



NSW Heritage Law

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Overview

This factsheet outlines how members of the public can use the NSW heritage system to protect heritage items or places.

Natural, cultural and built heritage is protected in NSW by the [Heritage Act 1977 \(NSW\)](#) (**Heritage Act**). Listings on the State Heritage Register, interim heritage orders and emergency protection orders can be used to protect heritage items or places. If these protections are in place, approval must be obtained from the NSW Heritage Council (**Heritage Council**) or local council (as relevant) before work can be done which might damage the protected item or place.

The Heritage Act is [currently under review](#) following a 2021 NSW Parliamentary inquiry (refer to [Upcoming reforms to the NSW heritage system](#) below).

, First Nations, National and World Heritage

Aboriginal heritage items or places are protected under specific laws,¹ although these items or places can also be listed for protection on the State Heritage Register or under an interim heritage order.

Read: [EDO Factsheet on Aboriginal Culture and Heritage](#) for more information.

Items and places which are of national heritage significance, Commonwealth heritage places or world heritage are protected under Commonwealth law.²

¹ [National Parks and Wildlife Act 1974 \(NSW\)](#).

² [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#).

Read: EDO Factsheet on [Commonwealth Heritage Protection Laws](#) for more information.

Forms of NSW heritage protection

Members of the public can seek to use the NSW heritage system to protect heritage items or places in three key ways:

Forms of protection	How can members of the public support protection?
(1) Listing on the State Heritage Register	✓ Work with their relevant local council to recommend an item or place for listing to the Heritage Council (or recommend an existing listing not be removed). ✓ Once proposed by the Heritage Council, support an item or place for listing (or oppose the removal of an existing listing) by making a written submission to NSW Heritage. ✓ Report to Heritage NSW any evidence of an item or place on the State Heritage Register not being properly maintained and repaired.
(2) Interim heritage orders	✓ Request their relevant local council to make an item or place subject to an interim heritage order. ✓ If the local council is unable to make an interim heritage order, request NSW Heritage to make an order.
(3) Emergency protection orders	✓ Request NSW Heritage to implement an emergency protection order to stop work on a site if an item or place is being harmed or about to be harmed.

Instances/exemptions where the Heritage Act will not apply

It is important to note that there are certain circumstances in which the protections afforded by the Heritage Act will not apply. Mostly, these exemptions apply to activities that relate to State significant development (**SSD**) and State significant infrastructure (**SSI**). For example:

- the emergency protection orders under s 136 of the Heritage Act **do not** apply to prevent or interfere with the carrying out of SSD³ that is authorised by a development consent,⁴ or approved⁵ SSI;⁶
- approvals under Part 4 of the Heritage Act (in relation to Interim Heritage Orders and listing on the State Heritage Register) and excavation permits required by s 139 of the Heritage Act are **not** required for SSD⁷ and SSI⁸ projects.

(1) Listing on the State Heritage Register

Listing an item of State heritage on the State Heritage Register means a person cannot damage, destroy, alter or move the item, building or land without approval from the NSW Heritage Minister (**Minister**).⁹

What is an item of State heritage significance?

Items of State heritage significance include places, buildings, works, relics, moveable objects or precincts which are of historical, scientific, cultural, social, archaeological, architectural, aesthetic or natural significance to the State of NSW.¹⁰ The Minister must publish the criteria that the Heritage Council uses to make decisions about whether or not an item is of State heritage significance.

How does an item get on to the State Heritage Register?

The Minister decides whether an item is of State heritage significance and should be placed on the State Heritage Register.

This can only be done if the Heritage Council recommends the listing and the Minister considers a range of factors in relation to the item, including the necessity of long-term conservation and the impact on its reasonable or economic use.¹¹

The Heritage Council can make a recommendation to the Minister:¹²

- at the request of the Minister;
- on the Heritage Council's own initiative;
- at the request of the owner of the item concerned; or

³ *Environmental Planning and Assessment Act 1979 (NSW)*, s 4.41(2).

⁴ See *Environmental Planning and Assessment Act 1979 (NSW)*, s 4.41(3).

⁵ See *Environmental Planning and Assessment Act 1979 (NSW)*, s 5.23(4).

⁶ *Environmental Planning and Assessment Act 1979 (NSW)*, s 5.23(2).

⁷ *Environmental Planning and Assessment Act 1979 (NSW)*, s 4.41(1)(c).

