

Conservation of Historic Heritage Places

Submission on the Productivity Commission's Draft Report

Supplementary Submission - original submission #208.

Submission by
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I attended the Productivity's Commission hearing in Sydney on January 31st and would like to comment on some matters that arose.

Local heritage in NSW

There seemed to me some confusion in the submissions from two people who appeared before the Commission in the morning as to heritage and planning in New South Wales

Heritage at the local government level in New South Wales is a planning matter and is organised under the planning legislation, the *Environmental Planning and Assessment Act, 1979*.

Planning is through environmental planning instruments (epis): State Environmental Plans, Regional Environmental Plans and Local Environmental Plans (SEPPs, REPs and LEPs). Heritage may be a topic in any of these plans.

The "heritage list" in a local government area is a schedule to a local environment plan (lep). There is a Ministerial direction under the Act that when they draft a lep, councils should make provision for heritage matters. The Department of Planning has prepared model heritage provisions. A heritage schedule is usually prepared after a heritage study of the area. I think there is State funding for these.

The Environmental Planning and Assessment Act provides detailed public notice procedures for preparing draft leps, including periods of public exhibition. The lep leaves the council as a draft, and is submitted to the Minister (ie the Department of Planning and the Parliamentary Counsel's Office). The Minister makes the lep, which has the status of delegated legislation under the Environmental Planning and Assessment Act, analogous to a Regulation.

Thus references in the PC's hearing to a Council making a heritage list or declaring something to be a heritage item are inaccurate.

The making of an lep is a legislative act and therefore there is no appeal. The making of an lep could only be challenged on procedural grounds, eg, before the Administrative Law Division of the Supreme Court. There was a reference in the PC's Hearing to approaching the State Ombudsman, and it may have been in this context. The procedures for making an lep are quite elaborate, and I am not aware of a successful challenge on these grounds.

Once made the lep is the basis of a local council's planning function. Decisions in planning matters are discretionary, so heritage is only one of the matters that the council must take into account in dealing with a development application, even in relation to an item on the heritage schedule to an lep. (s70C, EP&A Act)

Appeals may be taken from a decision of council to the Land and Environment Court. Appeals on the merits of the council's decision are heard by a Commissioner who is usually not a lawyer, but has planning or other professional qualification. Appeals on the grounds of failure to follow proper procedures in dealing with an application, including denial of natural justice could be heard by a judge. Parties to a hearing in the Land and Environment Court are usually represented even before a Commissioner. Thus the usual financial considerations in litigation apply, although costs are generally not awarded against an unsuccessful applicant.

Comment

The distinction made in the Commission's Report between dealing with individual items and precincts does not seem to align well with current local government procedures, where each is dealt with as a planning matter.

Road widening

There was a reference to a road widening order in relation to a property in the City of Sydney. These used to be made under repealed legislation, the *Local Government Act, 1919*. There was a procedure for lifting them. I don't know what their present status is but they are not a heritage matter.

Procedure in declaring heritage

There seemed to be confusion as to what is decided when.

It is clear that submissions to the New South Wales Heritage Council when it considers listing an item under the Heritage Act can consider other issues than heritage significance: conservation is unnecessary, reasonable and economic use is unfeasible, and financial hardship. (Heritage Act s33(2)).

While I would not argue against full details and justification being given to owners and the public at the time of designation, I had always thought that this designation of heritage was a first step. The parties at the Hearing seemed to assume that a heritage decision was all or nothing. The Heritage Act provides a second procedure, for when an owner wants to do work on a designated property. (*Heritage Act 1977 (NSW) Applications for Approval, Part 4 Div 3.*) It is here that the refinement of significance in the light of a

concrete proposal can take place. An owner can appeal against a decision of the Heritage Council to the Minister. As described above, heritage status is only one consideration when councils consider development applications.

On another tack:

National Trust legislation

The President of the National Trust (NSW) raised the matter of the recommendation in the Commission's Report that the Trust's legislation should be repealed. The recommendation seems to take a narrow view of the role of legislation.

In NSW there are non-government trading entities eg AGL, Westpac which for historical reasons have their own Charter or Act. There are also many non-government statutory corporations like the major charities, at least the older ones. Aspects of the churches are incorporated, probably to facilitate holding and dealing in property. I seem to remember noting a Trustees of the Archdiocese of Sydney Act, and Acts for the larger Catholic religious orders. This legislation generally is facilitative.

Legislation also empowers. The Trust's Act was extensively remodelled in the 80's. One aspect was to modify the judge made law relating to trusts as it applied to the National Trust. New clauses to allow a procedure for the modification of the trust conditions under which the National Trust accepts property from donors, were inserted. These provisions would need a new home if the Trust's Act were repealed.

What would become the Trust's new legislative base? It is inconceivable nowadays that the Trust would assume a non-incorporated status, and the *Associations Incorporation Act* is probably not suitable. I have begun to wonder whether the national companies' legislation is suitable for organizations that do not have a commercial focus. There is a continuing debate, for example, about corporate social responsibility, and whether wider social concerns might conflict with the major director's duty to act in the best interests of the corporation. Best interests are often read as financial. Similarly, there may be a conflict between that duty and a desire to further the purposes, like heritage, for which the corporation was established. We are beginning to rely on private quasi national parks run by corporations in the natural heritage area, Australian Bush Heritage Fund etc, but I have not seen any assessment whether the Commonwealth Corporations Act is a suitable legislative vehicle.

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