

## **Draft submission**

# **Parliamentary inquiry into the review of the Heritage Act 1977**

June 2021

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## Opening

Thank you for the opportunity to make a submission to the parliamentary inquiry into the review of the *Heritage Act 1977*.

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW canvassed the views of member councils to inform this submission, which remains in draft form until endorsed by the LGNSW Board. Any revisions made by the Board will be forwarded as soon as possible.

## Local government's role in heritage management

The ongoing retention, promotion and management of both built and Aboriginal cultural heritage is of significant interest and importance for local councils and the communities they represent.

Local councils are the responsible authority for the protection and ongoing compliance of locally significant heritage items listed under Local Environmental Plans (LEPs) and are thereby custodians of the majority of listed heritage items across the state. Furthermore, local government is a significant property owner of environmental heritage items, with many state and local heritage listed properties activated by local government for community benefit as community centres, libraries, childcare centres, sporting halls, museums and galleries, visitor information centres and tourist attractions.

Local government plays a significant role in promoting, incentivising and regulating the retention of locally significant heritage items, and in doing so, often bears significant financial and resourcing costs to run grant assistance programs, provide local heritage advice, undertake strategic planning and conservation, promote local and state heritage to a broader audience, as well as ensure compliance with heritage controls at a local level. Councils are also an important contributor of expert advice and information to inform the State Heritage Register.

While the *Heritage Act 1977* (NSW) relates primarily to state-listed built heritage items under the management of Heritage NSW, the intersections and impacts of state heritage legislation on key local government functions are both numerous and significant. Due to this significant impact, it is imperative that the views of local government on any amendments to the Act and other related legislation affecting both built environmental and Aboriginal cultural heritage are appropriately considered.

Local councils have legislated roles and responsibilities for local heritage under legislation including the *Heritage Act 1977*, *Local Government Act 1993*, *National Parks and Wildlife Act 1974* and *Environmental Planning and Assessment Act 1979*.

In particular, local government's legislated functions under the Heritage Act ('the Act') include:

- Referral of local development applications that impact on state-heritage items (under section 60 of the Act);
- Determination of development applications affecting state heritage items, where standard exemptions apply, under section 61 of the Act;
- Issuing and managing interim heritage orders (where delegated this power by the responsible minister<sup>1</sup>), under section 25 of the Act;
- Issuing stop work orders (where delegated this power by the responsible minister) under section 79C of the Act; and,

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<sup>1</sup> At present, the minister responsible for the *Heritage Act* is Special Minister of State, Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts.

- Formally recommending items for inclusion on the State Heritage Register, under section 166 of the Act.

Additionally, under both the *Heritage Act 1977* and the *Environmental Planning and Assessment Act 1979*, councils are tasked with identifying, assessing and managing heritage matters for Aboriginal cultural heritage (ACH) in relation to planning decisions made at both a local and state level.

LGNSW also publishes a Policy Platform<sup>2</sup>, setting out the consolidated advocacy positions of the local government sector (including on heritage matters), guided and amended by resolutions of the LGNSW Annual Conference. Relevant Conference resolutions are listed throughout this submission, and separately at **Appendix 1**.

LGNSW has received feedback from councils in developing this submission, which builds on positions supported by councils across NSW through resolutions of the LGNSW Annual Conference.

Collectively, councils have a wealth of knowledge and experience that can be used to guide and inform heritage legislation, policy, compliance, protection and activation across New South Wales. The recommendations made throughout this submission vary from the broad to the specific.

Importantly, our first overarching recommendation is that the NSW Government must closely collaborate with local government (and not merely consult as one of many stakeholders) in the development of any new heritage legislative framework for New South Wales.

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<sup>2</sup> LGNSW Policy Platform available at: [https://lgnsw.org.au/Public/Policy/Policy\\_Platform.aspx](https://lgnsw.org.au/Public/Policy/Policy_Platform.aspx)

## LGNSW Position

### 1. The need for an integrated heritage planning legislative framework in New South Wales

*Terms of reference (a), (b), (c) and (d)*

- **Focus Question 14:** *How could we improve heritage consideration within land use planning systems?*
- **Focus Question 15:** *Are there opportunities to enhance consideration of heritage at the strategic level?*

Strategic land use planning, development assessment, environmental management and regulatory compliance are core functions of local government. It is imperative that a modern heritage legislative framework is designed to make the work of local government, the Heritage Council of NSW, owners and proponents as easy as possible to manage and protect heritage items.

It is encouraging that Heritage NSW has *acknowledged* both the significant shift in the operating environment for development assessment and heritage protection in New South Wales since the inception of the *Heritage Act 1977* and associated legislation that form the local land use planning and development framework in New South Wales within its Discussion Paper<sup>3</sup> released in conjunction with this review.

LGNSW agrees in principle with the general position of the Discussion Paper in that the rate of legislative change to the Act has not kept pace with the rate of change in the way strategic land use planning and development is managed in New South Wales. This has led to inefficiencies, delays, duplication and unnecessary complexity to be able to achieve positive local planning outcomes.

It is critically important for the proper functioning of local development assessment, compliance and heritage protection processes that any future heritage framework is designed to ensure an efficient assessment and compliance process that reflects how heritage is managed in contemporary New South Wales, and reflects changes to the approach towards land use planning.

It is LGNSW's position that there is a need to design and develop any new heritage framework to be streamlined and reflective of, as far as possible, the *Environmental Planning and Assessment Act 1979*. This is needed to make the process of development assessment and environment management easier to understand and navigate, where referral and concurrence is required under the *Heritage Act 1977*.

