

28 June 2021

The Hon. Peter Poulos, MLC
Chair
Standing Committee on Social Issues
Parliament House
Macquarie Street
Sydney NSW 2000

By email: socialissues@parliament.nsw.gov.au

Dear Mr Poulos,

RE: Review of NSW Heritage Legislation Discussion Paper

Urban Development Institute of Australia NSW (UDIA) is the leading industry body representing the interests of the urban development sector in New South Wales. We represent over 500 member companies that are directly involved in the industry including developers, consultants (engineering, planning, legal, environmental, design), state agencies and local government.

The NSW Legislative Council's Social Issues Standing Committee (Committee) is seeking input into the Review of NSW Heritage Legislation Discussion Paper. UDIA welcomes this openness to improve the NSW Heritage Act (Act). We take this opportunity to provide some observations on behalf of our members.

UDIA notes that the potential changes associated with this review will impact not only owners of heritage items, but also owners of properties that undergo heritage impact assessments, whether the property is ultimately listed, as well as other landowners, residents and businesses in areas surrounding heritage items.

Our members report considerable concerns with the processes for Interim Heritage Order (IHOs) under the current Act, that is undermining the credibility of the heritage system and undermining opportunities to improve the maintenance and use of heritage assets.

Our submission provides examples to explain our concerns, and we respond directly to some of the Discussion Paper's focus questions below.

Focus Question 3: Are the objectives of the Heritage Act still relevant?

Yes, they are still relevant. However, the way in which the objectives are managed and applied in practice within Heritage NSW and in local councils (through IHOs in particular), is where the core mission of promoting and encouraging the use of state heritage has failed to be effectively executed. This has developed a "preserve in aspic" mentality leading to opposition to any change, rather than practical re-use.

A growing number of unfavourable experiences with the Heritage Act further exacerbate this underlying issue of the Act failing to cohesively conserve heritage in NSW in recent times.

Industry's experience is that there is a lack of consistency in how officers in approvals/management roles implement the requirements of the Heritage Act. Our members find that projects, heritage listings and developments will have a dramatically different range of outcomes (even within one agency) depending on who the 'assessing officer' is.

Focus Question 6: How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?

Adaptive reuse of heritage items is an important component of heritage conservation into the future. However, adaptive reuse is generally a more time-consuming form of development/re-development and, as a result, heritage is likely to become an overlooked and impractical aspect to the future of NSW. Heritage outcomes would be greatly improved by managing incentives, including within the tax system, that encourage adaptive reuse opportunities for heritage conservation.

As an example, UDIA is aware of a planned adaptive reuse re-development of a State Heritage listed item by one of its members. The adaptive reuse will include extensive renovation and deep heritage interpretation to ensure that the conservation outcomes can be maintained, whilst ensuring the requirements for a commercially viable operation into the future can be sustained and be enjoyed and celebrated by the community at large. In instances like this, outcomes for heritage would be best achieved with the provision of appropriate incentives.

Focus Question 8: How could tailored heritage protections enhance heritage conservation?

The proposed creation of 4 separate categories of heritage identification, with tailored and appropriate regulatory controls for each category, would enable better approaches and responses to the future support of the heritage item.

All items listed on the State Heritage Register are, at present, accounted for identically. This has put a strain on the planning framework, as solutions for overcoming ineffective heritage conservation are one dimensional and do not adequately apply to regulatory instruments such as Local Environmental Plans (LEPs).

Streamlining Heritage Processes

UDIA would welcome efficiency improvements to the current heritage legislation, including streamlining listing and amending processes. By ensuring greater consistency between heritage controls and the planning system, there is a stronger chance of avoiding the improper exploitation of Interim Heritage Orders (IHOs) and, subsequently, bringing a more relevant system that truly acts in the interests of heritage.

Currently, all too often, the processes for IHOs are used improperly and unfairly in ways that have nothing to do with heritage, undermining the entire heritage system. Improvements to the Act are necessary to stop it being weaponized and to ensure that IHOs are used with fairness and transparency, and aligned with its original objectives.

The power conferred on councils to make IHOs was inserted into the Heritage Act as part of the 1999 amendments. The rationale was to ensure that properties that are at risk of immediate harm, that may not have been listed as local heritage items in the council's LEP, were protected. Unfortunately, there is a growing trend of IHOs instead being used as a form of de facto development control, including in circumstances where no harm is threatened to the property.

UDIA is aware of numerous examples where the Heritage Act has been abused without commensurate conservation outcomes.

Some illustrative examples are provided below.

