

NATIONAL TRUST OF AUSTRALIA (WA) SUBMISSION



WESTERN AUSTRALIA HERITAGE BILL 2015 SEPTEMBER 2015

1.0 INTRODUCTION

The National Trust of Australia (WA) supports the review of state heritage legislation to ensure it is robust, fair and transparent. As a statutory agency with regulatory powers, it is essential the Heritage Council responds positively to community, private and government expectations as well as maintaining best practice in the protection of heritage places. In addition, heritage legislation and its implementation must also support the role of stakeholders including local government authorities and other agencies in the management, conservation and interpretation of heritage places.

The proposed Bill achieves greater certainty for owners and provides clarity of the role of the State Heritage Office in relation to other state government agencies. The National Trust welcomes the strengthening of regulatory powers of the Heritage Council to deal with demolition by neglect and to retain the substantial penalties against those who deliberately damage significant heritage places. Substantial changes to the function and powers of the Heritage Council and the implications of these have also been addressed as part of this submission.

This submission has been prepared in two parts:

- i. Principal Observations
- ii. Detailed Comments.

2.0 PRINCIPAL OBSERVATIONS

The National Trust of Australia (WA) has previously been consulted in regard to major heritage issues and is keen to reinforce its relationship with the Heritage Council and the State Heritage Office, including the clarification of roles and responsibilities.

However, there are reservations that the Bill establishes possible conflicts in the role of the Heritage Council. The Bill continues the previous regulatory functions of the Act in terms of providing advice to decision makers (noting these decision makers are required to adhere to the advice of the Heritage Council), the issuing of Protection and Repair Orders (formerly Conservation Orders) and the administration of the State Register of Heritage Places and its statutory implications. However, the proposed legislation expands significantly the powers of the Heritage Council, which could create potential conflicts with its core role as a regulatory and advisory body. An example of this is where the Bill proposes the Heritage Council act as manager and developer of heritage places (Section 14(2)(a),(b),(c)) as well as provide 'consultancy, management, advisory or other services for profit' (Section 14(2)(f)). The perceived conflict is that the Bill seemingly allows the Heritage Council to act as a regulator, as well as a manager, developer and consultant.

The combination of these roles represents a potential conflict of interest which is not replicated in any other state or territory Heritage Council in Australia. In addition, reviews of existing heritage Acts in Victoria and Queensland, which are currently underway, do not consider these functions or responsibilities to be appropriate in the context of their specific regulatory and advisory role in the

conservation of heritage. Organisations such as the Sydney Living Museums (formerly Historic Houses Trust)¹ in New South Wales and Working Heritage (formerly Mint Inc.)² in Victoria are examples of more appropriate models which involve government organisations or committees. These provide management services of public heritage assets on behalf of the government, but are separated from regulatory agencies.

In regard to comparable overseas context, English Heritage was recently split into two separate organisations (English Heritage and Historic England), resulting in a clear separation of regulatory and property management/development roles. A similar action occurred in Western Australia in the environmental sector with the split of the Department of Environment and Conservation into the Department of Environmental Regulation (regulator) and the Department of Parks and Wildlife (manager). These examples illustrate the inherent potential conflict of combining these roles and acknowledge the inappropriateness of this structure for government agencies.

The proposed powers of the Heritage Council, as stated in the Bill (Section 14), will create direct competition with the private and community sector which is in contrast to Government's efforts to facilitate increased service provision by not-for-profits and as outlined in the 'Delivering Community Services in Partnership Policy' (2011) document which states, 'As demand for services in our community continues to grow, there is a role for Government in supporting and building the capacity of these organisations to respond. Accordingly, the public sector is moving increasingly toward acting as a facilitator of services, rather than as a direct provider' (Hon Colin Barnett, May 2011, p 1). With public-private partnerships occurring across the entire public sector and a defined approach for the government to facilitate a greater role of not-for-profits, it is unusual that the Bill presents a seemingly inconsistent approach to established government policy and proposes additional powers for the Heritage Council, which will require additional resources, to replicate and provide services already undertaken by the community and private sectors.

Finally, the Bill has a considerable emphasis on regulations rather than providing greater detail within the legislation. There is an absence of definitive obligations, with an overuse of 'may' rather than 'shall'. As regulations are proposed to provide details for the mechanisms of the future Act, there is a greater need to ensure these are clearly stated and fairly implemented. While the Trust notes that reliance on regulations is a feature of modern legislation, that reliance could also result in significant weaknesses, as an absence of appropriate regulations may render entire sections of the Act unable to be implemented and could undermine important functions. It is also important that the language used reflects the authority of the legislation. The Trust considers that statements of policy and principle should always be made in the statute itself, leaving to regulations the provision of machinery by which policy is to be implemented.

¹ Refer to <http://sydneylivingmuseums.com.au/about-us>. Sydney Living Museums are part of the NSW Office of Environment and Heritage within the NSW Department of Planning and Environment.

² Refer to <http://www.mintinc.com.au/>. Working Heritage is a Committee of Management appointed by the Minister for Environment, Climate Change and Water and administered by the Department of Environment, Land, Water and Planning.

