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Review of the Heritage Act 2004
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Dear Secretariat

Review of the *Heritage Act 2004*

The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the government's review of the *Heritage Act 2004*.

The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each State and Territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation and offer education programs designed to facilitate public participation in environmental decision-making.

The EDO recognises the importance of heritage to the people of ACT, whether it is of cultural, environmental or indigenous importance. To this end, the EDO supports a comprehensive and robust heritage protection framework. The Heritage Act has gone some way to achieving this by implementing a heritage scheme with certain protections, however there are some shortcomings.

The EDO's comments focus on a number of questions posed by the discussion paper primarily relating to the nomination and assessment process, including the threshold test for heritage listing, and criteria for assessing nominations and the interaction with the planning and development process. In summary the EDO:

- supports the retention of the Heritage Council as an independent advisory body who makes the final decision on registration;

- supports a statutory timeframe for deciding nominations;
- does not support a deemed refusal at the end of the statutory timeframe if no decision, but recommends conversely a deemed listing;
- does not support an annual limit on nominations, recommends alternatively an annual heritage theme as a method of prioritising nominations and listings;
- does not support a cost/benefit analysis forming part of assessment process, supports nominations being assessed solely according to heritage value;
- recommends clarification of the significance threshold which applies to nominations;
- supports the registration of places and objects of heritage significance to the Territory and of local significance; and
- recommends a greater integration of the Heritage Council in the planning approval process, and recommends that developments should only be approved which are consistent with the Council's advice.

Further discussion of these points are detailed below.

Statutory role of the ACT Heritage Council

Should the Heritage Council remain an independent body, at arm's length from the government, with statutory power and some roles remaining with the Minister?

The EDO supports the retention of the Council as an independent body at arm's length from the government. The EDO strongly supports a heritage nomination and registration process with the Heritage Council making the final decision on whether a place or object is to be registered.

The role of the Council as an independent body is necessary to ensure that registrations are not influenced by matters other than the heritage value of a property or object. Other schemes which have government Ministers as the final decision-maker on listing or registration decisions, have been criticised as being open to influence by political factors.

An independent adjudicator is essential to ensure a robust and credible system.

The ACT Heritage Register and Nomination/Assessment Process

Should nominations have a statutory timeframe for consideration? If so, at the end of the statutory timeframe should there be a deemed refusal and the decision be open for review in ACT Civil and Administrative Tribunal?

The EDO is of the view that there should be no deemed refusals for heritage nominations. Whilst the EDO supports statutory time frames for listing decisions to ensure timely consideration of heritage matters, a failure to meet that timeframe should not result in a failure to protect a heritage place or object.

Unlike the Planning Act, for example, where deemed refusals of development applications not decided in the statutory timeframes have the effect of prohibiting development and protecting the status quo (see s.163), deemed refusals of heritage nominations mean that places or objects of potential heritage significance to the ACT are left unprotected without consideration of that heritage value having been undertaken.

The EDO's preferred approach would be to provide for a deemed heritage listing at the end of any statutory timeframe until such time as a proper consideration of the place or object can be undertaken. This will protect against damage being done to a potentially significant place or object during the time in which its heritage value is considered. Such an approach could be equated with a precautionary approach ie adopting caution in decision making prior to the full facts being available.

The EDO would also support additional resources being provided to the Heritage Council to ensure that nominations can be assessed in a timely manner.

Should an annual cap or limit be placed on the number of properties to be nominated for heritage listing?

The EDO is of the view that it is preferable to have no arbitrary annual limit on the number of properties nominated for heritage listing. Such an approach places resource issues above heritage protection. It could result in worthy nominations being refused when a cap has been reached.

However, the EDO acknowledges the practical reality of limited Council resources. In light of this, an alternative approach would be to allow the Minister or the Heritage Council to nominate an annual heritage 'theme', such as occurs under the Commonwealth heritage nomination process (see Division 1A of Part 15 of the *Environment Protection and Biodiversity Conservation Act 1999*). This would then have the effect of indicating those places or objects that the Council will prioritise for registration.

If an annual cap were adopted the EDO recommends that there is a mechanism to enable additional nominations to be made in exceptional circumstances once a cap has been reached.

