-2009 the NSW Heritage Grants contain the following five programs and notional budget allocations:

NSW Heritage Grants 2008-2009	
Caring for our heritage	
Program 1 State Heritage Register and state significant heritage item projects with sub-programs	\$1,060,000
Historical research and <i>nominations</i>	\$70,000
** <i>Conservation documents and management reports</i>	\$40,000
<i>Heritage advice cash-back</i>	\$40,000
*Kick start fund raising	\$50,000
*Interpretation	\$30,000
*Works	\$830,000
Program 2 Local government heritage management with sub-programs	\$988,000
Heritage planning studies	\$358,000
Heritage advisors	\$315,000
Local heritage funds	\$315,000
Program 3 **<i>Community strategic projects</i>	\$337,000
Program 4 **<i>Aboriginal heritage projects</i>	\$200,000
Program 5 <i>Special purpose projects</i>	\$50,000
Total for 2008-2009 program	\$2,635,000

Notes: * indicates advertised program – Minister approves advertised programs, all others approved under Ministerial delegation

** Italicised text – indicates new funding program initiatives for 2008-9

(Source: NSW Heritage Office, 2007)

The Expert Panel acknowledges that additional funding would undoubtedly assist in conserving and managing local heritage. However, given the Government's commitment to significant funding across a range of areas as outlined in the *State Plan*, considers that the provision of additional funding by the NSW Government for local heritage is unlikely at this time.

The Expert Panel believes that local government should take greater responsibility to assist in the funding of local heritage conservation. Many councils have already committed funds to protecting and managing local heritage. The Expert Panel commends these councils for undertaking such programs and encourages other councils to explore opportunities for similar initiatives. *How to Establish a Local Heritage Fund*, prepared by the NSW Heritage Office (2004) provides valuable guidance to councils to assist them in formulating appropriate procedures for establishing and managing such funds.

5.5 Conclusions

This chapter addresses a range of significant issues that were raised with the Expert Panel through written submissions and during meetings but which are generally outside of the Inquiry's Terms of Reference. Recommendations are made below in relation these matters.

5.6 Proposed Recommendations

- 1 Section 4 of the Heritage Act could be amended to require that a relic has to have heritage significance in order to be protected under Division 9.
- 2 The definition of "relic" could be replaced with new definitions for "archaeological object" and "archaeological site". This will also require amendment to the definition of "movable object".
- 3 The S170 Register Guidelines should be redrafted to require agencies to take a thematic approach to the identification of heritage assets, with the goal of identifying a representative group of items from different asset classes for conservation.
- 4 Where an agency has completed its S170 Register and this Register has been endorsed by the Heritage Council, local government should not have the power to list items specifically excluded from the Heritage Register while those items remain in government ownership.
- 5 Agencies should develop internal management procedures and (potentially) expertise with the aim of being delegated authority under the Heritage Act to self-approve works up to the level of "material affect".
- 6 Councils should be encouraged to explore opportunities to establish local heritage funds to assist owners in conserving and managing local heritage items.

SUMMARY OF RECOMMENDATIONS

1. State Heritage Provisions and Practice

- 1.1 To provide a more strategic and systematic framework in which to consider nominations and to assist in reducing the significant backlog of State Heritage Register nominations, the Heritage Council and the Director General of the Department of Planning should set a thematically based forward program. The program would be agreed with the Minister and include the order in which nominations or types of nominations would be progressed.
- 1.2 The thematic program would be prepared on an annual basis and would set time limits for formal nominations to be made by the Heritage Council to allow sufficient time and resources for these nominations to be considered.
- 1.3 A new function could be added to the Heritage Council under Section 21(1) of the Heritage Act “to prepare a thematic forward program of proposed nominations for the State Heritage Register to be agreed by the Minister”.
- 1.4 With the introduction of a thematically based forward program, the Heritage Council should call for nominations from the public provided that such nominations were in keeping with the identified theme. Public nominations should otherwise be limited to “emergency” nominations only.
- 1.5 The Heritage Act should be amended to provide that items proposed for listing on the State Heritage Register must meet more than one of the heritage significance criteria, except where the place possesses a very high level of rarity and is clearly an outstanding item.
- 1.6 Owners of places proposed for listing on the State Heritage Register should have a mandatory right for a Ministerial Review Panel or a Commission of Inquiry prior to Ministerial decision on a proposed listing.
- 1.7 Other than the above, no additional appeals mechanism is required in the process for considering a nomination for the State Heritage Register.
- 1.8 Heritage curtilages should in general be restricted to the legal lot boundary on which the heritage item is located, or to a smaller portion of land within that lot boundary.
- 1.9 Where a heritage curtilage encompasses land outside of a lot boundary, that land should only be listed if it is essential for the conservation of the first item. In such cases full consultation with the second landowner should occur prior to listing.

- 1.10 The use of a heritage agreement to protect non-core curtilage land could be considered rather than statutory listing on the State Heritage Register.
- 1.11 Development within the curtilage of a heritage item that is consistent with the conservation management plan or heritage agreement for that item should be allowed.
- 1.12 If there are properties presently listed on the State Heritage Register without curtilages these should be reviewed and an appropriate curtilage identified and approved by the Heritage Council.
- 1.13 No items should be listed on the State Heritage Register without explicitly defined curtilages. This includes items to be listed as a whole from a state agency S170 Heritage and Conservation Register.
- 1.14 Timeframes for the nomination process under Sections 33(d) and 34(1) of the Heritage Act should be removed.
- 1.15 Section 38 of the Heritage Act enables the Minister to direct the removal of a listing from the State Heritage Register if he considers the item concerned is not of State heritage significance and the Heritage Council recommends its removal. The Heritage Council may make such a recommendation to the Minister either at the Minister's request, on the Heritage Council's own initiative, or at the request of the owner. The procedure for the removal of a listing from the State Heritage Register is the same as the procedure for listing on the State Heritage Register.