**Recommendation 1:** The NSW Government must actively involve local government in the design of any amendments to the *Heritage Act 1977* and any other associated legislation that may result from this review.

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<sup>3</sup> *Review of NSW Heritage Legislation*, Discussion Paper, April 2021, available at: <https://www.heritage.nsw.gov.au/assets/A-Review-of-Heritage-Legislation-discussion-paper.pdf>, p. 6.

One of the twelve fundamental principles of LGNSW's Policy Platform is:

*Local government is best placed to lead and influence local and regional planning processes according to the needs and expectations of local communities.*

LGNSW strongly supports the integration and better consideration of locally led strategic planning policies and positions, such as adopted Local Strategic Planning Statements, Local Character Overlays, and local clauses within Local Environmental Plans as central considerations in heritage protection management. Local government's capacity to develop and deliver on the commitments to their communities within these strategic planning policies should be unencumbered.

A number of local councils that have provided feedback as part of this submission have expressed concern over an increasing number of state-wide planning policies and codes that in some instances, are jeopardising local councils' capacity to implement their own locally determined planning policies and strategies. Local councils express concern that the implementation of these state-wide, 'one-size-fits-all' planning policies such as the Low Rise Housing Diversity Code, can work to undermine the local heritage significance of heritage items and the intrinsic built form character within their local communities.

At the 2020 LGNSW Annual Conference, councils resolved:

#### **58 – Review of Planning Policies that threaten residential amenity**

That Local Government NSW lobbies the Department of Planning, Industry and Environment to urgently review various planning policies that threaten the amenity and heritage significance of the State's rural and regional towns and villages from developments such as seniors housing, aged care facilities, health service facilities, boarding houses and the new 2020 Low Rise Housing Diversity Code.

LGNSW strongly recommends that local government be actively involved in the legislative review and design process of any future heritage legislative framework, reflecting the important role of local government in heritage protection and management in New South Wales. It is critical that the views of local government are heard and understood in this process in order to not undermine local communities' own adopted strategic planning policies and local clauses for managing heritage. Furthermore, it is fundamentally important that any future heritage legislative framework works in concert with the proposed Design and Place SEPP<sup>4</sup> currently under consideration by the Department of Planning, Industry and Environment.

**Recommendation 2:** NSW Government agencies must work collaboratively together, and with local government, to ensure any future heritage legislative framework appropriately considers the interaction between the operation of heritage legislation and environmental planning legislation, the proposed Design and Place SEPP, local character overlays, local strategic plans and the provisions of Local Environmental Plans.

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<sup>4</sup> Department of Planning, Industry and Environment, 'Design and Place SEPP' (2021), DPIE, available at: <https://www.planning.nsw.gov.au/Policy-and-Legislation/State-Environmental-Planning-Policies/Design-and-Place-SEPP>

## 2. The voice of local government on the Heritage Council of New South Wales

*Terms of reference (a) and (b)*

- **Focus Question 1** – *What should be the composition, skills and qualities of the Heritage Council of NSW?*

The Heritage Council of New South Wales ('HCNSW') has an integral role in the administration of heritage policy and legislation in NSW, tasked with making recommendations to the Minister relating to what measures the government should be taking to conserve and promote state heritage across NSW. Importantly, the Council has a strong legislated role in the conservation, exhibition and provision to access and publication of information concerning state heritage assets, the maintenance of the State Heritage Register (which includes all locally listed heritage items) and community education on environmental heritage<sup>5</sup>.

Local government has both a unique and important role that works in concert with the work of the HCNSW in each of these areas, which can be impacted substantially by the advice provided by the Council to the Minister with respect to environmental heritage.

Despite these broad objectives of the HCNSW, at present there is no dedicated voice for local government amongst its membership. Section 8(1) of Act provides for "local government" as one of a list of fourteen (14) areas of qualifications, knowledge and skills in which members appointed to the Council may have, to qualify for appointment.

The HCNSW is comprised of 9 members, of which 8 are directly appointed by the Minister. There is special provision for mandating knowledge and expertise in Aboriginal heritage under section 8(3A), and one appointee is required to be made by recommendation of the National Trust of Australia (NSW), under section 8(4) of the Act.

At present, there is no mandated requirement for expertise in local government. Local government provides a unique and valuable perspective for state heritage, with expertise to community engagement, promotion and activation of heritage items and the development assessment process, which are all central objectives of the Act.

It is LGNSW's position that a dedicated voice for local government on the Heritage Council of NSW is imperative to ensure a robust heritage protection and management framework, and to advocate for the collective position of local government. In line with arrangements for similar bodies such as the NSW Environmental Trust and the NSW Geographical Names Board, the local government position should be appointed from among representatives nominated by LGNSW.

**Recommendation 3:** The NSW Government should consider legislative changes to the *Heritage Act 1977* that would provide for a mandated and dedicated voice for local government on the Heritage Council of New South Wales, nominated by LGNSW.

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<sup>5</sup> As prescribed in *Heritage Act 1977*, s 21 (1)(b).

### 3. Incorporation of Aboriginal cultural heritage into Heritage Act

#### *Terms of reference (c)*

- **Focus Question 2:** *How should Aboriginal Cultural Heritage be acknowledged and considered within the Heritage Act?*
- **Focus Question 3:** *Are the objectives of the Heritage Act still relevant?*
- **Focus Question 4:** *Does the Act adequately reflect the expectations of the contemporary NSW community?*

LGNSW acknowledges the intrinsic link between culture and heritage. We support a more robust system for the protection and preservation of Aboriginal cultural heritage (ACH) in NSW.

