



THE LAW SOCIETY
OF NEW SOUTH WALES

COPY

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20 July 2009

The Hon. Kristina Keneally, MP
Minister for Planning
Level 35, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Heritage Amendment Act 2009 (Act)

I am writing to you at the request of the Law Society's Environmental Planning and Development Committee (EPD Committee).

The EPD Committee considers and deals with matters related to environmental planning and development law and advises the Council of the Law Society on all issues relevant to its area of practice. The Committee members are experienced professionals whose expertise has been developed variously in representing the interests of local government, government instrumentality, corporate and private clients.

The Committee has concerns in relation to some of the provisions of the Act, which received assent on 9 June 2009. Those provisions, which amend the *Heritage Act 1977*, relate to public participation and are expressed to commence on proclamation.

Public participation

Removal of items from the State Heritage Register

At present, under sections 33 and 38 of the *Heritage Act 1977*, public submissions are sought both when the Heritage Council recommends that the Minister list an item on the State Heritage Register or recommends removal of an item from the State Heritage Register.

The Committee notes that, under the *Act* public submissions and input are sought on decisions about whether or not an item should be listed on the State Heritage Register (section 33(1)), but public submissions are not sought for decisions to remove an item from the State Heritage Register (section 38). The Committee considers that submissions from the public are as relevant to a decision to list an item, as it they are to a decision to remove the item from the Register, with a resulting loss of heritage protection. The views of the public ought to be taken into account by the Minister when forming a view as to whether or not the long-term conservation of an item is necessary.

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The Amendment does not recognize that heritage values are of value to the entire community, not just the owners of the site.

Amendment to section 92 of the Environmental Planning and Assessment Act 1979

The amendment to section 92 of the *Environmental Planning and Assessment Act 1979*, in Schedule 2 [6] of the *Act*, which will also commence on proclamation, makes a further incursion into the exercise of local councils' discretion when determining development applications. This section will prevent councils from refusing development consent on heritage grounds, in the event that state heritage approval has been granted for a development of a heritage item.

The Committee considers that local councils are often better placed to understand and gauge the heritage significance of a heritage item to a local community than the Minister or Heritage Council. The Committee is therefore of the view that a council's assessment of the heritage impacts of a development application involving a heritage item should be taken into account.

The amendment to section 92 of the *Environmental Planning and Assessment Act 1979* will also mean that, when assessing some development applications, councils will be unable to properly take into account public submissions, if those submissions seek the retention of an item of local heritage significance. The Committee is concerned by this further removal of opportunities for the views of the public to be taken into account, in the determination of development applications.

Right to legal representation

The Act amends section 36 of the *Heritage Act 1977* by adding the words "unless otherwise provided by regulations" after "personally or" so that the relevant part of that section now reads:

"36 Planning Assessment Commission

- (1) At a review conducted by the Planning Assessment Commission each of the following is entitled to appear before the Commission either personally or, **unless otherwise provided by the regulations**, by an Australian legal practitioner or agent;

- (a) an owner, mortgagee or lessee of land to which the proposed listing will apply....."

(bold emphasis added)

The Law Society has, in its earlier submissions relating to the NSW planning reforms, opposed proposals to exclude lawyers from the planning process (e.g. from planning arbitration and the PAC public hearing process). Those submissions stated that such exclusion is unjustified and inconsistent with the principles of access to justice. The same considerations apply to the potential removal of the right to legal representation, as a result of the making of regulations so providing, applying to a review where property rights may be significantly affected.

Name of the Act

The Committee notes that the Act also contains a series of amendments to the *Environmental Planning and Assessment Act 1979* that are unrelated to the *Heritage Act 1977* or heritage in general. The Committee is of the view that the name of bills in general should reflect their content, to facilitate transparency in the legislative process.

Objects Clause

The Committee is supportive of the proposal to add an objects clause to the *Heritage Act 1977* as it provides more guidance about how executive powers are to be exercised under the Act.

Conclusion

If you wish to discuss the matters raised in this submission, please contact Ms Liza Booth, Executive Member of the Committee by telephone to (02) 9926 0202 or by email to Liza.Booth@lawsociety.com.au.

Yours faithfully,



Joseph Catanzariti
President