The Expert Panel considers that the Minister's reasons for delisting an item from the State Heritage Register should be broadened under Section 38 to include the following additional matters:

- *that the items is not, or is no longer, of State heritage significance,*
 - *that the long-term conservation of the item is not necessary,*
 - *that the listing renders the item incapable of reasonable or economic use,*
 - *that the listing is demonstrably causing undue financial hardship to the owner, mortgagee or lessee.*
- 1.16 The Heritage Office should be directed to reassess items transferred onto the State Heritage Register from the former system of Permanent Conservation Orders, to determine if those items meet the criteria for State significance. Those items which do not meet the criteria should be automatically removed under savings and transitional provisions to an Amendment Act.
- 1.17 The use of heritage agreements and similar mechanisms are recognised as an important tool to support heritage conservation and should be put into wider use, in conjunction with statutory listing.

- 1.18 The use of exemptions under Section 57(2) of the Heritage Act could be expanded for minor works and other applications that will not impact upon significance.
- 1.19 For applications relating to items listed on the State Heritage Register, the current appeals process to the Land and Environment Court is appropriate and should continue.

2. The Functions and Constitution of the Heritage Council

- 2.1 The Minister should consider the following options for potential reform to the Heritage Council constitution:

Model 1 – Minor modification to the existing arrangements

- Retain the existing size of the Council at 15 members
- Reduce the number of ex officio and organisationally-based members in favour of skills-based positions
- Remove the positions for the Executive Director Heritage Office, Government Architect, Director General of the DECC and Unions NSW
- Provide a separate position for the Planning Institute of Australia
- Remove the skills-based categories of corporate promotion and natural heritage
- Add new skills-based categories for archaeology, architecture, engineering, general historian, property/planning/ environmental law and property economics from which the Minister can choose the appropriate balance for the Heritage Council.
- Remove the present term limits

Model 2 – Substantial modification to the Heritage Council

- Reduce the size of the Heritage Council to nine members
 - Remove all ex officio and organisationally based positions
 - Remove the skills-based categories of corporate promotion and natural heritage
 - Add new skills-based categories for architecture, archaeology, engineering, general historian, property/planning/environmental law and property economics
 - Fill all positions from an expanded list of skills-based positions
 - Minister to select the Chair from amongst the nine appointed members
- 2.2 Allow the Heritage Council to devolve itself into a smaller sub-committee or sub-committees as required to undertake some or all of the duties of the Heritage Council in relation to individual matters. These sub-committees could replace the existing committees if required.
- 2.3 The need for the appointment of Alternate Members under Section 13 of the Heritage Act could be removed altogether, as there are concerns that the use of alternates in the past has contributed to inconsistent decision-making, where

- the mix of Council members could change unpredictably from meeting to meeting.
- 2.4 The Heritage Act could be amended to enable the Minister to appoint an ‘acting member’ to fill in for a member who has been approved to take a leave of absence by the Minister, for a period of up to six months.
 - 2.5 If a member is to be absent from the Heritage Council for a period longer than six months, then they would be required to resign and the position filled as per the arrangements to fill casual vacancies.
 - 2.6 Section 9 of the Heritage Act could be amended to remove time limits on membership tenure.
 - 2.7 The Minister could consider appointing members for varying terms to ensure appropriate rotation.
 - 2.8 Consideration should be given to amending the Heritage Act to provide for emergency “stop work” powers for unauthorised works to items which are the subject of an IHO or State Heritage Register listing. This power should be exercised by the Minister or Heritage Council Chair on similar terms to the existing section 136 orders.
 - 2.9 A bilateral agreement could be formed under the EPBC Act between the State and the Commonwealth which accredits the heritage assessment and approvals processes for World, National and Commonwealth heritage items. It may be appropriate to formally recognise this role within the functions of the Heritage Council.
 - 2.10 A new role for the Heritage Council could be inserted in Section 21 of the Heritage Act, which is “to advise the Minister on matters relating to places listed on the World, National or Commonwealth Heritage Lists”.
 - 2.11 The Minister could consider progressing discussions between the NSW Government and the Commonwealth regarding a bilateral agreement to accredit NSW heritage approvals processes for World, National and Commonwealth heritage items within NSW.

3. Planning and Heritage

- 3.1 Owners of proposed heritage items should be consulted at the outset of the heritage assessment process and subsequently during the preparation and exhibition of the LEP.
- 3.2 Where owners continue to object to the listing of their property following exhibition of the draft LEP, the Expert Panel is of the view that one of three options should be considered:

- a) the establishment of an Independent Hearing and Assessment Panel (IHAP) to consider the objection and make a final recommendation to the Council regarding whether the item should be listed or not;
 - b) the establishment of a Public Inquiry under Section 68(1) of the EP&A Act to similarly consider the objection and make a final recommendation to the Council regarding whether the item should be listed or not; or
 - c) the appointment of a planning arbitrator to determine the matter. In this case, the decision of the planning arbitrator would be binding on the Council.
- 3.3 Gateway criteria should be established to guide councils in their decision-making on listing heritage items and identifying conservation areas, and to guide IHAPs when hearing objections to listings. The Expert Panel considers that the gateway criteria should address the following issues:
- the heritage significance of the item (as assessed against Heritage Office criteria and tests of authenticity and integrity);
 - compatibility with planning controls and planning goals for the area;
 - owners' views;
 - the implications for the economic use of the land;
 - community regard for the item;
 - whether there are measures in place to ensure long term conservation; and
 - whether there is a design solution to ensure long term conservation.
- 3.4 In deciding whether to list a local item, Councils should have particular regard for planning goals for the area and the recommendations contained in regional and sub regional strategies.
- 3.5 The Department of Planning could prepare a circular to issue to all councils detailing the gateway criteria and how they should be applied.
- 3.6 The Expert Panel supports the aims of the draft Planning Reforms to streamline the LEP making system, particularly as this will improve the process of listing and de-listing of heritage items.
- 3.7 Heritage LEP Guidelines should be prepared by the Department of Planning jointly with the Heritage Council. These Guidelines should support the Standard LEP template in striving for greater standardisation and clarity of controls across the State.
- 3.8 The Heritage Council should continue to provide support to local government through dedicated programs. Particular emphasis should be given to educating council staff, councillors and local heritage professionals in the appreciation and application of the heritage listing criteria.

