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29 May 2009

The Hon. Kristina Kenneally  
Minister for Planning  
Level 35, Governor Macquarie Tower  
1 Farrer Place  
SYDNEY NSW 2000

Dear Minister,

### Heritage Amendment Bill 2009

The Environmental Defender's Office of NSW (EDO) is a community legal centre specialising in public interest environmental law. We are writing in relation to the *Heritage Act Amendment Bill 2009* which was introduced into NSW Parliament on 13 May 2009. Although we are supportive of some of the changes we have significant concerns with some of the amendments that threaten to undermine what should be the *Heritage Act's* overarching objective – the protection and conservation of state heritage.

We provide specific comments below.

#### Objects clause

The EDO strongly supports the introduction of an objects clause into the *Heritage Act* clarifying that the Act's primary aim is the identification, protection and conservation of items of State heritage. This addresses a serious gap. The objects clause should guide decisions made under the Act in order to facilitate a culture of protection for items of state heritage significance and to guide decision-making by the Heritage Council and Minister for Planning. We therefore suggest that amendments are made that require the objects clause to be considered when exercising decision-making powers under the Act.

#### Heritage Council

The EDO submits that the Heritage Council should be treated as a specialist instrumentality that provides independent advice to the Minister for Planning on heritage issues. We therefore oppose the proposed s4A(3) which requires the Minister for Planning to approve the criteria prepared by the Heritage Council to assist it in determining whether an item is of State heritage significance prior to gazettal of the criteria. As a specialist body the Heritage Council should be free to determine its own criteria for assessing heritage significance. The Minister's discretion should come into play only in deciding whether to list an item on the register or whether to approve an application to harm heritage.

On the other hand, the EDO supports the removal of the provisions allowing Unions NSW and the Planning Institute to nominate members to the Heritage Council. The primary focus of these bodies is not heritage issues, and on occasion they may have agendas that are incompatible with heritage protection. We also support the retention of nominations from the National Trust of Australia as that body's primary goal is the protection and conservation of Indigenous, natural and historic heritage.

#### Listing decision



The EDO strongly opposes amendments to s32 requiring the Minister to consider whether listing an item would render it “incapable of reasonable or economic use” in determining whether an item should be listed on the State Heritage Register. This provision may lead to the situation where important heritage items are not listed on the Register because the Minister considers that listing would hinder the development of land, economic opportunities, etc.

We submit that economic considerations are not relevant to the decision whether an item is of State heritage significance and should therefore be listed on the State Heritage Register. Considerations of the future economic use of a heritage item or land upon which it is situated are only relevant to whether a Heritage Approval should be granted where an application is made. The listing determination should be based solely on the heritage importance of the item. **That is, only heritage considerations should inform the Minister’s decision whether or not to list an item or place on the State Heritage Register. The paramount consideration must be whether a place is of state heritage significance.** Otherwise, the whole ability to protect State Heritage will be diminished as in most cases a developer could argue heritage listing would restrict their ability to maximise profits on a site.

Similarly, we oppose the proposed s33(4) which also requires the Heritage Council to consider whether listing would render an item incapable of reasonable or economic use prior to recommending to the Minister that the item is listed.

#### Removal from register

The EDO strongly opposes the proposed s38(1) which will allow the Minister to direct the removal of an item from the register if the Minister is of the opinion that the long-term conservation of the item is not necessary and “the listing renders the item incapable of reasonable or economic use.” As above, we submit that the economic consequences of a listing are not relevant to whether an item is of state heritage significance.

Of most concern, this provision opens up the register to political influence. Developers can now effectively lobby for items to be removed from the register on the basis that the listing prevents large-scale development of a site. We strongly urge the NSW Government to remove this proposed section as it has the potential to compromise the integrity of the whole Act.

#### Conservation Management Plans

The EDO supports the introduction of conservation management plans into the Heritage Act. The bill stipulates that these plans will set our ‘policies and strategies’ for the retention of the heritage significance of an item listed on the State Heritage Register. We submit that it is important that there are clear strategies in place that guide the future protection of items and that set out the activities that may occur in relation to that item. This provides greater certainty for owners while at the same time facilitating the long-term preservation of items. However, it is unclear how Conservation Management Plans differ from heritage agreements under Part 3B of the Act.

#### Stop work orders

The EDO welcomes the introduction of s79C of the Act allowing the Minister or Chairperson of the Heritage Council to make stop work orders when of the opinion that an object the subject of an Interim Heritage Order or listed on the State Register is being or is about to be harmed. Given the importance of State heritage, the Act should contain robust enforcement and preventative mechanisms to protect that heritage. However, we submit that the Act should also contain the ability for third parties to



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enforce breaches of the Act. This will facilitate greater community involvement in heritage protection, improve enforcement and promote accountability and transparency.

Amendment to *Environmental Planning and Assessment Act 1979*

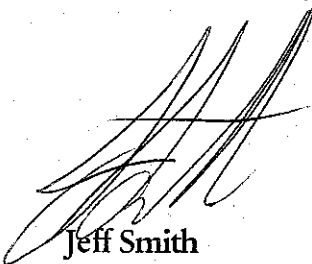
The EDO has concerns with the proposed amendments to Section 92 of the *EPA Act* removing the ability of a council to refuse a development application on the basis of heritage considerations where a state heritage approval has been issued in relation to a heritage item.

We submit that a council should retain the power to refuse a development on heritage grounds in this situation, especially where the item might be important item of local heritage. Councils are representative of their local area and are often best placed to determine the heritage significance of a site to a local community.

To discuss this matter further please contact me on [Jeffrey.smith@edo.org.au](mailto:Jeffrey.smith@edo.org.au) or (02) 9262 6989.

Yours sincerely

**Environmental Defender's Office (NSW) Ltd**



**Jeff Smith**  
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