⁸ *Environmental Planning and Assessment Act 1979 (NSW)*, s 5.23(1)(c).

⁹ Heritage Act, s 57(1) – (2).

¹⁰ Heritage Act, s 4A(1).

¹¹ Heritage Act, s 32(1).

¹² Heritage Act, s 32(2).

- at the request of the relevant local council.

Although members of the public cannot make recommendations directly, they can work with the relevant local council to make a recommendation to the Heritage Council.

Visit: The Heritage NSW [State Heritage Inventory Portal](#) to search for declared Aboriginal Places, items listed on the State Heritage Register, Interim Heritage Orders and items of local heritage significance.

Before the Heritage Council can recommend to the Minister that an item be placed on the State Heritage Register, it must (amongst other things) invite and consider public written submissions on the proposed listing.¹³ The [NSW Heritage website](#) explains how to make a written submission.

After the closing date for submissions, the Heritage Council must then notify its decision to all affected owners or occupiers, those who made a submission during the submission period and the relevant local council.¹⁴ The Heritage Council then makes its recommendation to the Minister (if it recommends a listing).¹⁵

Within seven days of the Minister's decision, the decision (whether to list or not) and the reasons for it must be published online.¹⁶

Can a listing be appealed?

There is no right to appeal the Minister's decision to make a listing on the State Heritage Register on the merits. This means a person cannot appeal the decision because they disagree with it.

However, if the Minister has not followed the correct legal process in deciding to make the listing, any person can bring judicial review proceedings in the NSW Land and Environment Court to challenge the validity of the decision under the Heritage Act¹⁷ (refer to [Case study](#) below).

Read: EDO Factsheet on the **Land and Environment Court of NSW** for more information on merits appeals and judicial review.

Can items be removed from the State Heritage Register?

The Minister can direct that an item or place be removed from the State Heritage Register if the Minister considers that:

¹³ Heritage Act, s 33.

¹⁴ Heritage Act, s 33(1)(e).

¹⁵ Heritage Act, s 33(1)(f).

¹⁶ Heritage Act, s 34(4).

¹⁷ Heritage Act, s 153.

- the item or place is no longer of State heritage significance; or
- the long-term conservation of the item or place is unnecessary and that the listing means the item is incapable of reasonable or economic use and/or would cause undue financial hardship to the owner or user of the item or place.¹⁸

As with a listing, this can only be done on the recommendation of the Heritage Council. The procedure for removing an item from the State Heritage Register is the same as for making a listing.¹⁹

What if an owner is not maintaining and repairing the listed item?

The owner of a building, work or relic which is listed on the State Heritage Register has a legal duty to maintain and repair the item.²⁰ There are minimum standards of maintenance and repair which must be met, including weather-proofing, fire protection and security.²¹

The Heritage Council can issue an owner with an order to maintain or repair a heritage item, but must first give the person notice and an opportunity to comment.²² The owner can appeal against the notice to the NSW Land and Environment Court within 28 days.²³ Failure to comply with an order may mean that the land cannot be used or developed for up to 10 years, or that the government can compulsorily take over the land.²⁴

(2) Interim heritage orders

An interim heritage order is a temporary form of protection over an item or place that can be made while further investigation of the State or local heritage value of the item or place is carried out. An interim heritage order means a person cannot damage, destroy, alter or move the item or place without approval from the Heritage Council or local council (as relevant).²⁵

What is an item of local heritage significance?

As compared to an item of State heritage significance (refer to [What is an item of State heritage significance?](#) above), an item of local heritage significance is defined as a place, building, work, relic, moveable object or precinct which is of significance to **an area**,

¹⁸ Heritage Act, s 38(1).

¹⁹ Heritage Act, s 38(3).

²⁰ Heritage Act, s 119.

²¹ Heritage Act, s 118; [Heritage Regulation 2012](#), cl 9 –18.

²² Heritage Act, ss 120 and 120A.

²³ Heritage Act, ss 120F and 120L. These appeals are heard in Class 2 of the NSW Land and Environment Court.

²⁴ Heritage Act, s 121.

²⁵ Heritage Act, s 57(1).

having regard to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.²⁶

How is an interim heritage order different to a listing on the State Heritage Register?

The process for making an interim heritage order is faster and less complex than making a listing on the State Heritage Register. Unlike listing on the State Heritage Register, the Minister is not required to give anybody notice before making an interim heritage order.²⁷

There are limited instances, however, where it will be appropriate for the Minister or local council to make an interim heritage order. These orders are generally only made if there is a threat of harm.

