

09 October 2007

Heritage Act Review Panel
c/- GPO Box 39
SYDNEY NSW 2001

1/89 York Street
Sydney NSW 2000
Tel: (61 2) 9262 6989
Fax: (61 2) 9262 6998

10 Club Lane
PO Box 212
Lismore NSW 2480
Tel: 1300 369 791
Fax: (61 2) 6622 6404

To Whom It May Concern,

email: edonsw@edo.org.au
web: www.edo.org.au/edonsw

Re: Heritage Act Review

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the review of the *Heritage Act 1977*. The EDO is a community legal centre specialising in public interest environmental law. The EDO has 20 years experience in litigating environmental matters and participating in environmental law reform processes.

The EDO recognises the importance of heritage to the people of NSW, whether it is of cultural, environmental or indigenous importance. In this vein, the EDO supports a comprehensive and robust heritage framework. The *Heritage Act 1977* has gone some way to achieving this by implementing a heritage scheme with significant protections, however there are some shortcomings. It is essential that there is strong heritage protection legislated at a state level, given the streamlining of the heritage listing provisions under national legislation.¹

The EDO makes comment on the following Terms of Reference:

2. *Strengthening the integration of heritage provisions with the Environmental Planning and Assessment Act (both at the plan making and development control levels); and*

5. *Consideration of local heritage processes and whether they warrant improvement.*

1. Strengthening the integration of heritage provisions with the Environmental Planning and Assessment Act

The EDO supports the substantive integration of *Heritage Act 1977* provisions into the planning regime. This currently works reasonably well for Part 4 developments. Under section 91 of the *Environmental Planning and Assessment Act 1979*, where a development involves interference with an item of State heritage, a heritage permit under section 57 of the *Heritage Act 1977* is required in addition to development consent granted by a local council. Therefore, any development that is likely to significantly affect a heritage item may not proceed unless the Heritage Council agrees to grant a permit. This ensures significant protection for the items listed on the State heritage register.

¹ See EDO Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006* - 27 October 2006, pp 15 - 19.



However, the situation is significantly different for Part 3A projects. Section 75U of the *Environmental Planning and Assessment Act 1979* stipulates that permits that would be required under the *Heritage Act* do not apply to approved major projects under Part 3A. This exclusion is part of a broader recent trend of sidelining concurrence and integrated approval requirements in the planning system and centralising power in one person, the Minister for Planning. The consequence of this is that heritage considerations may be validly disregarded when assessing a major project. The extent of any assessment of heritage impacts lies therefore at the discretion of the Director-General for Planning. This seriously undermines the effectiveness of the *Heritage Act*, as State listing is essentially meaningless. Therefore, to strengthen the integration of heritage provisions into the *Environmental Planning and Assessment Act 1979*, there is a need to ensure that heritage items are protected, or at the very least are mandatory considerations, under Part 3A. This would involve reinstating the integrated approval role of the Heritage Council as a means of curtailing the wide discretion currently exercised by the Director-General and the Minister for Planning.

2. Consideration of local heritage processes and whether they warrant improvement

The EDO is concerned about the level of protection currently given to items of local heritage. The *Heritage Act* is not concerned with items of local heritage, leaving their management to local councils. The EDO receives numerous calls on our free legal advice line from members of the public who are dissatisfied with the level of local heritage protection. Their complaints usually fall into two main categories: first, a failure by councils to list items of local heritage value in their Local Environment Plans; and second, councils giving approval to demolish or alter items of local heritage.

The first problem arises because unlike the *Heritage Act*, the *Environmental Planning and Assessment Act 1979* contains no formal process for listing items of local heritage significance. Often, councils will not list a property on the local heritage register when owners object. As there are no mandatory factors to have regard to when a nomination is made, councils retain a wide discretion in deciding whether or not to list an item. This has meant that many locally significant items have not been listed. A solution would be to require councils to go through a formal evaluation process when an item is recommended for local heritage listing. This will involve amendments to the *Environmental Planning and Assessment Act 1979*. These amendments should apply to both indigenous and non-indigenous heritage. Guidelines from the Heritage Office on the listing of local heritage would also be useful. Although there are provisions in the *Heritage Act* which allow Councils to list aboriginal heritage (consistent with their obligations to protect indigenous heritage in their area), the provisions are not effectively used as councils assume such heritage is covered by the register of aboriginal heritage provisions under the *National Parks and Wildlife Act*. EDO would support further education and resources for local councils to more effectively engage in listing indigenous heritage.

The second issue, concerning councils giving approval to applications to demolish items of local heritage, is a consequence of the discretion exercised by councils in their consideration of development applications. Section 79C of the EPA Act requires councils to consider the provisions of Local Environment Plans when deciding whether to grant consent to a development application. Hence, as long as a council can show that it had regard to an item's local heritage listing, it can validly approve an application to demolish it.



This contrasts markedly with the position for items of State heritage significance. The protection given to State heritage is stronger for two reasons. First, where an item of State heritage significance may be affected by a development, a proponent will require a permit from the Heritage Council in addition to a development consent. In considering whether to grant consent, the Heritage Council must consider a variety of factors, including whether the application, if approved, would affect the significance of the item, as well as public submissions made. Secondly, section 63 of the *Heritage Act* makes it clear that where an application is made to demolish the whole of a heritage listed building or work, the Heritage Council *must refuse* to grant approval, except where the item poses a danger to persons. This effectively ensures that State listed heritage items cannot be destroyed, except in exceptional circumstances.

In light of the above, the EDO recommends that the *Heritage Act* be amended to require approval from the Heritage Council for applications to demolish or damage local heritage items. This will ensure that applications to harm heritage items will be subject to the same level of scrutiny as State heritage items. It will also mean that councils' discretion is appropriately curtailed. Currently, the Heritage Office has no power to stop local councils from consenting to the demolition of local heritage. This will require an amendment to s 91 of the *Environmental Planning and Assessment Act 1979*.

A final point to be made is that there is a common perception amongst councils, and indeed the community, that heritage listing renders a property useless. This is certainly not the case, as there are social and individual benefits that may result from a listing. To assist in altering this perception, the EDO recommends that heritage agreements under the *Heritage Act* be extended to items of local heritage. Under Section 40, a heritage agreement in respect of an item can be made between the landowner and the Minister for Planning. An agreement can include, *inter alia*, the provision of financial advice and assistance to the landowner in conserving the item. This provides a financial incentive to landholders to protect locally-listed heritage items. It might also encourage people not to object to the heritage listing of their property, which in turn will make a council more inclined to list an item on its local heritage register.

Should you have any questions regarding this submission please contact Robert Ghanem on (02) 9262 6989.

Yours sincerely
Environmental Defender's Office (NSW) Ltd

Rachel Walmsley
Policy Director



An independent public interest legal centre specialising in environmental law