National Trust *of* Australia (Victoria)
ABN 61 004 356 192

NATIONAL TRUST

Tasma Terrace
4 Parliament Place
East Melbourne
Victoria 3002

Email: info@nattrust.com.au
Web: www.nationaltrust.org.au

T 03 9656 9800
F 03 9656 5397

28 August 2015

Heritage Act Review
c/- Tim Smith
Executive Director
Heritage Victoria
GPO Box 2392
Melbourne VIC 3001

RE: Heritage Act Review

Dear Mr Smith,

I am pleased to provide the National Trust of Australia (Victoria)'s submission to the Heritage Act Review.

The role of the National Trust in creation of the first act for protection of cultural heritage in 1974 (the Historic Buildings Act) was a fundamental one, and the Trust has maintained a presence and role in the Heritage Act ever since. We therefore welcome the opportunity to contribute to these important reforms.

This submission has been prepared following National Trust staff attendance at several stakeholder workshops conducted by Heritage Victoria, as well as consultation with National Trust branches and external stakeholders.

If you require any further information please contact me on 9656 9837. We look forward to advice regarding the outcome in due course, and look forward to engaging with the Review as it progresses.

Yours sincerely,

Anna Foley
Acting Manager, Advocacy & Conservation

Attachment 1: National Trust submission in response to the 'Review of the Heritage Act Discussion Paper' August 2015
Attachment 2: Case studies

CC National Trust Branches

National Trust submission
in response to the 'Review of the *Heritage Act* Discussion Paper'
August 2015

Introduction

The role of the National Trust in creation of the first act for protection of cultural heritage in 1974 (the *Historic Buildings Act*) was a fundamental one, and the Trust has maintained a presence and role in the Heritage Act ever since.

The *Discussion Paper* released on 21 June 2015 by the Minister deals almost exclusively with processes and does not discuss the composition of the Heritage Council or its overall functions. Nonetheless we consider that it is important to state that the National Trust continue to have a role in the constitution of the Heritage Council. One place from the 10 available places must be for a person selected from three names nominated by the Trust. Whilst the categories of other members include persons with expertise in architectural conservation and other expertise in heritage, the appointments remain susceptible to political influence.

Whilst the most recent round of appointments has, in our opinion, now considerably strengthened the depth of available expertise available on the Council, earlier appointments had weakened the strength of the Council, and therefore retaining a nominee of a an independent not-for-profit heritage organisation provides a modest but invaluable safeguard against political or otherwise indifferent appointments.

Summary

The Heritage Act has remained fundamentally unchanged for nearly 20 years. Whilst there are some simple reforms of the Act that have been awaiting a review for some time, most are of an administrative nature to remove duplications in process and clarify procedural matters. The idea of broader reform and of tackling some of the key principles that have created the most controversy has not been widely entertained in recent times.

Given that the purposes of the Act, which are to remain unchanged, are (*inter alia*) ''to provide for the protection and conservation of places and objects of cultural heritage significance'', in our view the greatest deficiencies in the current Act are:

1. The requirement for consideration impact of refusal of a permit on the "reasonable or economic use" of a place. This is frequently called-up by commercial developers to justify otherwise poor heritage outcomes.
2. The lack of third-party appeals under the Act.

3. The poor relationship in decision-making to local heritage issues and integration to local heritage planning.
4. The inability for places deemed by Heritage Council to be locally significant to be included in an interim heritage overlay control.

The *Discussion Paper* flags many administrative changes but few substantive changes to the Act. It highlights the following possible changes:

- streamlining heritage listings into one simple process
- introducing the concept of State significant heritage precincts and cultural landscapes
- including a significance threshold test for including sites in the Heritage Inventory of archaeological places
- ensuring that the views of local government are considered on permit decisions
- increasing penalties for unauthorised works
- making Heritage Victoria a statutory referral authority for subdivisions under the *Planning & Environment Act*
- removing the financial hardship clause from considerations of permit applications

In our view the *substantive* proposed changes that improve the enabling of the purposes of the Act are:

1. *Activating the Heritage Register for broadacre landscape and urban precincts protection*

   This issue has been difficult to deal with under the current Act, although not beyond its powers. The difficulty of dealing with multiple owners has been the major hurdle. The Heritage Council will provide revised assessment criteria and definitions. This is a welcome reform allowing expansion of the viable scope of listing on the Register.