How can an interim heritage order be made?

Interim heritage orders can be made by the Minister on the advice of the Heritage Council²⁸, or by local councils under authorisation.²⁹ The Minister can make interim heritage orders for items or places that the Minister considers may be found (after further inquiry) to be of State or local heritage significance.³⁰ Councils may only make interim heritage orders in relation to items or places that the council considers may be found (after further inquiry) to be of local heritage significance.³¹

The majority of interim heritage orders are made in response to concerns raised by members of the public or local government. If members of the public are concerned about the protection of an item or place of potential heritage significance, they can discuss it with the relevant local council in the first instance. If the local council is unable to make an interim heritage order, members of the public should [contact NSW Heritage](#).

Interim heritage orders must be published in the NSW Government Gazette and also notice of the making of the order is to be published in a form that is likely to bring the notice to the attention of members of the public in the area in which the item is located.³² An interim heritage order remains in force for 12 months, unless the order specifies a shorter period.³³

In the case of interim heritage orders made by a local council, these lapse after 6 months but can be extended by the local council up to a total of 12 months. During this time, the local council must decide whether to list the item in its local environmental plan or, if the

²⁶ Heritage Act, s 4A.

²⁷ Heritage Act, s 26.

²⁸ Heritage Act, s 24.

²⁹ Heritage Act, s 25.

³⁰ Heritage Act, s 24.

³¹ Heritage Act, s 25(2).

³² Heritage Act, s 28(1).

³³ Heritage Act, s 29(2).

item is of State heritage significance, nominate the item for inclusion on the State Heritage Register.³⁴

Can an interim heritage order be appealed?

An affected owner or occupier can appeal to the NSW Land and Environment Court against an interim heritage order which is made by a local council.³⁵ There is no right of appeal on the merits if the interim heritage order was made by the Minister.

If, however, the Minister has not followed the correct legal process in making the interim heritage order, any person can challenge the validity of the order in the NSW Land and Environment Court.³⁶

(3) Emergency protection orders

The Minister or the Chairperson of the Heritage Council can make an emergency order to stop work on a site if a building, work, relic or place is being harmed or is about to be harmed.³⁷ These orders may only be used where the item or place is not already covered by an interim heritage order or listing on the State Heritage Register.

Emergency orders only last for 40 days. Within that time, the Heritage Council must assess the heritage value of the item or place and advise the Minister as to whether an interim heritage order should be made.³⁸

Enforcement options

Can civil proceedings be brought?

Any person can bring civil enforcement proceedings in the NSW Land and Environment Court to remedy or restrain a breach of heritage protection laws.³⁹ Where a breach is established, the Court has broad powers to limit the manner in which a site can be used, or to order the restoration of a building or site.⁴⁰

Can the State of NSW take criminal proceedings?

³⁴ [Local Government Heritage Guidelines](#), cl 5.5.2(5) and Heritage Act, s 29(2).

³⁵ Heritage Act, s 30(1).

³⁶ Heritage Act, s 153. These are judicial review proceedings and are heard in Class 4 of the Court's jurisdiction.

³⁷ Heritage Act, s 136(1).

³⁸ Heritage Act, s 136.

³⁹ Heritage Act, s 153.

⁴⁰ Heritage Act, s 154.

Minor offences can be heard in a local court, whereas more serious offences are heard in the NSW Land and Environment Court.⁴¹

If a breach of the Heritage Act has been committed (e.g. a person has failed to obtain an approval to damage a heritage item or has breached the terms of an approval), the NSW Land and Environment Court can impose a penalty of up to \$1.1 million, or imprisonment for up to 6 months, or both.⁴² A breach of the Regulations, however, is punishable only by a penalty of up to \$5,500.⁴³

The maximum penalty that a local court can impose is \$22,000 or 3 months imprisonment, or both.⁴⁴

Offences must be prosecuted within 12 months of the alleged commission of the offence, or 12 months from when the offence first came to the attention of an authorised person.⁴⁵

If an owner of land is convicted of an offence which involved demolishing, damaging or despoiling a heritage item or place, the Minister can make an order directing that the land not be used or developed for up to 10 years.⁴⁶ Before the order is made, the owner must be given an opportunity to show cause as to why the order should not be issued.⁴⁷

Case study

Case study: Successful appeal by local community group against Minister's decision to not list on the State Heritage Register⁴⁸

In July 2016, the Minister made a decision that the Sirius Apartment Building at Millers Point in Sydney not be listed on the State Heritage Register.