- 3.9 Regional and thematic heritage studies could be used to improve comparative analysis and therefore the quality and reliability of individual assessments. The Heritage Council could explore opportunities to work with individual councils or regional groups of councils in undertaking such studies.
- 3.10 Councils should be encouraged to identify if a property is listed as a local heritage item, or is located in a conservation area, or in the vicinity of a local heritage item or conservation area on Section 149 certificates. This will ensure that potential property owners are made aware up front of the heritage values and implications for development.
- 3.11 Councils should review existing heritage schedules in LEPs as part of the Standard LEP adoption. Where there is insufficient background information to support existing listings, councils should be required to provide new evidence and statements of significance to support listings or otherwise remove items. Councils may be exempted from reviewing their schedules where existing heritage studies and inventories are recent and based on sound analysis.
- 3.12 Councils should be required to review heritage listings in LEPs on a regular basis, preferably at least every five years, to consider the current condition and circumstance of each item and identify items that no longer meet the criteria for local heritage significance. However, this should not necessarily be seen to be an opportunity for major expansion of heritage lists but rather to identify any anomalies
- 3.13 Items should only be designated as having State significance where such items are listed on the State Heritage Register. All other items should be listed in LEPs without a corresponding ranking. If this approach is adopted, the provision in the Standard LEP requiring the referral of proposals involving demolition of State significant items (but not including items listed on the State Heritage Register or subject to an IHO) to the Heritage Council could be removed.
- 3.14 A model Heritage DCP should be developed to guide development in conservation areas. The model DCP could provide for the designation of conservation areas only where there are clear heritage values associated with them. Areas with high amenity or other distinguishing characteristics worthy of retention, but not historically significant, should be dealt with through Character Statements.
- 3.15 The Minister should consider removing the duplicative processes for development approval under S91A of the EP&A Act and S57 of the Heritage Act by either:
- a) Exempting development from the requirement to obtain approval under s60 of the Heritage Act if approval has already been granted under S91A of the EP&A Act, or
 - b) For development which has already been approved under s60 of the Heritage Act prior to seeking approval under S91A of the EP&A Act, preventing a consent authority from refusing the subsequent DA on

heritage grounds provided that the development is the same as that for which the S60 approval has been granted.

- 3.16 The Heritage Council's general terms of approval should be structured to match more closely with councils' conditions of consent, particularly in terms of timing, for example, prior to issue of construction certificate, prior to issue of occupation certificate etc.
- 3.17 The EP&A Act could be amended to enable State Government agencies to use the IDA provisions in relation to development of State Heritage Register listed assets.
- 3.18 The Heritage Council's *Statements of Heritage Impact Guidelines* should be revised to provide guidance on:
- how heritage impact statements should be tailored to the scale of development;
 - the circumstances under which development involving local heritage items should be exempt from the requirement to prepare a HIS;
 - developing a simple pro forma to enable owners and builders to prepare their own heritage impact statements; and
 - alternative documentation that can be supplied to councils for small scale developments to determine heritage impact.
- 3.19 As proposed in the draft Planning Reforms, consideration should be given to amending the EP&A Act, standard LEP template and SEPP 60 to enable exempt and complying development to be undertaken in relation to items of environmental heritage and conservation areas.
- 3.20 As part of the mandatory default code proposed for exempt and complying development proposed in the draft Planning Reforms, consideration should given to including appropriate exempt and complying development standards specifically tailored for local items of environmental heritage and conservation areas. Where a proposal does not comply with these requirements it would be subject to the local DA process.
- 3.21 The EP&A Act could be amended to make provision for councils to enter into heritage agreements for local heritage items, similar to the provisions that apply to heritage agreements for State listed items.
- 3.22 To assist councils wishing to enter into agreements with owners, the Heritage Office of the Department of Planning could issue Heritage Agreement Guidelines together with a standard heritage agreement template.
- 3.23 The definition of "public purpose" under Section 93F of the EP&A Act could be amended to include "the protection and enhancement of heritage items". This would enable councils and developers to enter into planning agreements that provided for the conservation of heritage items.

- 3.24 In preparing the Heritage LEP Guidelines, possible planning incentives could be explored that could be included in the standard LEP template as “optional” provisions.
- 3.25 The current review of existing SEPPs and REPs should include a review of the heritage listings and heritage provisions in these instruments, particularly with a view to removing any overlap, providing for effective rationalisation of controls, and incorporating heritage provisions and listings into LEPs wherever appropriate.
- 3.26 Regional and sub regional strategies should guide heritage policy formulation at the local level, particularly in balancing heritage and broader planning goals.