Should an analysis of the costs and benefits to the community and the actual/relative value of an object or property be required in heritage nominations?

The EDO is of the view that heritage nominations should be assessed only according to their heritage value based on recognised heritage criteria. International best practice for heritage conservation as set out in *The Burra Charter – the Australia ICOMOS Charter for Places of Cultural Significance*, clearly identifies the need to ensure that

heritage recognition is determined solely on heritage merits.¹ Costs and benefits to the community and the value of an object or property should not be relevant to determining whether a place or object is of sufficient value to place on the heritage register.

The Burra Charter recognises a wide range of benefits that may flow from protecting heritage. It states

‘Places of cultural significance enrich people’s lives, often providing a deep and inspirational sense of connection to community and landscape, to the past and to lived experiences. They are historical records, that are important as tangible expressions of Australian identity and experience. Places of cultural significance reflect the diversity of our communities, telling us about who we are and the past that has formed us and the Australian landscape. They are irreplaceable and precious.’

It will be very difficult to put a quantifiable measure on these benefits so as to allow a meaningful comparative cost/benefit analysis.

It may be appropriate to analyse such factors when determining what protections should apply to a place or object once it is registered. For example, when making a heritage management agreement it may be appropriate to take into account costs in relation to preserving the property or object.

However these considerations should not feature during the initial determination of heritage value and nomination.

The process of registration is set out in Part 6 of the Act. Are the timeframes and public consultation processes effective and efficient for Council and reasonable for owners of nominated places and objects?

The EDO strongly supports community participation in environmental matters. Public participation and consultation in relation to administrative decision-making is a fundamental element of good governance. In addition to fostering an inclusive society, public consultation leads to better decisions by assisting decision-makers in identifying public interest concerns and the views of all stakeholders.

The EDO is of the view that the current consultation processes outlined in the Act appear adequate.

However, the EDO is of the view that the Act should clarify that upon receiving a nomination the Heritage Council should not limit its consideration of the heritage significance of a place or object to the criteria outlined by the nominator. Where other criteria may be relevant to the nomination these should also be considered by the

¹ See www.icomos.org/burra_charter.html

Council. This recognises that the Council, as an expert advisory body, may have greater expertise in assessing the relevant criteria than a nominator.

The registration process as currently defined is more easily applied to historic places than to Aboriginal and natural places or objects. Should the registration process accommodate different types of heritage registrations? How?

The EDO is of the view that historic, indigenous and natural heritage should all be recognised on the heritage register. This is consistent with international best practice as set out in the Burra Charter.

Currently the definition of a 'place' in section 8, and the criteria for registering a place or object set out in section 10 allow historic, indigenous and natural heritage to be included on the register. However, the EDO would support new initiatives to encourage the listing of Indigenous and natural heritage places and objects.

In assessing the heritage value of a property or object, should a process for comparative or relative assessment of the costs and benefits in relation to preserving the property or object be required?

Again the EDO strongly emphasises its view that the only consideration in the assessment of a heritage place or object should be the heritage value of that place or object. Introducing other factors in the heritage assessment process severely detracts from the effectiveness and credibility of the heritage list.

As discussed above, it may be appropriate that the costs and benefits be assessed in some instances, for example, when entering into an agreement for the protection of any registered place or object. However, the EDO is of the view that the heritage protection of the place or object should always be the primary consideration in any decision that affects a registered place or object.

Does the legislation adequately allow register entries to be updated as new information becomes available without an onerous process? For Section 24 to apply it must be proven that a mistake or omission occurred. Otherwise, Part 7 applies and full or partial cancellation must occur.

The EDO supports measures to ensure that information can be readily updated to ensure accurate heritage listing information is available. The EDO would support the amendment of section 24 to allow the Council to update listings where additional information has been provided to the Council and it is in the interests of the conservation of the place or object that the listing information be updated. If such an amendment were made the EDO recommends that a Council decision to update the register should be a reviewable decision.

However if an update to the register were to result in lessening of the heritage protection provided to a registered place or object then the EDO is of the view that Part 7 should apply, with the appropriate consultation as provided for in that Part.

