

3 July 2021

Director – Social Issues Committee
NSW Legislative Council

Online submission

NSW Legislative Council Social Issues Committee – Review of the Heritage Act 1977

Dear Committee Members

I write in relation to the NSW Legislative Council Social Issues Committee – *Review of the Heritage Act 1977* and, specifically, the accompanying *Discussion Paper*.

The Urban Taskforce welcomes the timely review of this now outdated and often mis-used piece of legislation.

Not only does NSW have the slowest and most complicated planning system, with the highest fees and charges in the country; Urban Taskforce members are increasingly advising that the current Heritage legislation and decision-making framework is inconsistently and unfairly applied.

Heritage has, as a concept, been weaponised by groups of well organised local activists to effectively frustrate or oppose development. This anti-development agenda has contributed to a crisis in housing supply and the unsustainable blow-out in housing prices.

It should be noted at the outset that the process and outcomes for development projects, where the State or Local government is the land-owner, differs greatly to that of the private sector developer.

For example, Government projects involving heritage considerations, such as the Sirius redevelopment or the Ryde Civic Centre, have been dealt with expeditiously and delivered a development positive outcome. Like so much in the Heritage field, the decision making process and rationale for decisions appears to be random (at best) or political (at worst). The failure of the Heritage Council to list and protect the Ryde Civic Centre, with all its physical prominence, architectural modernist design merit and cultural significance, is lamentable.

This contrasts with the experience of many private investor owners that are often put through a torturous and often unexpected process of interim listings and reviews with the eventual outcome being a State Heritage listing that renders any meaningful development unfeasible.

Recent decisions and advice from the NSW Government under the current legislation have been quite random and based on a highly questionable merit assessment.

Inconsistent assessment of heritage value against the broader public benefit is not in the community's best interests. Ambiguous and randomly applied criteria make current and potential property investors in NSW extremely nervous.

The inconsistency of decision making is apparent in reviewing the decision making around the consideration of heritage value of the MLC Building at North Sydney and the Ryde Civic Centre.

Both fine examples of post-World War II "modernism", the Heritage Council was happy to see the Ryde Civic Centre demolished and re-developed – despite, as noted above, its prominence, cultural history and architectural merit; yet the same body saw fit to State Heritage list a privately owned building, not in a prominent location, which has never been a place of local significance. *Attachment 1* provides a more detailed comparison. The assessment undertaken by the Heritage Council failed to even consider the Quantity Surveyor analysis of the costs associated with the rectification of the many issues associated with the Miller Street MLC Building.

The Minister referred this matter to the Independent Planning Commission. Unfortunately, this body is not resourced with personnel or staff capable of undertaking the assessment they were asked to undertake. Some of the members of the IPC were directly conflicted and only removed themselves from participation in the review after this was pointed out to the Commission.

The Minister's ultimate decision to State Heritage list the MLC building at North Sydney imported further risk and cost to investment decisions in Sydney (a matter beyond the scope of consideration for the IPC). Adding a Heritage listing to a building after the site has been *up-zoned* and planning authorities had encouraged the new owner to spend millions of dollars on design plans, is very disappointing and very costly.

This situation renders the purchase of a site in Sydney for development akin to an exercise of Russian Roulette and puts the urban renewal of Sydney at risk.

The composition of membership of the Heritage Council staff and leadership should be changed to be balanced in a way that allows for heritage listing proposals and considerations to be dealt with consistently, irrespective of whether the land-owner is a private homeowner, landowner or developer, or public authority. Further, expertise of Council members must allow for considered appraisal of the economic impacts of proceeding or not proceeding with a listing or de-listing.

Accordingly, **Urban Taskforce recommends** that requirements relating to the composition of the Heritage Council be amended to ensure a more balanced representation of interests and backgrounds and a sufficient level of expertise to allow for robust discussion and evidenced based discussion.