4. Duplicative and Overlapping Provisions with Other Legislation

- 4.1 Consideration should be given to undertaking a separate inquiry into the management of Aboriginal heritage in New South Wales having particular regard to the existing requirements of the Heritage Act 1977, the Aboriginal Land Rights Act 1983 and the National Parks and Wildlife Act 1974. (Refer also discussion in Chapter 5.)
- 4.2 The Minister should consider undertaking discussions with his ministerial colleague responsible for DECC, to determine the agency best suited to manage natural heritage including consideration of nominations of natural places for the State Heritage Register, advice to the Minister and the processing of statutory applications for natural heritage matters.
- 4.3 The NSW Government should pursue a bilateral agreement with the Commonwealth under the EPBC Act which accredits the State’s approval regimes under the EP&A Act and Heritage Act for development which includes a “controlled action”.

5. Other Identified Issues

- 5.1 Section 4 of the Heritage Act could be amended to require that a relic has to have heritage significance in order to be protected under Division 9.
- 5.2 The definition of “relic” could be replaced with new definitions for “archaeological object” and “archaeological site”. This will also require amendment to the definition of “movable object”.
- 5.3 The S170 Register Guidelines should be redrafted to require agencies to take a thematic approach to the identification of heritage assets, with the goal of identifying a representative group of items from different asset classes for conservation.

- 5.4 Where an agency has completed its S170 Register and this Register has been endorsed by the Heritage Council, local government should not have the power to list items specifically excluded from the Heritage Register while those items remain in government ownership.
- 5.5 Agencies should develop internal management procedures and (potentially) expertise with the aim of being delegated authority under the Heritage Act to self-approve works up to the level of “material affect”.
- 5.6 Councils should be encouraged to explore opportunities to establish local heritage funds to assist owners in conserving and managing local heritage items.

APPENDIX A

Summary of Submissions

SUMMARY OF SUBMISSIONS

The following is a brief summary of issues raised in the submissions received by the Expert Panel. A significant number of issues were raised in submissions and a wide variety of views were expressed. As a result, the summary under each heading may contain contrary statements.

Duplication and Overlapping Legislation

- A number of areas of overlap exist between the Heritage Act and other legislation, notably the NPWS Act, Mines Act, EP&A Act (s60/IDA) and State Records Act,
- Although there are some overlapping provisions between Commonwealth and State legislations covering heritage, this does not present a major problem as there is an agreement between State and Federal Government where delegation of approval role for works to nationally listed places to the State. Similarly duplication exists between the Heritage Act and the National Parks and Wildlife Act for Aboriginal heritage items. Management agreements between the relevant agencies have helped reduce duplication.
- There is scope to streamline approvals for items listed on multiple registers through the development of bi-lateral agreements between the various levels of government;
- There is a need to streamline s60 approvals & integrated development assessment (IDA) to eliminate duplication in the development application assessment process.
- A consistent approach is needed to the terminology that applies to heritage listings as well as the assessment of proposed heritage listings between all levels of government.
- Responsibility for assessing Aboriginal heritage should be consolidated in one authority with the final decision for listing remaining with the Heritage Council.
- Local and state heritage listings should be consolidated in one instrument to avoid duplication and minimise owner confusion and make the system straightforward and transparent.

Integration with EP&A Act

- A number of submissions support the current legislative framework that separates heritage and planning and oppose any changes that would dilute heritage provisions over time. Overseas examples are cited to support the view that heritage protection would be strengthened by independence of the heritage bodies from the planning bodies.
- Conversely, a number of submissions suggested that better integration of the two legislations will improve the operation of the system. Heritage should be considered as a critical goal in planning legislation. The two Acts and the

processes should be reviewed to ensure that they are consistent and complementary.

- A number of submitters believe the issues are mostly procedural reflecting the lack of resources rather than the need for legislative reform.
- Concern was expressed about the operation of Part 3A of the EP&A Act which removes the requirement for approvals under the Heritage Act for Major Projects. Some submissions contended that this means that heritage considerations may be validly disregarded when assessing a major project. Heritage should be a mandatory consideration under Part 3A.
- DAs relating to items listed on the State Heritage Register should not be refused on heritage grounds if the Heritage Council has already provided approval for the proposal under the Heritage Act.
- When a property is proposed to be listed, current zoning should be reviewed as to whether it is the most appropriate given the potential conflict between development potential and heritage protection that may exist.

Delegation

- A number of submissions commented on delegation of approval authority and power to make interim heritage orders.
- State agencies recommend consideration be given to exempt public authorities from s46 of the Heritage Act for local heritage items and if an agreement was in place between the public authority and the Minister for State listed heritage items.
- Sydney Harbour Foreshore Authority submitted that delegation from the Heritage Council to assess applications for work on heritage listed properties has enabled it to achieve a more expeditious processing of heritage applications.
- Certain councils believe all councils should have delegation to place IHOs on properties under consideration for listing. Some councils received the delegation power in 2002 but there appears to be no regular review of such delegations. There is also no clear guidance for the operation of these powers when council areas are amalgamated.
- State agencies recommend public authorities be given power to assess and determine minor maintenance works.
- Delegation should only occur if the council or State agency is adequately resourced to manage the process.
- Consideration should be given to delegate authority to council to grant exceptions to the requirement for an excavation permit where the archaeological resource is considered not to be significant at the local level.

Listing Process

- Inadequate resources to allow review of some early and poorly documented listings are considered by some as the major shortcoming of the current system. Others consider the issues are related to administrative procedures rather than the Act.
- Concern that the assessment of the significance of local items is often inadequate. Listings should include statements of significance or tangible evidence of the item/place's significance or suitable interpretation information.

Also listings should preferably be based on thematic and regional studies to enable comparative analysis.