Local councils have specific, legislated roles and are tasked with identifying, assessing and managing heritage matters for ACH in relation to various planning decisions. It is important that any proposal carried forward has appropriate local government consultation, in partnership with local Aboriginal communities in its design and implementation to ensure a balanced and holistic understanding of a locality's unique character and history.

Councils are invested stakeholders which currently manage cultural heritage services at a grassroots level and will play a key role in mentoring, advising and coordinating cultural heritage matters, within councils' own functions and with wider community stakeholder groups.

NSW is the only state in Australia without stand-alone ACH legislation. We recognise that the NSW Government has been undertaking a review of the current legislative framework for managing ACH and developing draft legislation for the management of ACH since 2011, with the most recent consultation being undertaken in 2018 on the draft *Aboriginal Cultural Heritage Bill 2018*, in which LGNSW made a submission to the then Office of Environment and Heritage in April 2018.<sup>6</sup>

The detail provided within the Government's Discussion Paper is limited, so it is difficult to comment on the merits of whether the management of ACH should be brought into the Act. We strongly support the NSW Government's commitment to ensuring that ACH is managed and cared for by Aboriginal people in any legislative reform process.

With that said, some concern has been expressed by member councils regarding bringing ACH into the *Heritage Act*. This concern recognises the importance of understanding both the cultural sensitivities and practical complexities in bringing Aboriginal cultural heritage into the same statutory framework as built heritage management. This process should involve detailed consultation with local Aboriginal communities, as well as with local government to ensure local decision making and practice is maintained and strengthened.

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<sup>6</sup> LGNSW's submission to the draft Aboriginal Cultural Heritage Bill 2018 is available at: [https://lgnsw.org.au/common/Uploaded%20files/Submissions/LGNSW\\_submission\\_to\\_the\\_Aboriginal\\_Cultural\\_Heritage\\_Bill\\_2018.pdf](https://lgnsw.org.au/common/Uploaded%20files/Submissions/LGNSW_submission_to_the_Aboriginal_Cultural_Heritage_Bill_2018.pdf)

**Recommendation 4:** Local government's ongoing role in the management of Aboriginal cultural heritage must be clarified in any proposed reforms to state heritage legislation.

#### 4. Incentives for the ownership, activation and adaptive reuse of heritage items

*Terms of reference (d) (ii), (iii) and (iv)*

- **Focus Question 5:** *How can the NSW Government legislation better incentivise the ownership, activation and adaptive reuse of heritage?*
- **Focus Question 6:** *How can we improve incentives within the taxation system to help mitigate the cost of private heritage ownership?*
- **Focus Question 7:** *What sort of initiatives might encourage activation and conservation of heritage through commercial and philanthropic investment?*
- **Focus Question 11:** *Would streamlining enhance the listing process?*
- **Focus Question 12:** *How could we improve the current approval permit system?*
- **Focus Question 13:** *Are the current determination criteria for heritage permits still appropriate?*

As acknowledged in Heritage NSW's Discussion Paper, the public often views the ownership of heritage assets as overly expensive and burdensome, with added levels of consideration and financial outlay for management and compliance<sup>7</sup> that non-heritage properties do not. We are encouraged by HNSW's recognition of the need for greater incentivisation of the ownership, activation and adaptive reuse of heritage as part of this review.

Local councils have long recognised there is an ongoing need to incentivise and promote the multitude of benefits of local heritage listing to property owners. In doing so, it is important to recognise there is a significant resource and financial cost to councils.

#### 4A. Supporting the adaptive reuse of heritage items

Local government strongly supports adaptive reuse as a method of preserving heritage items, whilst providing both activation and pathways to financial viability for otherwise underutilised assets. Local councils are particularly attracted to the adaptive reuse of heritage assets where possible as a means of activating the building and delivering key council functions for community benefit.

As has been well recognised in the Discussion Paper, the adaptive reuse of heritage items can often require markedly more time, money and resources by the proponent to achieve the desired outcome to a comparable building which is not heritage listed. The added complexities

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<sup>7</sup> Heritage NSW, 'Benefits of Listing' (2021), *Department of Premier and Cabinet*, available online at: <https://www.heritage.nsw.gov.au/protecting-our-heritage/managing-a-heritage-listed-item/benefits-of-listing/>.

presented in navigating the referral and concurrence process between the proponent, the responsible authority (often local councils) and Heritage NSW acts as a strong disincentive for pursuing the adaptive reuse of heritage assets. The Discussion Paper recognises the approval processes with Heritage NSW are “*generally considered onerous, procedurally complex and adversarial to adaptive reuse*”<sup>8</sup> which is a view strongly shared by many local councils.

Many councils who provided feedback to inform this submission reported complexities and frustrations in navigating development approval processes for their own adaptive reuse projects. The source of this frustration has broadly stemmed from:

- A lack of clarity in Heritage NSW’s requirements (both generally and site-specifically);
- Slow responses to requests for further information, technical guidelines, assessment updates and decision timeframes from Heritage NSW;
- Difficulties in receiving clear instructions on providing appropriate disability access infrastructure; and
- Exhaustive requests for further information from Heritage NSW.

Without concerted effort to both streamline and improve efficiencies in the assessment of development applications referred to Heritage NSW, some opportunities to realise the adaptive reuse of heritage assets may not be realised if proponents are recurrently facing administrative barriers to the timely assessment of a particular project.