3.0 DETAILED OBSERVATIONS AND COMMENTS

3.1 Aboriginal and natural heritage values

The Bill states in Section 9(2) that the Act does not apply to a place '(a) which comprises only the natural environment'; or '(b) whose cultural heritage significance derives solely from its connection with Aboriginal tradition or culture'. The exclusion of solely natural or Aboriginal heritage places in the Bill dismisses a holistic approach to heritage places. The justification for this refers to the provision of clauses in other legislation such as the *Aboriginal Heritage Act 1972*. However, it will be important for the Bill to provide details regarding how these values will be managed or how consultation with other agencies will occur. Separate legislation for Aboriginal, natural and historic heritage presents obvious challenges. The National Trust is concerned there may be potential for natural or Aboriginal values to be discounted or devalued if inadequate consultation and assessment is undertaken. It is therefore essential for interactions between Aboriginal and State Heritage legislation to be formally embedded with an agreed process.

3.2 Membership of the Council

The Trust agrees that it is desirable for members of the Council to have the skills as enumerated. However, removal of third party representatives may be perceived as being inconsistent with the independence and the decision-making integrity of Council. While regulations will allow for the removal of members of the Council, the independence of the Council may be further eroded if the statute itself does not set out the grounds upon which this may occur.

3.3 Functions of the Council

The Trust notes substantial changes to the functions and powers of the Heritage Council in the Bill in regard to property management, development and other services. This is a considerable departure from the 1990 Act which states, 'in general, not to act as a custodian except upon an interim basis' (Section 7(1)(g)). Section 13 of the Bill now allows the Council:

'(h) to undertake or provide for the Conservation of places owned by the State that are, or may be, of cultural heritage significance'

'(i) to acquire, own, conserve or arrange for the conservation of, lease, manage and dispose of places that are or may be of significance to the cultural heritage of Western Australia'.

No other state or territory Heritage Council has these functions or powers and the Trust is not aware of attempts to incorporate these as part of recent reviews of legislation being undertaken in Victoria and Queensland. Examples taken from overseas and locally in other government departmental areas suggest that the combination of roles of regulators and managers/developers has been unsuccessful and has led to the clear separation of these functions. It is unclear from the proposed Bill, as well as the Information Paper (August 2015), why this approach has been taken.

In addition, Section 14(2) provides the following powers to the Heritage Council:

- (a) acquire, hold manage and dispose of real and personal property; and
- (b) carry out, or cause to be carried out, the conservation and development of a place that is owned by the Council;
- (c) grant a lease or licence in respect of property that is owned by the Council;
- (f) use its expertise and resources to provide consultancy, management, advisory or other services for profit or otherwise

The provision of such functions and powers to the Heritage Council is a departure from current state government policy and potentially creates a duplication of services already on offer in private and other sectors. In addition, the Heritage Council will be reliant on the state government to fund these activities, rather than from grants or private sponsorships which are currently available to the National Trust and other organisations. The effective performance of such functions would seem to require an increased investment of public resources and may be a less cost-effective way to carry out the same activities.

Section 7(1)(f) of the current Act includes consultation with the 'National Trust and other relevant persons to undertake, or to arrange, the recording, conservation and presentation of places that have cultural heritage significance or special interest'. While there is no reference to this in the Bill, the Trust wishes to maintain this significant involvement.

Section 15 retains the Council's power by which any of its functions may be delegated (Section 15(1) of the Bill). The National Trust received delegated authority under Sections 7(e), 7(f), 7(g), 11(2), 78 and 79 of the 1990 Act as gazetted in 1993. It is understood this delegation will be extinguished under a new Act. The National Trust's objectives and values ensure that programs and projects at heritage places which are the responsibility of the Trust meet the highest standards and best practice. It should be noted that the National Trust has for many years forwarded details of all projects affecting places on the State Register to the State Heritage Office, regardless of this delegation. Therefore, it is strongly recommended that this delegation be gazetted under the new Act. The Trust understands that this is the intention.

3.4 The State Register of Heritage Places

The National Trust supports the proposed streamlined process for the registration of places in the State Register. The current two-step process (Interim and Permanent), as stated in the 1990 Act, is not considered necessary as a single process will provide a more efficient response to assessments.

The new process, as described in the Bill, retains public consultation and notification of new entries. The Trust notes that specific references to the Australian Heritage Commission (now Council), the National Trust, local governments and community organisations have been deleted (Section 47(3)(a), 1990). Regulations are proposed to define the public consultation process and the Trust would encourage the Heritage Council to continue to consult as widely as possible.

The National Trust supports Section 45(1)(b) by which removal of entries needs the approval of both Houses of Parliament.

3.5 Protection Orders and Repair Orders

Generally, the National Trust supports the strengthening of regulatory powers of the Heritage Council in terms of protection and repair orders as this addresses issues related to demolition by neglect. However, this section requires more detail and clarity, particularly in relation to definitions and measures for the following:

Section 51(2) will provide that a protection order may contain prohibitions relating to: (e) anything which, in the opinion of the Minister, is likely to cause disturbance to the land or any plant or species of animal at the place'. The Bill specifically excludes the consideration of natural heritage values (Section 9(2)). Whilst natural heritage may be included as part of a historic

cultural heritage place, it is unclear why consideration of significant plant or animal species is dealt with in this way in the Bill, having regard to the asserted justification that there is other legislation and other government agencies to consider this. A holistic approach to values that acknowledges possible natural and Aboriginal values alongside historic significance should be incorporated into the Bill, in which case the inclusion of Section 51(2)(e) will be justified.