- The current local listing approach is based on 'the best in the local government area' rather than on a broader regional context.
- There is no formal process for nomination, assessment, notification and consultation for listing items of local heritage significance. Councils have wide discretion in deciding whether or not to list an item. This lack of proper process and transparency in decision making is considered by many to be the main reason for the negative responses to the system.
- Standard heritage assessment procedures for local government should be established and implemented to provide a consistent policy for the process of assessment, notification and consultation with property owners and the community.
- Listing should be proactive through a wider program of thematic and regional heritage studies rather than the current reaction approach.
- Multiple listings (i.e. State Heritage Register, LEP lists/schedules, s170 Register and State Heritage Inventory) are confusing. Some suggest the State Heritage Inventory should be used as a one-stop place for listing of all statutory and non-statutory places and items in NSW that are of local, State and national or international significance.
- A 'deemed' listing approach should be considered for items of natural heritage for listing in the State Heritage Register. For items identified as State significant on s170 Register, they should be listed in the State Heritage Register without further assessment.
- An expert peer review process is suggested and it should be available to property owners who are concerned about a proposed listing.
- The Heritage Council/Heritage Office should have the review power to ensure local government heritage lists are suitably comprehensive and soundly based.
- There is a need for a more thorough and systematic development and maintenance of LEP heritage schedules, which should be reviewed every 10 years. Provisions should also be available to remove items from schedules or to reclassify items as contributory components of conservation areas.
- Some are concerned about the discretionary power available to council to approve demolition of locally listed item. They recommend the Heritage Act be amended to require approval from the Heritage Council for applications to demolish or damage local heritage items to ensure applications to harm heritage items will be subject to the same level of scrutiny as State heritage items.
- Retrospective or defensive heritage listing of a property that is the subject of a development application should not be allowed.
- Several heritage property owners are very critical of the local listing process. They used experiences with their respective local council to illustrate their concerns.

Listing Criteria

- The listing criteria are generally considered adequate except for a few submitters who are of the view that the criteria are unclear, repetitive and difficult to

understand. Others suggest expansion to cater for modern mid 20th century items and address the issue of curtilage.

- There is a lack of emphasis given to social significance and an overemphasis on architectural significance.
- Equal attention should be given to internal structures as to facades.
- There is also a suggestion to consider listing of heritage values associated with places/items instead of the current approach of listing the places/items themselves;
- Listing and delisting should be based on merit and significance only, not economic factors.

Level of significance

- Re-establish a regional significance category to cater for items that do not reach the threshold for State significance but have wider significance than their local context. These items should be managed by the Heritage Office or a regional body.
- Some regional environmental plans include heritage listings that appear to be based on minimal assessment. These should be reviewed.

LEP Template

- A range of views expressed about the standard heritage provisions in the LEP Template.
- Many request variations to the Template be allowed so as to reflect local conditions and accommodate local community expectations. Others suggest any local variations be dealt with under a heritage DCP based on a standard DCP template to be prepared by the Heritage Office.
- Provision should be included to ensure councils have the power to enforce minimum maintenance and repair locally listed built heritage items.
- Mandatory regular review of heritage list/schedule should be incorporated into the standard LEP template.

Exempt and Complying Development

- Standard exemptions for heritage items in the LEP template should be expanded.
- Current maintenance exemptions under s118 of the Heritage Act are too restrictive. Minor works that relate to the continuation of essential infrastructure/services should be exempted or public authorities be given delegation to assess and determine such works.
- Greater delegation should be provided to local government to approve exemptions under the Heritage Act provided the council has the appropriate expertise to assess exemption applications
- There is concern that if complying and exempt development includes heritage items and conservation areas, approval may occur through private certification.

Private certifiers may not have appropriate experience in heritage and standards will be compromised.

Constitution and Functions of Heritage Council (Heritage Office)

- The Heritage Council and Heritage Office are well regarded as an effective independent expert body. Their independence is said to be a key component in the successful operation of the State's heritage management system. The recent organisational change that brought the Heritage Office into the Department of Planning is a concern to many submitters as they fear the Office will lose its independence.
- Certain submitters are of the view that the Heritage Council and Office are working well and no significant changes should be made to the administration and composition of the Council or the Office. However, others suggest representation should be broadened.
- Appointments to the Council should be directly related to one of the listed categories and should not have vested interests that conflict with heritage values. A public statement of appointment should be made public.
- Many call for additional resources to be provided to the Heritage Office so as to allow it to undertake thematic studies and provide technical and funding assistance to local governments.
- A new model (similar to the Catchment Management Authorities and the Natural Resource Commission) for heritage management in NSW should be considered.
- There is a need to compile data and statistics that can quantify or measure the public (and private) benefits of listing.
- There are insufficient historical archaeologists employed in the Heritage Office resulting in delay in the issuing of excavation permits.
- Heritage Office should change its focus for a period of 2-3 years so as to concentrate on promotion and education of heritage issues.
- The inability of the Heritage Council to deal with listing at a local level is considered detrimental to the recognition and appreciation of heritage in the local community.
- The Heritage Council should have a more aggressive policy to ensure State agencies comply with s170 requirements.

Conservation Area

- Conservation areas are generally supported by the community and property owners who have invested in such areas. Suggestion that they provide for more equitable forms of control as opposed to individual listing. Conservation areas reduce the bulk of listings attached to LEPs and enable a more balanced system of assessment to apply.
- Assessment should be carried out on properties within conservation area and listed individually where appropriate. Otherwise unidentified items in a conservation area may not receive adequate protection.

Heritage Studies and Assessment

- Many local heritage studies are of a poor quality. Standard formats for documentation should be developed to assist local government in preparing heritage assessments.
- Need to update existing heritage studies where they are inadequate and review planning instruments accordingly.
- The scope of Heritage Impact Statements and Conservation Management Plans also needs to be reviewed.
- All listings in the State Heritage Register should be reviewed to ensure minimum levels of information are recorded and a consistent approach adopted to defining and making variations to the curtilage of State Heritage Register listed properties.
- Assessing the merit of a nomination should fall with the assessing authority, not the nominator as is the current situation.