#### **Example: Bathurst Regional Council – Bathurst Railway Museum**

*The Bathurst Rail Museum is built on the site of the original Railway Institute building in Bathurst. The earliest section of the building can be traced back to 1909 with extensions occurring over time until the mid 1950s, and then more recently in 2019 in its development as the Bathurst Rail Museum.*

*In 2014 Bathurst Regional Council was gifted through the Cultural Gifts Program a large HO scale model railway, that was the catalyst for the development of the museum. Funding was secured from the Federal and State governments with Council contributing the bulk of the money for the \$5.4 million project.*

*The award-winning museum opened in February 2020 and complements other museums operated by Bathurst Regional Council including The Australian Fossil and Mineral Museum, National Motor Racing Museum and Chifley Home and Education Centre.*

*On the 28<sup>th</sup> June 2016 a DA was referred to the [then] NSW Office of Environment and Heritage] (‘OEH’) for section 60 approval under the Heritage Act. After a long drawn out process, final approval was received 12<sup>th</sup> June 2018.*

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<sup>8</sup> *Review of NSW Heritage Legislation*, Discussion Paper, April 2021, available at: <https://www.heritage.nsw.gov.au/assets/A-Review-of-Heritage-Legislation-discussion-paper.pdf>, p. 7.

*The original design for the extension to the building was rejected after numerous requests for further information and extended delays in gaining responses from OEH. Many phone calls and emails were exchanged with all information requested from OEH sent through quickly in the hope of gaining the approval as soon as possible. Representatives from Council also travelled to Parramatta to meet with OEH staff in an attempt to speed up the process. Multiple requests were made for representatives of OEH to undertake site visits which would have answered many of the questions posed. Each request was denied.*

*Following the rejection of the original design after 12 months, Council appointed Integrated Design Group in July 2017 to work with OEH to ensure the new design would meet their approval. This process took another 12 months with final approval received in June 2018.*

*The approval process was so challenging that serious consideration was made to abandon the use of the Railway Institute Building in favour of a greenfield site.*

It is LGNSW's position that both existing guidelines and procedures for assessing works that may impact state heritage assets under s 60 of the Act should be reviewed and improved to better incentivise and support the adaptive reuse of heritage assets. This has become even more important in light of the state's productivity goals and employment generation objectives.

**Recommendation 5:** Heritage NSW should review its internal processes to make it both quicker and easier for proponents to garner approval for works requiring concurrence under the *Heritage Act 1977*. This review should explore set exempt or complying development standards for accessibility works and a review of the currency and ease of use of the *Guidelines for the Adaptation of Historic Buildings and Sites*.

#### **4B. Incentives for the activation of heritage items**

The activation of heritage items, while supported in principle, can often be difficult to achieve due to the complexities of navigating government approval processes to be able to use heritage items, even in circumstances where the activation of the item is temporary or ancillary. Several local councils who provided feedback to LGNSW in preparing this submission reporting significant regulatory difficulties in using heritage items and/or the curtilage of the heritage item for events and small-scale cultural programming as part of major or community events.

Heritage assets provide focal points of interest for creative performances and events and present an important opportunity to both activate the assets as well as educate communities on local history, stories and perspectives.

The current heritage permit process is ambiguous in the required approvals for these forms of temporary and small-scale activation under s 57 and s 60 of the Act. As mentioned in Part 4A of this submission, the significant delays experienced in receiving approval from Heritage NSW for various forms of development concurrence (which includes for non-exempt events and activations) can act as a disincentive to using these assets for this purpose, which is counter-intuitive to Heritage NSW's objectives set out in the Discussion Paper.

It is LGNSW's view that facilitating an easier pathway for approval of the use of heritage assets for these temporary purposes (where no physical modifications are required), such as through site-specific and/or asset class exemptions as well as standardised event/use management plans, would work to significantly incentivise the use of these assets for activation.

**Recommendation 6:** The NSW Government should consider site-specific and/or asset class exemptions that would facilitate the greater use of heritage assets for small-scale cultural uses and community events, where appropriate. Heritage NSW should support the development of standardised event and use management plans for heritage assets to support their activation.

Additionally, while the activation of heritage items is supported in principle, LGNSW stresses the importance of community consultation in forming a position as to whether it is in the best interest of the asset, or of the wider community, to activate a particular heritage asset. Many heritage assets across the State, particularly those on the State Heritage Register, have complex histories that must be approached sensitively and with deep and meaningful consultation with affected communities.

**Recommendation 7:** While the activation of heritage places for tourism is supported in principle, close and detailed consideration must be made to the suitability of the adaptive reuse and/or activation that considers the views of local communities.

#### 4C. Taxation incentives to heritage listing

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

Local councils currently have limited capacity to mitigate the cost of private heritage ownership.

Under current legislation, there is currently a limited capacity for local councils to offer category-based rate concessions on council rates for owners of locally listed heritage items under the *Local Government Act 1993*. In contrast, concessions on council rates, land tax and other duties are able to be provided, at the discretion of the Minister, to owners of state-listed heritage items under section 45 of the Act, and funds for reimbursement are drawn from the NSW Heritage Incentive Fund.

Councils resolved at the 2019 LGNSW Annual Conference to seek the NSW Government's support in exploring legislative changes to the *Local Government Act 1993* that would enable Councils to offer concessions on rates to owners of heritage listed properties, as a means of incentivising owners of these properties.