Example 1 – Rescission and Reimposition of IHO

The proponent went about their normal processes when considering purchasing two adjoining sites for redevelopment. Neither property was a heritage item, but considering that nearby properties were listed, the proponent commissioned and paid for a heritage impact assessment. The Heritage Impact Statement concluded

“that the two dwellings located on the subject site do not meet the criteria for individual heritage listing.” Based on this advice, the proponent entered into options to purchase the sites and proceeded with their redevelopment plans.

A Development Application (DA) was lodged to demolish the present properties and construct a 3-storey apartment, consistent with local development controls. Several months passed with no response to the application from council.

Later that year, the council commenced a heritage review on one of the properties (following a resident nomination). Neither the developer nor the current residents of the property were alerted that a potential IHO was being considered until 4 days before it was to be heard in a council meeting.

The IHO was rescinded.

Not long after, the IHO was re-imposed. The proponent could not continue to fight the council to defend their Heritage Impact Statement and is now forced to resubmit an amended design. The IHO process is clearly being abused to prevent otherwise allowable development. A smaller company could well face bankruptcy from this type of improper use of the IHO process.

Example 2 – Council Game Playing

The proponent actively sought out a site/area with no heritage controls and where the LEP for the area had been unchanged over the last 40 years. They purchased two properties in such an area.

As it stands, there is no legislative requirement for councils to alert interested parties about impending IHO motions. Current law only provides that the owner of the land be notified after the Order is made. In this example, the proponent learned of the potential IHO for these properties just 24 hours before the motion was put forward at a council meeting. After spending \$50,000 to obtain Heritage Impact Assessments to defend their sites, the proponent was successful and the IHO did not proceed.

It is the proponent’s belief that the imposition of the IHO was put forward by councillors, with the aim of circumventing the planning process to block the development. The local government area (LGA) in question has very limited opportunities for development and the use of IHOs to prevent or delay development appears to be a growing trend on other sites in the LGA as well.

Had the motion for the IHO been successful, the best-case scenario for the proponent would see the property not get heritage listed post-assessment. However, the proponent would still face up to 12 months of no work during the assessment, almost certainly leading to job losses and reduced housing supply in the area.

Example 3 – Church Listing

A council made an IHO over a former church after the applicant lodged a development application to demolish the existing structures and construct a six-storey mixed-use development, including a boarding-house that would provide affordable housing.

The applicant filed an appeal against the IHO and the refusal of the DA. The council ultimately resolved not to list the property as a heritage item on its LEP. The IHO expired, and the council withdrew its contentions in the DA appeal concerning the heritage significance of the property. The applicant was successful in the DA appeal a month later.

The IHO process attempted to prevent, and did delay, the construction of a boarding house for the more vulnerable members of the community.

Focus Question 10: Would greater community engagement deliver a more robust State Heritage Register?

As demonstrated by the above examples, IHOs are being abused. They are not being used for their intended purpose of protecting appropriate items of heritage. Bringing in greater community engagement, without stronger controls to prevent abuse, would devalue legitimate items of heritage and undermine adaptive re-use potential.

Focus Question 12: How could we improve the current approval permit system?

Streamlining of heritage legislation in NSW is supported as a key focus to improving the permit system.

In December 2020, a change was made to standard exemptions, which were regularly relied upon to undertake minor works including routine building repairs, fit-out and inground testing. The intention of this change to streamline assessment by Heritage NSW is generally supported (where previously exemptions were reviewed by Heritage NSW in 21 days). The new self-assessment of heritage exemptions has been a positive change.

However, the changes to the standard exemptions did affect compliance for various minor works with the exempt and complying development provisions of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 and State Environmental Planning Policy (Infrastructure) 2007.

This highlights the importance of changes being considered holistically in conjunction with the planning system.

Focus Question 15: Are there opportunities to enhance consideration of heritage at the strategic level?

UDIA agrees that there needs to be a greater focus on heritage identification as part of a council's overall strategic planning.

Our members are aware of circumstances where councils seek to proceed with the proposed listing of properties as heritage items in their LEP, even where evidence has been provided in response to community consultation that the properties have been significantly altered internally. In one example, the council had only recently granted development consent to a DA for substantial alterations and additions to the building, only to turn around and propose to list it as a heritage item. The listing did not proceed but only after the landowner had engaged a heritage consultant and a lawyer to advocate on its behalf.

Conclusion

UDIA appreciates this opportunity to inform the Committee's review of NSW Heritage Legislation and is focused on ensuring that any amendments deliver better outcomes for NSW communities. We value heritage conservation as a shared benefit for all Australians. Unfortunately, the current system can be unbalanced and is open to frivolous or improper uses that impose most of the societal burden on a single landowner. We look forward to seeing improvements in this space.

Please contact Kit Hale at khale@udiansw.com.au to arrange any further consultation.

Yours sincerely,



Mr Steve Mann
UDIA NSW CEO