Built in the 1980s with a distinct architectural style, the building is a significant and well-known building in Sydney. The building was predominantly used as social housing until the NSW Government announced in March 2014 that it intended to sell the building and re-invest the proceeds in other social housing in NSW.

The owner (Property NSW) and lessee (NSW Land and Housing Corporation) of the building objected to the listing on the grounds it would adversely affect the value of the

⁴¹ Heritage Act, s 158; [Land and Environment Court Act 1979 \(NSW\)](#), s 21(e). These matters are heard in Class 5 of the Court's jurisdiction.

⁴² Heritage Act, ss 156 and 157.

⁴³ Heritage Act s157(2)

⁴⁴ Heritage Act, s 158(4).

⁴⁵ Heritage Act, s 158A.

⁴⁶ Heritage Act, ss 160 and 161.

⁴⁷ Heritage Act, s 160.

⁴⁸ *Millers Point Community Association Incorporated v Property NSW* [2017] NSWLEC 92.

building and, in turn, how much revenue the NSW Government would generate from the building's sale.

A key reason for the Minister's decision to not list the building on the State Heritage Register was that "whatever the heritage significance" of the building, even at its highest, that was outweighed by the "undue financial hardship" the listing would cause to Property NSW by diminishing what would otherwise be its sale price.

A resident action group, Millers Point Community Association Incorporated (**MPCA**), challenged the decision under the Heritage Act in the NSW Land and Environment Court (**LEC**). As outlined above ([Can a listing be appealed?](#)), the Act permits any person to bring proceedings to restrain or remedy a breach of the Act. The MPCA argued that the Minister had:

- erred in his interpretation of "financial hardship"; and
- by failing to quantify the heritage significance of the building, had failed to properly consider whether there was "undue" financial hardship.

The LEC agreed with the MPCA. Acting Judge Molesworth found that:

- the Minister had erred when he accepted that a mere price difference between the building being listed or remaining unlisted automatically resulted in "financial hardship" – this determination needed to be based on Property NSW's particular financial circumstances; and
- assessment of "undue" financial hardship requires comparison between the heritage value of the item being considered for listing and the adverse financial impact the listing would have – with the Minister failing to quantify the heritage value of the item, he had failed to undertake this necessary analysis.

As a consequence, the LEC held that the Minister's decision was invalid and of no legal effect and it directed the Minister to re-make his decision.

This was an important decision in ensuring greater rigour around future listing decisions, including those hinging on considerations of undue financial hardship.

Upcoming reforms to the NSW heritage system

The Heritage Act is [currently under review](#) following a 2021 Parliamentary inquiry into the Act. The NSW Government has committed to implement the [recommended reforms](#) as part of a broader review of the NSW heritage system. A strategy paper is currently under development. However, the public consultation period closed on 31 March 2024.⁴⁹

Of particular relevance to heritage proponents, the recommended reforms include:

⁴⁹ See: <https://www.haveyoursay.nsw.gov.au/nsw-heritage-strategy>

- including a more varied, inclusive and nuanced concept of what constitutes the State's heritage in the Heritage Act (e.g. beyond buildings and structures to include intangible cultural heritage and cultural landscapes);
- increasing opportunities for community participation and co-design in the identification, protection and management of heritage, including Indigenous members of the community;
- introducing, on a trial basis, an early round and community-driven nomination process to call for potential State Heritage Register nominations;
- improving consultations with heritage applicants, carrying out site visits to improve understanding of the value of heritage applications and streamlining the heritage application process; and
- progressing reform of Indigenous culture heritage legislation as a priority, in tandem with review of the Heritage Act.⁵⁰

We will post updates on the reforms as they become available. In the meantime, you can [contact Heritage NSW](#) for further information.

⁵⁰ NSW Legislative Council Standing Committee on Social Issues, *Review of the Heritage Act 1977*, Report 59, October 2021, pages x – xi (Recommendations 2, 5, 9, 13 and 16), available at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2814/Report%20No.%2059%20-%20Standing%20Committee%20on%20Social%20Issues%20-%20Review%20of%20the%20Heritage%20Act%201977.pdf>.

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