#### 37 – Rebate for heritage-listed properties

That Local Government NSW calls on the NSW Government to make provisions for a variable rating policy for heritage-listed properties to be included in the *Local Government Act*.

The capacity of local government to be able to offer this incentive, should it choose, in certain and specific cases to support broader strategic objectives for the local area, would aid in the promotion of the tangible benefits to owners of having a local heritage listing on their property.

**Recommendation 8:** The NSW Government should explore legislative changes to the *Local Government Act 1993* that would enable local councils to offer a rebate/concession on council rates for land with local or state heritage-listed properties, on an opt-in and case-by-case basis.

#### 4D. Other financial incentives to maintain locally listed heritage items

Many of the items that are added to the State Heritage Register (SHR) first appear on the local heritage list contained within a Local Environmental Plan (LEP), before being elevated to the SHR. It is therefore critical for the ongoing, sustained growth of the State Heritage Inventory (SHI) that local heritage items are maintained to a suitable standard of repair over time. This is paramount to ensure their ongoing preservation and retain their intrinsic social, environmental, economic and cultural value to local communities, and for local councils to be able to meaningfully maintain existing local built character.

As acknowledged in Heritage NSW's Discussion Paper, heritage items are expensive for owners to maintain<sup>9</sup>. Over 60% of local councils<sup>10</sup> across NSW run local heritage improvement grants to support local private property owners to maintain heritage local assets, in part with financial support of Heritage NSW's Community Heritage Grants Program.<sup>11</sup> The Heritage NSW Small Heritage Grants provide matched funding (dollar for dollar) to support these programs, which are successfully run by local councils.

In the 2020-2021 round of Heritage NSW Small Heritage Grants, all councils that applied for funding received an equal grant of \$5,500, which was distributed to 74 local councils (58% of total) across the state. This is despite large disparities in each council's size, operating budget and number of local heritage items in the SHI.

##### **Example: Lake Macquarie City Council – Local Heritage Places Fund<sup>12</sup>**

*In FY 2020/2021, Lake Macquarie City Council, through its annual Local Heritage Places Fund, is offering grants of up to \$5,000 to support minor heritage restoration and maintenance works on local heritage listed properties.*

*LMCC received \$5,500 of funding from Heritage NSW's Small Heritage Grants program for financial year 2020/2021. A condition of the funding from Heritage NSW is for the local council to match the grant funding, dollar for dollar.*

*The budget for the Fund in FY 20/21 is \$11,000, and Council has so far received over \$22,000 of requests.*

*Due to budget constraints, Council has been unable to support all requests for funding received, meaning Council will have a backlog of requests into following financial years, or may see essential works not completed in a timely manner.*

For many larger councils with a large quantity of privately-owned local heritage assets, the funding provided is vastly inadequate to meet their current demand. It is LGNSW's view that

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<sup>9</sup> Review of NSW Heritage Legislation, Discussion Paper, April 2021, available at:

<https://www.heritage.nsw.gov.au/assets/A-Review-of-Heritage-Legislation-discussion-paper.pdf>, p. 5.

<sup>10</sup> Heritage NSW, 'Grants recipients' (2021), Department of Premier and Cabinet, available online at <https://www.heritage.nsw.gov.au/grants/grants-recipients/>

<sup>11</sup> Heritage NSW, Community Heritage Grants 2021-2023 Funding Guidelines (2021) available at: <https://www.heritage.nsw.gov.au/assets/Guidelines-x-Community-Heritage-grants-2021-23.pdf>.

<sup>12</sup> Lake Macquarie City Council, Heritage Properties – Local Heritage Places Fund (2021), LMCC, available at: <https://www.lakemac.com.au/Development/Building-and-development-process/Heritage-properties>

Heritage NSW should explore options to provide further funding from the NSW Heritage Incentive Fund to support local councils in administering these programs.

**Recommendation 9:** The NSW Government should make more funding available through the Heritage NSW Local Heritage Grants Fund program to assist local councils to promote the ongoing maintenance of local heritage items and minimise shortfalls in requests for grant assistance.

## 5. Promotion of heritage tourism and local heritage collections

*Terms of reference (a) and (e)*

- **Focus Question 17:** *How could understanding of state heritage be enhanced?*
- **Focus Question 18:** *How could we improve heritage tourism or help activate heritage places for tourism?*
- **Focus Question 19:** *How could public heritage buildings be activated to meet the needs of communities?*

The promotion of local built and cultural heritage is an important part of telling the unique history, stories and cultural perspectives of local communities across the State and presenting a compelling proposition to visit and invest in local communities. Both state and locally listed heritage assets are key destinations, attractions and experiences that are integral to tourism product development and marketing for towns and regions.

Local government is at the forefront of both the presentation of local and state heritage, running both heritage sites for activation and tourism, as well as local galleries and museums, presenting a large collection of objects of local, state, national and international significance.

From both the strategic and operational level within the NSW Government, there is little dedicated support for both programs and grants to support the activation of heritage assets, as well as the promotion of heritage tourism. There is neither a state-led strategy for the activation of heritage assets to identify and prioritise investment and partnerships required for the activation of these heritage assets, nor specific actions for the promotion of local or state heritage within the recently released *NSW Visitor Economy Strategy 2030*<sup>13</sup>, which is currently being implemented by Destination NSW.

While there are several grants run through Heritage NSW that are designed to support local governments' capacity to promote and maintain built and cultural heritage through the Community Heritage Grants Program<sup>14</sup>, the focus of these grants does not extend to either activation support or promotional campaigns activities. Likewise, support provided by Destination NSW through the Tourism Industry Marketing Support Grants Program, Experience Enhancement Fund and Tourism Product Development Fund<sup>15</sup> is extremely limited in its focus on the promotion of heritage tourism and activation of cultural collections.