   The complexities of this issue can be illustrated by the example of the Collins Settlement Precinct (see Attachment 2).

2. *Provide a greater role for local government*

   The consideration of the views of local government has been a vexed matter, resulting in frustration at the local level for decisions made at the state level failing to take account of local heritage issues. The changes will require Heritage Victoria to consider the views of local government and its heritage advisers.

   The complexities of this issue can be illustrated by the example of 'Lathamstowe' in Queenscliff (see Attachment 2).

3. *Heritage Victoria to be a statutory referral authority for subdivisions under the Planning & Environment Act*

This was a recommendation in the final report of the *Review of Local Heritage Provisions* 2007. A number of recommendations from that Committee have been implemented over the years but progress has been slow. This proposed reform is perhaps the most radical of all the suggested changes to the Act. It removes duplication of permits under the *Heritage Act* and *Planning & Environment Act* and makes Heritage Victoria a statutory referral authority with determining powers – i.e. if Heritage Victoria wants the permit refused on heritage grounds by the local authority, it must be refused.

This is also a model for dealing with all heritage approvals for state-listed places in the future. If adopted, the proposal for subdivision decisions will be very closely scrutinised for its workability and success, and could lead to a broadening to all permits matters being handled in this way. We believe it has great merit, because the Executive Director would make considered judgements and submissions about heritage impacts alone. The 'reasonable or economic use' clause currently in the Act could also become redundant. All the balancing of competing issues would be undertaken by the Council, which would take into consideration their own local policies as well as the statutory heritage referral response. It will also open the process of review up to appeals at VCAT. One of the biggest deficiencies of the current Act is that it has no third party rights of appeal.

The Trust had flagged such a reform in the 2014 state election, and whilst only dealing with subdivisions, which are much less numerous compared to normal development and works permits under the Act, it will be a valuable testing ground for future reform, and is therefore welcome and strongly supported.

4. *Removal of financial hardship clause from consideration of permits*

This is not as radical as it sounds, as the benefit derived from the clause is primarily aimed at homeowners and that class of owners, generally speaking, do not raise the most contentious types of development under the *Heritage Act*. The financial hardship clause is infrequently invoked, with the most controversial permit applications instead being made by developers or commercial owners seeking reliance on the accompanying 'reasonable or economic use' provision. Large developments impacting heritage places frequently call-up the impact refusal of a permit would have on 'reasonable or economic use' of the place. Nonetheless removal of financial hardship clause is certainly an improvement in securing better heritage-driven outcomes, and its removal may pave the way for greater reform later.

If the Act is amended as proposed, the substantive outstanding remaining deficiencies would be:

1. The inability for Heritage Council decisions that finds places of local significance to be translated to interim heritage controls. If, following an assessment by Heritage Victoria (and a possible hearing) the Heritage Council determines that a place is not of state level significance, but should be referred to local government for consideration for an overlay, in many instances the referral is not taken up by local government. The politics of local government frequently cloud a detached assessment process. The recent failure of Glen Eira Council to proceed with an amendment for *Frogmore* – and its consequential demolition – illustrates how a place of clear local significance can quickly succumb to demolition.

2. The lack of third party appeals for permits. The exemption from review rights is anomalous.

3. The retention of the ''economic & reasonable use'' clause in permit decisions. The clause was absent from the 1974 legislation, but in 1981 the Historic Buildings Council was directed to take certain factors into consideration in its permit decision-making, including the introduction of consideration of reasonable or economic use and undue financial hardship. The provision has been retained in all subsequent legislation.

4. The lack of any workable mechanism for enforcement against demolition by neglect. The complexities of this issue can be illustrated by the example of 14 William Street, Port Fairy (see Attachment 2).

Comments on parts one and two of the Proposed Changes to the *Heritage Act*

A. Improving Heritage Registration Processes

1. Streamlining the registration process.

This is an administrative change that improves timely manner of decision-making.

2. Reform of the nomination process

We have some concerns about introducing a test of "reasonable prospect of success." Whilst it will perhaps rule out some applications that have absolutely *no* prospect of success it will result in a number of 'nomination appeal' hearings that, where successful in that first instance, will mean that places may ultimately be subject to two hearings. The resources to deal with the same place twice, albeit on different procedural matters, will still require an assessment and close examination of significance. Indeed, experts may be called twice. The change thus potentially impedes access to prompt and efficient administrative decision-making.