Section 57 Repair notice states a repair order will be issued if '(a) a registered place suffers from neglect of a prescribed kind or extent'. Importantly, this section will assist in managing the issue of demolition by neglect and deliberate actions by owners to allow significant heritage places to be exposed to damage. However, this section should also incorporate an explanation as to the circumstances to which an order may be made and the parameters by which the potential damage will be judged.

Section 58(2)(b)(ii) refers to the likelihood of 'undue hardship' to the recipient of a Repair order. There have been situations in Western Australia where owners of heritage places have argued for substantial modification or demolition of heritage places based on economic concerns. However, there is no requirement for owners or local government authorities or other agencies to provide documentation to support this argument. The National Trust suggests that the provision will only be workable if references to 'hardship' are adequately identified, with the onus on the owner or responsible agency to provide information to support this, similarly to the expectation that owners provide an engineer's report to justify demolition for structural reasons.

Section 58(3)(b) states the Minister is not to make an order for 'a place that is owned by a public authority that is established under, or performs functions under, an Act, except with the concurrence of the Minister to whom the administration of the Act concerned is committed'. This safeguard may evaporate if the Minister who has the administration of the Act governing the public authority is the Heritage Minister.

3.6 Decision makers

Under Section 67, a 'decision maker is not to make a decision which would, or would be likely to, adversely affect to a significant extent a place mentioned in section 65(1)'. Approvals for developments must be consistent with advice provided by the Heritage Council, unless 'the decision maker finds that there is no feasible and prudent alternative to the decision made' (Section 67(2)). The National Trust supports Section 67, however the sub-section needs to be strengthened to ensure due consideration of the advice of the Heritage Council. If advice from the Heritage Council is not followed, will the penalties as described in Part 11: Enforcement of the Bill, be applicable.

Section 78 which enables the Minister, by a simple notice published in the Government Gazette, to make inapplicable or without effect the provisions of a written law in relation to a specified registered place in the circumstances described in sub-section (4) is extraordinarily wide. If such a power is required, the Trust recommends that it be formulated so that it does not in that way override other statutory provisions.

3.7 Local Government

Municipal Heritage Inventories have been modified to Local Heritage Surveys in the Bill. This encompasses the way this tool has evolved and has been utilised by local government authorities. The expanded definition from 'buildings' (Section 45(1), 1990 Act) to 'places' is

supported. The publication of guidelines is proposed to assist local governments to prepare these surveys. The Trust therefore recommends that an holistic approach be taken by local governments to ensure places of historic, Aboriginal and natural heritage values are considered. This adheres to the purpose of preparing these surveys to identify and record places that are, or may become, of cultural heritage significance to a local government district (Section 92(a)) and assist the local government in making and implementing decisions that respect these cultural heritage values (Section 92(b)).

3.8 Impacts on existing Acts

The National Trust is considered a 'statutory authority' under the *Financial Management Act 2006*. It seems that the reference to a 'state agency' under Part 9 of the Bill, applies to the Trust. As to the impact on the Trust's Act, however, the Bill states in Section 124 'Nothing in this Act affects the operation of...any other written law dealing with the protection or conservation of places or things having cultural heritage significance of a particular kind'. This is acceptable to the Trust if it is agreed that the *National Trust of Australia (WA) Act 1964* is covered by this description. However further clarification regarding the impact of Part 9 (on the National Trust) and on Section 124 would be helpful. Perhaps the simplest solution would be to include the National Trust Act in the statutes listed in the section.

3.9 Enforcement

The Trust is concerned by the fact that a police officer is automatically an inspector, although not appointed under section 105, with all the powers which go with that office, not necessarily to be exercised only in aid of an appointed inspector.

4.0 CONCLUSION

The National Trust commends the efforts of the Heritage Council in working towards an open and transparent new Heritage Act. The assessment process for the State Register of Heritage Places has been made more efficient, regulatory powers of the Council are clearly defined and articulated, and penalties for deliberate detrimental actions to heritage places are retained. However, the Trust has concerns regarding potential conflicts of interest as a result of the additional functions and powers as presented in the Bill. Combining regulatory and management/developer roles within a single heritage agency conflicts with established practice throughout Australia and which has been deliberately dismantled in comparative agencies both locally and overseas.

Furthermore, the Trust reiterates the importance of an holistic approach to heritage places, including natural and Aboriginal places of significance.

The National Trust recommends that references to property management, development and provision of for profit services which compete with existing community and private service providers should be modified in order to maintain the regulatory and advisory integrity of the Heritage Council.

The National Trust has appreciated the opportunity to provide its feedback, through this submission, for consideration in the deliberations of the final draft of the Heritage Bill 2015 to be introduced to Parliament.