Alternatives to Listing eg Heritage Agreements

- The majority of submissions believe there is no effective substitute for a system of heritage listing. A few strongly support voluntary heritage agreements as they believe it is the most equitable way for property owners.
- Most consider heritage agreement should be complementary to listing, not in place of listing.
- Heritage agreement is accepted by many as an efficient mechanism for establishing an agreed framework on complex sites on already listed properties.
- A significant number of submitters are of the view that heritage agreement will not protect the item for the following reasons:
 - It would impose significant additional costs on council and possibly private owners;
 - standard conditions and legal arrangements would be required;
 - the process is time consuming and labour intensive;
 - as heritage agreement is individual, there is likely to be inconsistency in agreements and outcomes between items;
 - there is rarely a guarantee of a long-term nexus between the parties to a heritage agreement, and the site itself
 - there is a need to renegotiate with each new owner;
 - there is no control over the long term future of the item;
 - extra funding will be required to administer the system.
- If heritage agreement is to be adopted, there is a need to prepare documentation that clearly outlines the opportunities that heritage agreements have for complex sites undergoing development.

Local Government Resources

- A regular funding program should be provided for local councils for heritage matters including undertaking studies, conservation work to public property and assets and setting up a local heritage fund.
- A heritage lottery scheme should be examined for adoption in NSW.

- Consider a way of resourcing a unit of professional historians who would be available to assist councils in identifying State significant items
- Provide education and training program to the public and council officers;
- Greater investment in heritage conservation education would assist promoting the heritage conservation across a wider segment of the community.
- Lack of resources to complete inventory or update/review heritage listing or undertaking research and technical know-how is a major concern, particularly to the regional and rural councils.
- Improved access to heritage technical advice and tradespeople is needed.

Owners' right

- The existing system does not allow property owners to appeal against a council's decision to list their property. Any appeals are limited to the process of listing rather than the merit of listing or unreasonable burden of costs.
- Private owners carry a disproportionate burden in protecting heritage items. If heritage conservation is a public good, the community should be prepared to pay for it.
- Some submitters consider the current process in terms of consultation with property owners and appeal right is adequate. To extend the current process to a more comprehensive review process would be impractical for council to facilitate or fund that process.
- Owners should be involved early on in the listing process with concise guidelines and information about what heritage listing means and the benefits/costs to the property owner. The appeal rights of owners against listing also need to be clear, concise and readily available.
- A few submitters support a right of appeal for individuals based on economic hardship against a listing of a property or unreasonable cost.
- Some suggest appeals to listing should be available to the Heritage Council while others suggest the Administrative Appeals Tribunal, or an expert panel appointed by the Heritage Council or the Land and Environment Court.
- Some community groups consider community stakeholders should have a right to take part in appeal proceedings.

Incentive schemes to heritage property owners

- Monetary and development Incentives such as rate relief, tax concessions, transferable development rights, FSR bonuses/concessions should be provided. Other mechanisms such as planning agreements or other programs should also be developed to facilitate the conservation of State and local heritage items.
- Providing funding assistance for maintenance and repairs is considered by some as the most effective and desirable form of funding or compensation as rate rebates cannot guarantee that the money will actually be spent on the heritage items.
- If listing is to occur, property owner should be compensated for the loss of value due to listing and extra costs associated with DA process including heritage

consultant costs, extra construction costs to cover special documentation and specifications required.

- The community should be prepared to compensate the owner for the loss of asset value and potential amenity benefits.
- The draft heritage incentives contained in the Standard LEP template for flexibility of use should be expanded to a wider flexibility of development standards.

Minimum maintenance and repair

- A number of councils have requested provisions be made available either in the Heritage Act or the EPA Act to allow councils to deal with wilful neglect to local heritage items/places. Some suggest amendments to the following sections of the Acts to provide such power:
 - S121B of the EPAA be expanded to address demolition by neglect in respect of heritage properties
 - S118 of the HA (minimum standards of maintenance and repair) be explicitly referred to in the EPAA and be included in the provisions of LEP template
 - S118 minimum standards of maintenance and repair also apply to items which are the subject of an Interim Heritage Order

Monitoring of compliance

- More rigorous monitoring of compliance on DAs and enforcement is needed to ensure protection of heritage values.

Public Benefits

- There are a range of public benefits that flow from the conservation and ongoing management of heritage places, including:
 - economic benefits through increased property prices;
 - social benefits via retention, adaptation and reuse of a variety of buildings that are then available for community or other uses,
 - increased amenity of heritage areas resulting in an improved sense of community;
 - environmental benefits through preservation of natural environment, recycling or adapting built fabric, and some heritage building may have better performance in terms of energy or water use.
- The Heritage Council should prepare or compile data and statistics that can reliably quantify or measure the public (and private) benefits of listings.

Public Consultation

- The Heritage Act should include active public consultation and involvement in determining items that the Heritage Council should consider for listing. There should also be provision to promote public involvement in heritage discussions

and in developing heritage controls for areas not under local government jurisdiction.

- There should be more meaningful engagement with those in the community with relevant special knowledge and with the community at large within a prescribed process, rather than the current ad hoc arrangements.

Heritage Committee

- The use of Heritage Committees either under the Local Government Act or as informal groups should be encouraged.
- Local heritage committees should include Local Aboriginal Land Council representation and should consult broadly with Aboriginal communities on heritage matters. Local Government should also revise the composition and terms of reference of their existing Aboriginal advisory and reference groups to give them a role on heritage matters.