3. Develop a consistent approach to heritage registrations

This is supported.

4. Provide for heritage area designation (cultural landscapes and urban precincts).

This is supported and is a significant move to overcome the problem that it is difficult to register and manage broad-acre landscapes and urban precincts of state significance under the *Heritage Act*. The proposal allows the Heritage Council to recognise areas and landscapes of state significance and pass these on to local government for implementation and management under the *Planning and Environment Act*. However there needs to be some link to the *Planning and Environment Act* so that assessment by the Heritage Council will be sufficient grounds for implementing a planning scheme amendment. Duplication of a Heritage Council hearing and a panel hearing should be avoided. Local Government should also be required to implement the amendment within a specified period of time.

As is proposed for permits for subdivision under the *Planning and Environment Act* the Executive Director must be a determining referral authority for permits in a landscape or area of state significance.

5. Ensure the heritage Inventory is effective and transparent

These measures are supported but records of all archaeological sites should be retained as a database.

6. **Provide for the protection of objects that contribute to the significance of a place.**

This is supported.

7. **Specify a significance threshold for the Heritage Register**

Whilst it is accepted that the Heritage Council should provide guidance on the level of significance for a place of State significance we consider that it would be a mistake to enshrine such guidance in the Act. The current system of threshold guidelines and assessment criteria provide a good level of guidance in assessment whilst allowing evolution and change to notions of what is significant. The proposed change would provide for a very inflexible set of definitions that would not allow the definition of understanding of heritage to evolve.

8. **Streamline the amendment or removal of a place or object from the Heritage Register**

This is supported. However care will need to be exercised when taking action under b) (2). It will often be hard to predict whether the development of excised land will have an adverse impact on remaining heritage fabric and retaining the area of registration may be the only control available to retain the setting and context of remaining fabric.

9. **Clarify exemptions in new registrations**

This is supported.

B. Simplifying Heritage Permit and Consent Processes

1. **Provide greater role for local government in permit processes**

The relationship with local government and a local council's heritage policies and practices has been one of the greatest failures under the current Act's permit processes. This is a not uncommon scenario:

- Heritage Victoria conducts extensive pre-application consultations with a proponent and negotiates a solution satisfactory to the Executive Director.
- An application is submitted and the local council notified. Councils frequently fail to respond within the two-week time frame because it is too short for Council to receive comments from planners and their heritage advisor.
- If the application reaches the planners and/or heritage advisor the council might conclude that the proposal is contrary to local heritage policy.
- A great deal of time has been invested in negotiating the current version of the proposal so a permit is issued regardless of the Council's views.

It is not clear if the proposed changes would remedy this problem and we do not know what the 'prescribed' time is to be.

As discussed on pp. 2–3 of this submission, a very effective solution would be for the Council to become the permitting authority with the Executive Director being a determining statutory referral authority under the Act. This would also introduce appeal rights to VCAT. The merit is that the all the balancing of competing issues would be undertaken by the Council, which would take into consideration their own local policies as well as the statutory heritage referral response. The permitting process would then be totally integrated with local heritage policies, and with the Executive Director retaining the right to determine a refusal.

2. **Provide for a 'one-stop-shop' for subdivision applications.**

The proposal that the subdivision permitting process be determined by the local council whilst the Executive Director acts as a determining referral authority is strongly supported. This is the most innovative change proposed in the Review and will provide a trial process that in time could become applicable to all permits for State registered places, as discussed in (1) above.

3. **Remove 'undue financial hardship' considerations in permit determinations**

The removal of this provision is supported for the reasons provided in the *Discussion Paper*, namely that the financial circumstances of an owner may change over time, and heritage places may be on-sold with such benefitting permits to owners with different financial circumstances. We also believe that the provision has been rarely used.

4. **Ensure a clear role for the National Trust in permit matters.**

The provisions applying to the National Trust allow a role in permit hearings when a hearing is allowed, but no third party appeal. The proposed amendment clarifies that the Trust may be heard if it has made a submission and a hearing is convened following a request by the owner.