Notwithstanding the serious concerns of the Urban Taskforce with the current Heritage Act and decision making framework, the Urban Taskforce does support the protection of items of genuine heritage significance.

However, heritage identification and listing need to be in the interests of the broader community, be evidenced based and, be dealt with proactively – rather than reactively once a planning application is made.

If the Heritage Council considers that the MLC Building at North Sydney, or any other site for that matter, should be listed, it should have been pro-active in its nomination. The fact that the application was reactive demonstrates the urgent need for the current review and a dramatic change in practice. A reactive nomination, perhaps at the time the site was up-zoned, would have saved the owner millions of dollars.

Heritage consideration should not be re-active.

Consistent with other recent reforms to the land-use planning system in NSW and beyond, **Urban Taskforce recommends** that heritage consideration be proactive and only undertaken at the strategic planning stage.

Further, **Urban Taskforce recommends** that the relevant sections of Parts 3 and 4 of the *Heritage Act 1977* that allow for the reactive request for and issuing of Interim Heritage Orders be deleted and objective (d) of the objects of the Act relating to the interim protection of items, also be deleted.

Urban Taskforce welcomes the Discussion Paper's and the Committee's interest in exploring incentives for heritage activation and adaptive re-use.

Currently, there are very few incentives available to investors and developers to protect and activate heritage across NSW.

Urban Taskforce believes that it is critical that the NSW Government explores all opportunities to create jobs and support the property sector to deliver much needed new homes and office accommodation. The review of the Act presents an excellent opportunity to introduce transferable incentives to encourage innovative and responsive adaptive re-uses on and around items of heritage significance.

Accordingly, **Urban Taskforce recommends** the NSW planning framework be amended to include **transferable heritage floor space** incentives where heritage items have been retained and/or activated and there is a subsequent loss of yield and or additional building costs.

Further, for such a program to be commercially attractive to investors and developers, the scope of the transferability of incentives would need to be across sites and LGA boundaries. To ensure consistency of application, the scheme would need to be administered by the State Government.

In considering any improvements to Heritage legislation it is critical that the costs to a private landowner of having their land or structure State Heritage listed be assessed, and commensurate compensation be made.

A Heritage listing of a privately owned building is exactly the same as a new freeway being identified and delivered across a property. There is an immediate impact which is addressed through the Just Terms Compensation Act. With out the Heritage listing, the

market (and indeed the Valuer General – whose valuations are central to the determination of land tax payments and Council Rates), in the absence of a Heritage Listing, considers the Gross Floor area, the developable floor area, the height and set-backs associated with the planning controls, and the highest and best use for the site.

Clearly, once a Heritage order is placed on a building, this limits the potential for development and has a direct and immediate impact on the value of that land.

The difference in value (and the value of the lost opportunity) must be compensated.

Urban Taskforce recommends that, consistent with the approach of the Land Acquisition (Just Terms Compensation) Act 1991, property valuations are undertaken pre and post heritage listing and property owners are accordingly compensated. Compensation should be by way of cash payment. However, if this is not supported, a market based transferable “heritage floor space bonus” should be applied. This would have the effect of encouraging the preservation of genuine heritage assets, while not ripping the value-floor from under a legitimate purchase for the purpose of future development.

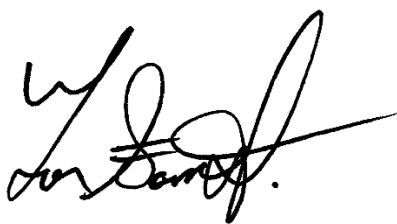
The Urban Taskforce notes opportunities to streamline the current heritage permit process. **Urban Taskforce supports** the proposal to identify thresholds for standard exemptions, fast track applications and standard applications for permits under the Act. Additionally, **Urban Taskforce recommends** that industry be directly consulted in the setting of thresholds.

Table 1 includes a summary of all Urban Taskforce recommendations.