Definitions require clarification and/or extension

- Various definitions identified that need further clarification and/or extension. These include:
 - 'Moveable object' – the broad definition in the Heritage Act potentially includes records and documents that are subject to the requirements of the State Records Act.
 - 'Relic' – interpretation used in practice is inconsistent with the definition. A clearer working definition of what constitutes a 'relic' in terms of statutory responsibilities and archaeological investigations would be desirable.
 - 'Harm' – should be extended in relation to buildings and works so that it will include any action (either willful or through neglect) that results in damage, deterioration or demolition of a local or State listed heritage item or to an item protected by an IHO.

Archaeology

- Any review of the archaeological provisions of the Heritage Act should retain the protection of all archaeological evidence of heritage significance from disturbance or destruction as provided in the existing Act.
- The Heritage Act is essential to the maintenance of archaeology and heritage in the State.
- Many archaeological sites of State significance are not on the State Heritage Register. The relics provisions in the Heritage Act offer the only statutory trigger.
- A major concern is the absence of one or more archaeological repositories.
- One submission recommends archaeology provisions should only apply to major Aboriginal sites and to all pre-1860 European sites where evidence is likely to remain.

Amendments to EP&A Act and Heritage Act

- There is a need to clarify the interpretation and function of s137A of the Heritage Act with regard to the voiding of previous development consents.
- S33 of Heritage Act should be amended to include a definitive process to expand or reduce a listed curtilage.
- S116C of the EP&A Act should be amended to ensure consistency with the principles enshrined in the Heritage Act, especially in regards to items of State significance or on the State Heritage Register.

Time-frame

- Extend the timeframe within which the Minister must pursue S34(1)(a), (b) or (c) of the Heritage Act.
- The Minister should be able to defer making a decision for a designated period of time.
- Statutory time frame for processing s140 applications (permits and exceptions) should be brought in line with s60 applications
- To adopt a publicly declared priority assessment list and assessment time schedule would increase transparency of the process and certainty for property owners as well as other stakeholders.

Impact of/Conflicting with other legislations

- There appear to be conflicting provisions between the Heritage Act and the Commonwealth and NSW Disability and Access legislations and the Protection (Between Neighbour) Tree Act.
- Need to investigate the impact of BASIX legislation on the conservation of heritage items particularly at the local level.

Other Issues

- Consideration should be given to establishing a register of significant horticultural landmarks.
- Clear guidance is needed on priority of assets identification and assessment for s170 Register as well as defining whether an agency is responsible for the 'care and control' of the whole or parts of an item if the item is not wholly owned by the agency.
- There is currently no connection between assessment of beneficial heritage attributes for SHR listing of an item and the consideration of the responsibilities for the cost of managing an item to conserve those attributes. The high cost of managing these heritage assets should be a reasonable and feasible consideration when they are nominated for inclusion on the SHR.
- The Minister for Planning is responsible for both the EPAA and HA. This situation undermines the integrity of the planning process and the heritage listing system by creating a perception of a conflict of interest between the Minister's two roles. To avoid such conflicts of interest, consideration should be given to separating

the role of the Minister for Planning from the role of the Minister responsible for administering the HA.

- Powers allowing the Minister to restrict all future developments to the building envelope of a destroyed heritage item should be enforced.
- Information relating to local, state and national heritage listings in NSW should be included in s149 certificates and s149 forms be made available in both electronic format on council websites and in hardcopy format in council offices.
- SHI database software should be configured to ensure that all conservation area and site heritage listings are copied to all relevant statutory records including s149 certificates.
- Local items should be considered equal to State listing and should not be 'easier' to demolish.
- Adminstrating the Act at a regional level (as per Aboriginal heritage management in NSW and the system in operation in NZ) would result in better connections with communities, a better and more manageable context for managing strategically – as well as better support for local government.
- Expert Panel
 - All submissions and possibly a summary or discussion of the Panel's findings be published as public record.
 - There should be more support provided to assist community groups with their submissions to the Panel. The 8 week submission period was considered inadequate.
- Concern there is no appropriate and detailed training available in Australia for persons active in the heritage conservation area.
- Decentralising heritage skills to develop regional support teams of suitably qualified professional such as historians, archaeologists, architects, heritage planners and other specialists would provide the much needed skill shortage in regional and rural areas.

Heritage Act Review Panel
List of Submissions

Sub No.	Name of Submitter	Date Received
1.	Councillor Gary Green 1a. Letter dated 2 Oct 2007 Re 32-33 Church St Camperdown	07/08/07 05/10/07
2.	Wollongong Heritage Owners (Submission from George Smith) 2a. Submission from Christine Haywood	20/08/07 08/10/07
3.	Brian Green & Family 3a. DVD titled Heritage Horror (ABC Stateline Program)	04/09/07 04/09/07
4.	Ronald Charles Knowles (letter request information) 4a. Request additional information 4b. Submission to Panel	11/09/07 22/10/07 1/11/07
5.	The Vaucluse Progress Association	11/09/07
6.	Peter Woodley	12/09/07
7.	Peter Reynders	18/09/07
8.	Barbara Best	21/09/07
9.	Peter and Umi Freeman	24/09/07
10.	Glenda & Adrian Wolman	25/09/07
11.	Tony Taussig	27/09/07
12.	Ashfield Municipal Council	27/09/07
13.	State Records (Department of Commerce)	28/09/07
14.	Norman Rich	28/09/07
15.	Sydney Ports Corporation	28/09/07
16.	Bathurst Regional Council	02/10/07
17.	Australian Heritage Council	02/10/07
18.	Rob Stokes, MP	02/10/07
19.	Wingecarribee Shire Council	02/10/07
20.	Kevin Begaud	03/10/07
21.	Beryl & Morry Manson	03/10/07
22.	Neil Buhrich (Re 375 Edinburgh Rd Castlecrag) 22a. Re 315 Edinburgh Road Castlecrag	03/10/07 03/10/07
23.	Wollongong City Council	03/10/07
24.	Warringah Council	03/10/07
25.	John & Anne Tubridy	04/10/07
26.	Galina Shein	04/10/07
27.	Manly Council	05/10/07
28.	The Hills District Historical Society Inc	05/10/07
29.	Lismore City Council	05/10/07
30.	Leeton Shire Council	05/10/07
31.	Rockdale City Council	05/10/07
32.	Dr EJ Walker & Ms LD Fowler	05/10/07
33.	Tanner Architects	05/10/07
34.	Anne Carroll OAM	08/10/07
35.	Stephen M Szabo	08/10/07
36.	Bruce Pennay	08/10/07
37.	JCIS Consultants	08/10/07
38.	Convict Trail Project & Hornsby Shire Historical Society	08/10/07
39.	Friends of Ku-ring-gai Environment Inc	08/10/07
40.	Name withheld as requested 40a. Addendum to submission	08/10/07 12/10/07