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<sup>13</sup> Destination NSW, *NSW Visitor Economy Strategy 2030*, 2020, available at:

<https://www.destinationnsw.com.au/wp-content/uploads/2020/12/nsw-ves-2030.pdf>

<sup>14</sup> Heritage NSW, *Community Heritage Grants 2021-2023 Funding Guidelines* (2021) available at:

<https://www.heritage.nsw.gov.au/assets/Guidelines-x-Community-Heritage-grants-2021-23.pdf>

<sup>15</sup> Destination NSW, 'Funding and Grants' (2021), Destination NSW, available at:

<https://www.destinationnsw.com.au/tourism/business-development-resources/funding-and-grants>

It is LGNSW's view that with the dual issues of growing demand of, and limited funds available to local government, it is essential that the NSW Government supports a comprehensive program of funding support for local councils to support ongoing efforts to activate heritage assets and cultural collections and their promotion to local, interstate and international visitors.

**Recommendation 10:** The NSW Government should develop a state-wide Heritage Activation Strategy to coordinate government efforts to activate and promote heritage assets (both built and cultural heritage) across New South Wales. This should commit a dedicated funding pool to local government to support the activation and promotion of built and cultural heritage across New South Wales.

## 6. Local government powers to enforce heritage compliance

*Terms of reference (a) and (d) (iii)*

- **Focus Question 16:** *How could heritage compliance and enforcement be improved?*

For items listed on the State Heritage Register, the Act provides for minimum standards for the maintenance and repair of listed items under section 118. The Act provides numerous powers of compliance and enforcement against owners and occupiers of state-listed heritage items for non-compliance, with statutory authority held by the Heritage Council of NSW and the Minister.

Compliance and enforcement powers for local government against owners of locally listed heritage properties are much more limited under the *Environmental Planning and Assessment Act 1979*.

Councils are only compelled to act where heritage listed buildings are in such a state of disrepair that they are condemned or ordered to be demolished, or where there is non-compliance with a development approval.

### **Example: Blue Mountains City Council**

*In the Blue Mountains LGA there are about 1,000 local listed heritage items. This built heritage significantly contributes to the character of our towns and villages and represents an important connection with the history of the Blue Mountains.*

*A number of these buildings (some of them significant public structures) have fallen into disrepair, leading to further damage often resulting from a lack of basic maintenance, such as weather proofing. Ultimately, without intervention, this could result in demolition of heritage by neglect. Local government has limited powers to require owners to keep locally listed heritage properties in a reasonable state of repair or require that basic maintenance be undertaken.*

The limited scope of these powers, in many circumstances, prevents local councils in taking meaningful, preventative action to ensure the ongoing good repair and longstanding retention of heritage items in their local communities.

At the 2019 LGNSW Annual Conference, member councils resolved:

#### 40 – Strengthening heritage provisions

That Local Government NSW:

1. Writes to the Department of Premier and Cabinet (Heritage Division) to advocate for the provision of stronger powers to State Government and local government agencies, to require that locally listed heritage items meet minimum standards of maintenance and repair; and the power to enforce these requirements; and,
2. Recommends to the Department of Premier and Cabinet (Heritage Division) that these minimum standards align with those required for State-listed heritage items under the *Heritage Act 1977*.

The lack of meaningful capacity for councils to step-in when local heritage items are in danger from irrevocable harm from poor maintenance must be seriously considered and rectified in order to ensure the ongoing preservation of heritage items in local communities and preserve local character.

**Recommendation 11:** The NSW Government should explore legislative options to mandate minimum standards for the maintenance and repair for locally listed heritage items. These legislative options should provide councils with sufficient enforcement powers to enforce minimum standards of maintenance and repair.

Further, the Discussion Paper proposes the “introduction of a series of intermediate enforcement powers to allow heritage regulators to take a graduated and proportionate response to non-compliance. This would include investigative powers allowing Heritage NSW the ability to gather sufficient evidence to prove an offence, along with the ability to issue penalty or infringement notices<sup>16</sup>.”

LGNSW supports in principle mechanisms that would afford flexibility and proportionality to the heritage regulatory system that would improve heritage compliance, reduce costs and provide administrative efficiencies. It is LGNSW’s view that these powers should be provided (so far as they are applicable to the management of local heritage listings) to local councils to ensure that local councils are in a similar position to be able to take targeted enforcement action against property owners for non-compliance with local heritage controls. Additional funding, or the capacity for councils to recover the costs of heritage compliance monitoring should be considered.

**Recommendation 12:** Any reforms to the enforcement powers within the *Heritage Act 1977* should be mirrored, where appropriate, within the *Environmental Planning and Assessment Act 1979* and associated legislation and regulations. This would provide intermediate enforcement powers to local government to enforce compliance with local planning laws for locally listed heritage items. Additional funding, or the capacity for councils to recover the costs of heritage compliance monitoring should be considered.

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<sup>16</sup> *Review of NSW Heritage Legislation*, p. 19.