Attachment 2 comprises Urban Taskforce responses to relevant focus questions.

The Urban Taskforce is available to appear before Committee Hearings to assist the Committee in finalising its report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tom Forrest', written in a cursive style.

Tom Forrest
Chief Executive Officer

Table 1 – Summary of all Urban Taskforce recommendations

	Urban Taskforce recommendation
1.	<p>Urban Taskforce recommends that requirements relating to the composition of the Heritage Council be amended to ensure a more balanced representation of interests and backgrounds and a sufficient level of expertise to allow for robust discussion and evidenced based discussion.</p>
2.	<p>Consistent with other recent reforms to the land-use planning system in NSW and beyond, Urban Taskforce recommends that heritage consideration be proactive and only undertaken at the strategic planning stage.</p> <p>Further, Urban Taskforce recommends that the relevant sections of Parts 3 and 4 of the <i>Heritage Act 1977</i> that allow for the reactive request for and issuing of Interim Heritage Orders be deleted and objective (d) of the objects of the Act relating to the interim protection of items, also be deleted.</p>
3.	<p>The review of the Act presents an excellent opportunity to introduce transferable incentives to encourage innovative and responsive adaptive re-uses on and around items of heritage significance.</p> <p>Accordingly, Urban Taskforce recommends the NSW planning framework be amended to include transferable heritage floor space incentives where heritage items have been retained and/or activated and there is a subsequent loss of yield and or additional building costs.</p> <p>Further, for such a program to be commercially attractive to investors and developers, the scope of the transferability of incentives would need to be across sites and LGA boundaries. To ensure consistency of application, the scheme would need to be administered by the State Government.</p>
4.	<p>Once a Heritage order is placed on a building, this limits the potential for development and has a direct and immediate impact on the value of that land.</p> <p>The difference in value (and the value of the lost opportunity) must be compensated.</p> <p>Urban Taskforce recommends that, consistent with the approach of the Land Acquisition (Just Terms Compensation) Act 1991, property valuations are undertaken pre and post heritage listing and property owners are accordingly compensated. Compensation should be by way of cash payment.</p>
5.	<p>The Urban Taskforce notes opportunities to streamline the current heritage permit process. Urban Taskforce supports the proposal to identify thresholds for standard exemptions, fast track applications and standard applications for permits under the Act. Additionally, Urban Taskforce recommends that industry be directly consulted in the setting of thresholds.</p>

6.	<p>With the supply of greenfield land for new development, in Sydney, being finite and the escalating issue of housing supply and subsequent impact of affordability, it's imperative that well located, serviced sites and properties are efficiently used. Opportunities for adaptive re-use of items of State Heritage significance should be strongly encouraged and clearly facilitated by the decision making framework.</p> <p>Urban Taskforce recommends that objective 'e' of the Heritage Act be amended to read:</p> <p><i>“to <u>facilitate</u> the adaptive reuse of items of State heritage significance”</i></p>
7.	<p>Urban Taskforce recommends targeted engagement with the development industry to extend the scope of minor impact works on Heritage items that do not require a permit.</p>

Attachment 1 – Heritage Listing Comparison

Ryde Civic Centre, Ryde



Outcome:

The Heritage Council allowed Ryde Council to completely knock down and redevelop the Ryde Civic Centre

Description:

- Council owned
- classic mid-century office building
- designed by Buckland and Druce,
- example of the post-World War 2 International Style by having a subtle curve and gridded glazing pattern on a curtain-wall facade
- dramatic location on a ridge in Ryde
- symbolic as the centre of governance for the Ryde area

MLC Building at 105 Miller St North Sydney



Outcome:

State Heritage listing made after:

- the CBD had been up-zoned by the Council and supported by the elected Council representatives
- the existing building had not met the heritage listing criteria in the Government's 2013 Thematic Listing Program
- an un-challenged subject matter expert Quantity Surveyor assessment of the costs associated with preservation of the existing structure was wantonly ignored by Heritage NSW and by the IPC (which proved to be singularly inadequate in process and rigour)
- a NSW Government funded Metro station has been approved adjacent to the site
- local authorities encouraged the new owner to spend millions of dollars on design plans to redevelop the site, and
- multiple surveys demonstrate that a silent majority - at least 65% of the local community - overwhelming support the Owner's redevelopment plans

Description:

- Privately owned
- 1950's office building, with no cultural or civic significance
- Does not fit in well with the context of the setting as North Sydney is a high-rise CBD – a point highlighted by Council
- Building is flood prone - rendering it incapable of reasonable use under the terms of the Heritage Act
- Cost of refurbishment identified by QS WT Partnership as being circa \$213 million

Attachment 2: Urban Taskforce responses to Focus Questions of relevance to our members

◆ Focus Question 1: What should be the composition, skills and qualities of the Heritage Council of NSW?

The Heritage Council and Heritage NSW should represent the broader community in the advice being prepared and the recommendations being made. This will allow Government to make more informed decisions that better represent the people of NSW, now and into the future.

The Heritage Council in particular should represent the interests of the younger and future generations and should not be dominated by heritage obsessed architects and consultants.

Further, the composition of the Council should be balanced in a way that allows for heritage listing proposals and considerations to be dealt with consistently irrespective of whether the land-owner is a private homeowner or developer, or public authority.

The Act currently sets out a range of qualifications, knowledge and skills including those with property economic and building and development background that, in theory, should allow for decision making that considers broad cost impacts of heritage protection or adaptation. However, the reality is that over time there has been a focus on members having a background in architecture, conservation and/or local government. This focus together with the mandated requirement for further representation from National Trust is not delivering balanced advice to the Minister.

Accordingly, **Urban Taskforce recommends** that requirements relating to the composition of the Heritage Council be amended to ensure a more balanced representation of interests and backgrounds and a sufficient level of expertise to allow for robust discussion and evidenced based discussion (including on the economic impacts of proceeding or not proceeding with a listing or de-listing). This could be achieved by explicitly stating the number of experts/representatives from each field/background in section 8 of the Act.

◆ Focus Question 3: Are the objectives of the Heritage Act still relevant? Urban Taskforce notes the objects of the Act are as follows:

- (a) to promote an understanding of the State's heritage,*
- (b) to encourage the conservation of the State's heritage,*
- (c) to provide for the identification and registration of items of State heritage significance,*
- (d) to provide for the interim protection of items of State heritage significance,*
- (e) to encourage the adaptive reuse of items of State heritage significance,*
- (f) to constitute the Heritage Council of New South Wales and confer on it functions relating to the State's heritage,*
- (g) to assist owners with the conservation of items of State heritage significance.*

Urban Taskforce recommends that the objective 'd' relating to the interim protection of items be deleted. Interim protection of a *place, building, relic, moveable object or precinct* that may or may not have heritage significance is a reactive tool to stifle new development. Recent examples (as outlined above) show that interim heritage orders are

utilised by anti-development councils and/or activist interest groups to delay and potentially put to an end to otherwise worthy and supported development.

Further **Urban Taskforce recommends** that objective 'e' be amended to read:

"to facilitate the adaptive reuse of items of State heritage significance"

There are over 37,000 items on the NSW State Heritage Inventory with the majority of these located in Sydney. With the supply of greenfield land for new development, in Sydney, being finite and the escalating issue of housing supply and subsequent impact of affordability, it's imperative that well located, serviced sites and properties are efficiently used. Opportunities for adaptive re-use of items of State Heritage significance should be strongly encouraged and clearly facilitated by the decision making framework.

◆ **Focus Question 4: Does the Act adequately reflect the expectations of the contemporary NSW community?**

No. The contemporary NSW community includes the younger and future generations and their need for new development to deliver new homes and jobs. Currently the Heritage Act is being used to frustrate, not support, much needed new development.