The Act allows for the registration of places and objects of heritage significance to the Territory. Should the Act allow for the registration of places of local significance?

There is a level of difficulty in assessing the standard to which each of the existing criteria in section 10 are assessed and how they can be practically applied. For example criterion (e) provides that 'it is significant to the ACT...' whereas criterion (h) provides for significance in local history.

The EDO submits that there should be a consistent standard throughout the criteria. The EDO further submits that the Heritage Council should produce guidelines for the application of the criteria to allow the public to better engage with the heritage listing process.

Given the size of the ACT it may be difficult to draw a distinction between local and Territory wide significance and it appears that the existing criteria have attempted to recognise this difficulty.

However the EDO submits that at a minimum there should be a mechanism for the recognition of local heritage. It is possible that a place or object may be of significance to a local area of the ACT but not the region as a whole. It is appropriate that there is recognition of such locally significant places in the ACT. This would be consistent with heritage protections provided in other jurisdictions as for most of Australia there exists a heritage protection regime at a local level. Governance structures are artificial in the context of heritage and where there is a place or object of heritage value to a distinct community that heritage value should be respected irrespective of the particular geographic location it occurs in.

For locally significant places it may be appropriate to have a different level of protection provided.

Land Planning and Development

Does the Act and its supporting practices successfully integrate heritage and land planning and development issues in the Territory? If not, why not? What improvements could be made?

The EDO supports the current provisions in the Planning Act which require a development application in the merit or impact track to be referred to the ACT Heritage Council for advice (s.148). The EDO also supports the ability of the Heritage Council to initiate advice to the ACT Planning and Land Authority (ACTPLA) in relation to a development that the Council is satisfied would affect the heritage significance of

a registered (or provisionally registered) place or object, even without a referral (under s.60 Heritage Act). The EDO also supports the requirements for the Council's advice in relation to a development application to include an outline of the effect of the development on the heritage significance of the place or object and ways of avoiding or minimizing the impact of this (s.61 Heritage Act).

However, the EDO is concerned that subsections 119(2) and 128(2) of the Planning Act enable development to be approved contrary to the Heritage Council advice in certain circumstances. Whilst recognising that these circumstances are limited, the EDO is of the view that any development that is likely to significantly affect a registered (or provisionally registered) place or object should not be approved by ACTPLA without the agreement of the Heritage Council.

Should archaeological assessments be undertaken by Government prior to releasing land to developers?

The EDO is of the view that it would be valuable to undertake archaeological studies and get an independent assessment of heritage values of land prior to its release to developers, particularly for large developments.

This would ensure that an assessment is made as to whether land is suitable for redevelopment, it would enable heritage objects or places to be identified early in any development process, and enable steps to be taken to minimise the risk of their destruction.

ACAT Review of Decisions

Should a right of appeal exist if there is an unreasonable cost involved in maintaining a heritage-listed property?

Individual property rights, assertions of a property owner's right to use the property as they see fit and the imposition of costs on heritage property owners are sometimes used as an argument against effective heritage recognition and conservation.

The EDO does not agree with this position. Whilst property rights should be respected, it is not inconsistent or incongruous to say that certain limitations or requirements should be placed on property owner's rights in dealing with the property in order to protect public rights and the heritage values concerned.

Property rights have been controlled, and regulated by Governments in all common law jurisdictions for centuries and there is an established body of jurisprudence that establishes a government's right to do this without giving rise to compensation.²

² Only in very extreme situations will regulation amount to a taking of property rights sufficient to require compensation.

One line of argument that is often used to explain the position is that property owners share equally in the community benefit obtained from the regulation. Individual proprietary rights are exchanged for improved civic rights to environmental welfare. This concept was spelt out by Lord Hoffman:

*'The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.'*³

The exercise of free dominion over private property is already restricted by a range of controls that exist for the public good. Zoning requirements, easements for sewerage and water, lease purpose clauses all exist to facilitate the well being of the community. Heritage protection mechanisms are no different.

The EDO is of the view that the costs of maintaining a heritage listed property should not be given any greater recognition than other interests which may give rise to an appeal right.

Please do not hesitate to contact me if you wish to discuss this submission further.

Yours sincerely

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³ *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C per Lord Hoffmann.