## 7. Proposed categorisation scheme for state heritage listings

### *Terms of reference (d) (i)*

- **Focus Question 9:** *How should heritage items that are residential properties be accommodated under a proposed category scheme?*
- **Focus Question 11:** *Would streamlining enhance the listing process?*
- **Focus Question 12:** *How could we improve the current approval permit system?*
- **Focus Question 13:** *Are the current determination criteria for heritage permits still appropriate?*

Heritage NSW's Discussion Paper proposes a significant reform of the categorisation of items on the State Heritage Register to provide for a more nuanced approach to the controls applied to heritage items based on defined categories of heritage importance. This approach has been suggested as a mechanism to combat existing practice of applying a one-size-fits-all approach to regulation of heritage items of distinct differences in item type, circumstance, location and significance.<sup>17</sup>

Broadly speaking, LGNSW is supportive of examining current heritage listings with a view to streamlining and/or adopting site and category specific controls that respond better to the particular asset and reduce red tape and cost, where overly or improperly applied.

The detail provided within the Discussion Paper regarding the proposed categories is general in nature, so it is difficult to ascertain what implications there may be on existing practice for local councils who have particular responsibilities for referral and concurrence of development applications effecting state heritage items. As this reform is likely to have a significant effect on existing process and the types of development requiring concurrence or determination through the integrated development pathway, it is integral that local government is actively consulted on the practical effects of this potential reform.

Additionally, councils who have provided feedback to inform this submission have expressed some concern regarding the potential loss of ability for local government to be able to provide comment to the Heritage Council of NSW on development applications for heritage items, should regulatory thresholds for referral to local government be heightened. Councils must retain concurrence in the assessment process for items where they are listed within a Local Environmental Plan, which includes items on the State Heritage Register and/or owned by state agencies.

**Recommendation 13:** Local government must be consulted on any proposed categorisation scheme for state heritage items. Any proposal to provide a category-based heritage listing

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<sup>17</sup> *Review of NSW Heritage Legislation*, p 14.

system must not remove any of the current concurrence powers of local government for development applications within their local government areas under existing concurrence and integrated development assessment processes.

## 8. Enhancing the community nomination process

*Terms of reference (b)*

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

Local communities deeply value local built and cultural heritage and strongly support its ongoing protection, evidenced by the inclusion of protection of local heritage across most councils' Community Strategic Plans and recently endorsed Local Strategic Planning Statements. The provision of easier pathways for local communities to be able to directly make representations to Heritage NSW regarding the State Heritage Register is strongly supported as a mechanism to deliver a more robust State Heritage Register.

Councils are currently empowered to make direct recommendations for state heritage listings to the Heritage Council of NSW under section 166 of the Act. As councils are constituted of elected representatives of local communities, council endorsed recommendations are a credible indicator of community sentiment and should be maintained.

**Recommendation 14:** The existing pathways for local government to make formal recommendations for state heritage listing under section 166 of the *Heritage Act 1977* should be maintained. Heritage NSW should explore options to expand the capacity for local communities to recommend items for heritage listing through accessible means, such as online nomination and consult with local government on the design of this program.

## 9. Exercise of stop work order powers

*Terms of reference (e) – any other related matter*

Stop work orders are a mechanism provided under section 79C of the Act to protect items on the State Heritage Register or subject to an interim heritage order from threats of immediate harm caused by development works. Issuing a stop-work order is at the discretion of the Minister for Heritage or the Chairperson of the HCNSW (for items on the State Heritage Register) or local councils (for items of local heritage significance). We recognise stop work orders are an important 'lever of last resort' for both state and local government to protect items from irrevocable loss or harm caused from development works.

There is an inherent tension that arises where stop work orders are issued by the Minister for Heritage or the Chairperson of the HCNSW, over a development which has already received development approval from a local council or local/regional planning panel.

Stop work orders can cause significant impacts and delays to construction schedules and negatively impact the confidence of proponents in undertaking development. Councils have raised some concern in the exercise of the stop work order powers, particularly in circumstances in which developments have been comprehensively assessed through a

development assessment process and heritage impacts have already been considered and assessed through that process.

The over-exercise of the Minister's or Chairperson's discretionary powers may be perceived to demonstrate a lack of confidence in the assessment process, in which development applications are referred to heritage experts, such as a council's internal heritage advisor, an independent heritage consultant and/or Heritage NSW.

It is LGNSW's view that both the Minister and the Chairperson of the Heritage Council of NSW should exercise caution when exercising this power after a development approval process has been undertaken to maintain confidence in the development assessment process. A clear set of criteria should be developed and published to guide the circumstances in which this discretionary power can be exercised.

**Recommendation 15:** The Minister and the Chairperson of the Heritage Council of NSW should exercise caution in issuing stop work orders where development approval has already been issued by a local council or a local or regional planning panel, and the works are being undertaken in accordance with the development consent. A published set of criteria should be developed to guide the circumstances where the Minister or Chairperson may use these powers, including requirements to consult with the proponent and/or landowner.

## 10. Interim heritage orders (IHOs)

*Terms of reference (e) - any other related matter*

Interim Heritage Orders (IHOs) protect items of potential heritage significance that are under immediate threat. Currently, it is at the discretion of the Minister to delegate to a local council the power to issue interim heritage orders under section 25 of the Act. This has resulted in an inconsistency among councils, with only some able to utilise this delegated authority to protect local heritage where it is deemed necessary.

One of the twelve fundamental principles of LGNSW, the overarching values that guide advocacy on behalf of the local government sector, sets our position on local and regional planning processes:

*Local government is best placed to lead and influence local and regional planning processes according to the needs and expectations of local communities.*

It is LGNSW's position that local councils should equally have the capacity to fully determine matters of local heritage significance in order to consistently administer their own heritage conservation strategies and local planning processes to protect local heritage.