◆ **Focus Question 5: How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?**

State level, systemic, transferable heritage incentives together with industry innovation can deliver considerable opportunities for heritage activation.

The commercial reality is that adaptive re-use and development around heritage items adds an additional cost - that is ultimately passed on to the new home or business owner. To offset these costs development incentives are required.

Urban Taskforce recommends that the NSW planning framework be amended to include transferrable heritage floor space incentives where heritage items have been retained and/or activated and there is a subsequent loss of yield and or additional building costs. For such a program to be commercially attractive to investors and developers the scope of the transferability of incentives would need to be across sites and LGA boundaries and as such would need to be administered by the State Government.

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

Urban Taskforce supports any opportunity to offset the costs of private heritage ownership.

◆ **Focus Question 7: What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?**

N/A

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

and

◆ **Focus Question 9: How should heritage items that are residential properties be accommodated under a proposed category scheme?**

The more nuanced approach to listing categories proposed is broadly supported in so far as it acknowledges that a "standard residential property" does not have the same heritage significance as the Hyde Park Barracks or the Myall Creek Massacre and Memorial Site, for example.

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

No. Unfortunately the practical reality of community engagement in NSW is that it is dominated by a cohort who oppose growth and change, largely on the basis of a perceived need to protect the (already escalating) value of their home and investment.

The self-interest of the vocal few is driving inter-generational inequity, with this group opposing on all fronts any change to "local character" which in turn limits the delivery of supply of new housing. The result being young people are locked out of the housing market. Further community engagement on heritage would only add to the 'fire power' of heritage being used as a 'weapon' against new development being able to deliver much needed new homes and jobs.

Instead, a refreshed NSW Heritage Council and appropriately staffed NSW Heritage Office (see response to Focus Question 1) should be empowered to make evidence based assessments and recommendations to Government as to items to be included or removed from the State Heritage Register.

◆ **Focus Question 11: Would streamlining enhance the listing process?**

Any streamlining of a process that sits aside the most cumbersome planning system in Australia is broadly welcomed.

Urban Taskforce suggests that "periodic" reviews of heritage be aligned to the five yearly reviews of District Plans. (This recommendation is further discussed in our response to focus questions 14 and 15.)

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

Urban Taskforce supports the proposal to identify thresholds for standard exemptions, fast track applications and standard applications for permits under the Act. **Urban Taskforce recommends** that industry be directly consulted in the setting of thresholds.

◆ **Focus Question 13: Are the current determination criteria for heritage permits still appropriate?**

No, the current determination criteria can be confusing, and cost thresholds are not always commensurate with impact. Accordingly, **Urban Taskforce recommends** targeted engagement with the development industry to extend the scope of minor impact works on Heritage items that do not require a permit.

◆ **Focus Question 14: How could we improve heritage consideration within land use planning systems?**

Heritage consideration should not be re-active. Consistent with other recent reforms to the land-use planning system in NSW and beyond, **Urban Taskforce recommends** that heritage consideration be proactive and only undertaken at the strategic planning stage.

The current provisions in the Act that allow for the issuing of Interim Heritage Orders on the basis of State and/or local significance should be removed. Current interim heritage order provisions are predominantly used by anti-development, activist interest groups (sometimes led by architects with a vested interest). These interest groups do not represent the broad community interest in stymieing what is otherwise an appropriate development.

Accordingly, **Urban Taskforce recommends** that the relevant sections of Parts 3 and 4 of the Heritage Act that allow for the reactive request for and issuing of Interim Heritage Orders be removed.

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

Yes. The Heritage Council on the advice of Heritage NSW should review and update the heritage database in the context of other important land use planning considerations, such as housing and jobs targets. This work could be undertaken as part of the regular review of District Plans and would allow for the addition or removal of items if heritage significance to guide Councils' preparing their LSPs and subsequent LEPs.