41.	Graham Brooks & Associates	08/10/07
42.	National Trust of Australia (NSW)	08/10/07
43.	Woollahra Municipal Council 43a Letter from Mayor Cr Geoff Rundle	08/10/07
44.	Woollahra History and Heritage Society Inc	08/10/07
45.	KW Payne	08/10/07
46.	Professional Historians Association (NSW) Inc	08/10/07
47.	Submission withheld as requested	08/10/07
48.	Parramatta City Council	08/10/07
49.	Heritage Solutions	08/10/07
50.	Campbelltown City Council 50a. Letter from director, Planning and Environment advising Council's endorsement of draft submission to Panel	08/10/07 30/10/07
51.	NSW Treasury (Confidential)	08/10/07
52.	Hornsby Shire Council 52a. Letter from Mayor dated 5 Nov 2007	08/10/07
53.	Richmond River Historical Society Inc	08/10/07
54.	Betty P Payne	08/10/07
55.	Hunter's Hill Council	08/10/07
56.	Heather and Stephen Berry	08/10/07
57.	Australasian Society for Historical Archaeology	08/10/07
58.	Assoc Prof Paul Adam	08/10/07
59.	Garry Smith	08/10/07
60.	Hunter Heritage Network Inc	08/10/07
61.	Barbara Meyer	08/10/07
62.	City Plan Heritage	08/10/07
63.	History Council of NSW	08/10/07
64.	Pittwater Council	08/10/07
65.	Forbes Heritage Advisory Committee	08/10/07
66.	Environmental Defender's Office NSW Ltd	08/10/07
67.	Western Sydney Regional Organisation of Councils Ltd	08/10/07
68.	Blacktown City Council	08/10/07
69.	Janine Kitson	08/10/07
70.	Lane Cove Council	08/10/07
71.	Deborah Arthur	08/10/07
72.	Casey & Lowe Pty Ltd	08/10/07
73.	Felicity Barry	08/10/07
74.	The Organ Historical Trust of Australia	08/10/07
75.	Joint Submission from S Davies, D Arthur, F Binns, ML Taylor, J Phillips & D Scobie	08/10/07
76.	John Callaghan	08/10/07
77.	Royal Australian Institute of Architects (NSW)	08/10/07
78.	Ku-ring-gai Council	08/10/07
79.	Heritage Committee of Engineers Australia	08/10/07
80.	Public Service Association	08/10/07
81.	Conservation Volunteers Australia	08/10/07
82.	Walcha Council	08/10/07
83.	Margaret Mayo	08/10/07
84.	Penny Crook	09/10/07
85.	Liverpool City Council	09/10/07
86.	Cr Tony Hall 86a Email from Mrs Glenda Wolman	08/10/07 08/10/07
87.	The Haberfield Association	09/10/07

88.	MP Short	09/10/07
89.	Strathfield Council	09/10/07
90.	Canada Bay Council 90a. Letter from Mayor, Cr A Tsirekas to Minister for Planning dated 5 October 2007 Re Heritage Impact Statement	09/10/07 26/10/07
91.	Moree Plains Shire Council	10/10/07
92.	George Smith	10/10/07
93.	Orange City Council	10/10/07
94.	Royal Australian Historical Society	10/10/07
95.	Cr Chiang Lim	10/10/07
96.	Christine Haywood	10/10/07
97.	Name withheld as requested	11/10/07
98.	Heritage Council	11/10/07
99.	Willoughby City Council	11/10/07
100.	Cabonne Council	11/10/07
101.	NSW Urban Taskforce	11/10/07
102.	Sydney Water	12/10/07
103.	Ryde City Council	12/10/07
104.	Property Council of Australia NSW	15/10/07
105.	Planning Institute Australia (NSW)	22/10/07
106.	Department of Environment and Climate Change	15/10/07
107.	Roads and Traffic Authority	15/10/07
108.	Cr Anne Field	15/10/07
109.	Clover Moore, MP	15/10/07
110.	Walter Burley Griffin Society Inc	15/10/07
111.	June Pead	15/10/07
112.	Sydney City Council	15/10/07
113.	Heraldry Australia	15/10/07
114.	Shoalhaven City Council	15/10/07
115.	Baulkham Hills Shire Council	15/10/07
116.	Harden Shire Council	16/10/07
117.	Anne Bickford	16/10/07
118.	Roslyn Lunsford 118a. Supplementary Submission	17/10/07 18/10/07
119.	Narromine Shire Council	17/10/07
120.	NSW Department of Aboriginal Affairs	29/10/07
121.	Australia ICOMOS	04/10/07
122.	Petra O'Neill	18/10/07
123.	Local Government and Shire Association	23/10/07
124.	Randwick City Council	25/10/07
125.	Sydney Harbour Foreshore Authority	26/10/07
126.	The New Italy Ratepayers Association	01/11/07