**Recommendation 16:** All councils should have equal capacity to make interim heritage orders for items of local heritage significance.

## Summary of recommendations

In summary, LGNSW makes the following recommendations:

**Recommendation 1:** The NSW Government must actively involve local government in the design of any amendments to the *Heritage Act 1977* and any other associated legislation that may result from this review.

**Recommendation 2:** NSW Government agencies must work collaboratively together, and with local government, to ensure any future heritage legislative framework appropriately considers the interaction between the operation of heritage legislation and environmental planning legislation, the proposed Design and Place SEPP, local character overlays, local strategic plans and the provisions of Local Environmental Plans.

**Recommendation 3:** The NSW Government should consider legislative changes to the *Heritage Act 1977* that would provide for a mandated and dedicated voice for local government on the Heritage Council of New South Wales, nominated by LGNSW.

**Recommendation 4:** Local government's ongoing role in the management of Aboriginal cultural heritage must be clarified in any proposed reforms to state heritage legislation.

**Recommendation 5:** Heritage NSW should review its internal processes to make it both quicker and easier for proponents to garner approval for works requiring concurrence under the *Heritage Act 1977*. This review should explore set exempt or complying development standards for accessibility works and a review of the currency and ease of use of the *Guidelines for the Adaptation of Historic Buildings and Sites*.

**Recommendation 6:** The NSW Government should consider site-specific and/or asset class exemptions that would facilitate the greater use of heritage assets for small-scale cultural uses and community events, where appropriate. Heritage NSW should support the development of standardised event and use management plans for heritage assets to support their activation.

**Recommendation 7:** While the activation of heritage places for tourism is supported in principle, close and detailed consideration must be made to the suitability of the adaptive reuse and/or activation that considers the views of local communities.

**Recommendation 8:** The NSW Government should explore legislative changes to the *Local Government Act 1993* that would enable local councils to offer a rebate/concession on council rates for land with local or state heritage-listed properties, on an opt-in basis.

**Recommendation 9:** The NSW Government must make more funding available through the Heritage NSW Local Heritage Grants Fund program to assist local councils to promote the ongoing maintenance of local heritage items and minimise shortfalls in requests for grant assistance.

**Recommendation 10:** The NSW Government should develop a state-wide Heritage Activation Strategy to coordinate government efforts to activate and promote heritage assets (both built and cultural heritage) across New South Wales. This should commit a dedicated funding pool to local government to support the activation and promotion of built and cultural heritage across New South Wales.

**Recommendation 11:** The NSW Government should explore legislative options to mandate minimum standards for the maintenance and repair for locally listed heritage items. These legislative options should provide councils with sufficient enforcement powers to enforce minimum standards of maintenance and repair.

**Recommendation 12:** Any reforms to the enforcement powers within the *Heritage Act 1977* should be mirrored, where appropriate, within the *Environmental Planning and Assessment Act 1979* and associated legislation and regulations. This would provide intermediate enforcement powers to local government to enforce compliance with local planning laws for locally listed heritage items. Additional funding, or the capacity for councils to recover the costs of heritage compliance monitoring should be considered.

**Recommendation 13:** Local government must be consulted on any proposed categorisation scheme for state heritage items. Any proposal to provide a category-based heritage listing system must not remove any of the current concurrence powers of local government for development applications within their local government areas under existing concurrence and integrated development assessment processes.

**Recommendation 14:** The existing pathways for local government to make formal recommendations for state heritage listing under section 166 of the *Heritage Act 1977* should be maintained. Heritage NSW should explore options to expand the capacity for local communities to recommend items for heritage listing through accessible means, such as online nomination and consult with local government on the design of this program.

**Recommendation 15:** The Minister and the Chairperson of the Heritage Council of NSW should exercise caution in issuing stop work orders where development approval has already been issued by a local council or a local or regional planning panel, and the works are being undertaken in accordance with the development consent. A published set of criteria should be developed to guide when the Minister or Chairperson may use these powers, including requirements to consult with the proponent and/or landowner.

**Recommendation 16:** All councils should have equal capacity to make interim heritage orders for items of local heritage significance.

\* \* \*

LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are appropriately considered.

To discuss this submission further, please contact LGNSW Policy Officer Beau Reid at [beau.reid@lgnsw.org.au](mailto:beau.reid@lgnsw.org.au) or on 02 9242 4082.

## Appendix 1: Local Government NSW Annual Conference Resolutions

### 2020 resolution

#### 58 – Review of Planning Policies that threaten residential amenity

That Local Government NSW lobbies the Department of Planning, Industry and Environment to urgently review various planning policies that threaten the amenity and heritage significance of the State's rural and regional towns and villages from developments such as seniors housing, aged care facilities, health service facilities, boarding houses and the new 2020 Low Rise Housing Diversity Code.

### 2019 resolution

#### 40 – Strengthening heritage provisions

That Local Government NSW:

1. Writes to the Department of Premier and Cabinet (Heritage Division) to advocate for the provision of stronger powers to State Government and local government agencies, to require that locally listed heritage items meet minimum standards of maintenance and repair; and the power to enforce these requirements; and
2. Recommends to the Department of Premier and Cabinet (Heritage Division) that these minimum standards align with those required for State-listed heritage items under the *Heritage Act 1977*.

### 2017 resolution

#### 37 – Rebate for heritage-listed properties

Local Government NSW calls on the NSW Government to make provisions for a variable rating policy for heritage-listed properties to be included in the *Local Government Act*.