5. **Introduce appeal rights for archaeological consents.**

This proposal is consistent with other provisions of the Act and is supported.

6. **Clarify issues arising from registered places in multiple ownership**

This is supported.

7. **Remove the capacity for the Heritage Council to determine permit applications**

This was introduced as part of the Act in 1995 but has never been invoked as the Heritage Council did not wish to lose their right to conduct an appeal arising from a

decision of the Executive Director. The change is supported.

8. **Prescribe information to accompany a permit or consent application and implement timeframes for further information requests**

These provisions are practical and necessary.

9. **Provide for amendment of permit applications and permits**

Supported.

10. **Ensure the Victorian Civil and Administrative Tribunal (VCAT) has appropriate expertise to consider referred matters.**

This is a laudable aim but it should be noted that VCAT has resisted such provisions in the past.

11. **Provide for consistent decision-making on review**

This appears to be totally appropriate.

12. **Clarify permit exemptions**

This is consistent with the proposed use of permit exemptions at the time of registration and is supported.

13. **Clarify liturgical permit exemptions**

Acceptable.

14. **Introduce a fee for lodging a permit appeal**

Supported.

15. **Introduce a fee for amending permits**

Supported.

Attachment 2 – Case studies

A) 1803 Collins Settlement Site, Sorrento

The inability of the Heritage Act to prohibit subdivision of the Shelmerdine owned portion of land in the Collins Settlement precinct, together with no third party right of objection has led to the site becoming a historical disaster with interpretive signage the only visible relationship between history and sense of place. The heritage value of this land now only remains as a distant figment of what was historically a most significant event in Victoria's history.

Recently the Shire, supported by representatives of the local community fought in VCAT for the right to a view cone from the Eastern Sister to the Western Sister and portion of Sullivan Bay – critical elements of the 1803 site having to be fought over does not give the public confidence in the depth of intent to protect heritage by the Act.

The Mornington Peninsula Branch strongly supports the NTAV submission paper.

Judy Walsh
Chair Mornington Peninsula Branch
National Trust of Australia (Vic)

B) Lathamstowe, Queenscliff

The Geelong and Region Branch of the National Trust of Australia (Victoria) was not satisfied by the decision or the process regarding the recent permit for Lathamstowe in Queenscliff (P22392). The community has expressed its frustration regarding the lack of transparency regarding the current permit assessment and decision.

Further, the Geelong and Region Branch are concerned that Heritage Victoria may not be adequately resourced to enforce the 17 conditions and 18 instances whereby the applicant will be required to notify or seek approval from the Executive Direction. It is the position of the Geelong and Region Branch that some plans and reports required as a condition of the permit should have been completed prior to the assessment of the application. Please refer to the submission by the Geelong and Region Branch (from which this brief summary has been drawn) for more detail relating specifically to the Lathamstowe case study.

Possible solutions in remedying the issues arising above include:

1. Publication of decision guidelines used in assessing permits under the *Act* to provide transparency for the community in understanding the process of permit assessment.
2. Permit decisions published with comment regarding the officer's application of the guidelines.
3. Third party appeal rights for permit decisions.

C) Port Fairy

The Port Fairy Branch of the National Trust of Australia (Victoria) cites 14 William Street, Port Fairy, as a terrible example of demolition by neglect, which reportedly was actively facilitated by the owner by not securing the property. Heritage Victoria were contacted but did not make any enforcement orders. Should Heritage Victoria require greater powers to compel owners with registered properties to protect them against damage or vandalism, then those powers should be considered under the current review of the *Act.* Similarly, Heritage Victoria should be resourced adequately to undertake enforcement where they have the power to do so.

The Port Fairy Branch cites another case study regarding enforcement of required permits. The Port of Port Fairy (a s.87 Committee of the Moyne Shire Council) installed stone steps in April 1999 without a permit in place. No retrospective permit was issued by Heritage Victoria. Despite ongoing correspondence from 2000-2005 and several management plans recommending removal, the steps remain in place. This issue does not inspire the Port Fairy Branch with confidence in the process, giving the impression locally that there is an apparent double-standard: one for private owners, and another for Council. All Councils should be setting an example in meeting the requirements of the *Act*.

This brief summary has been drawn from advice provided by the Port Fairy Branch of the National Trust of Australia (Victoria).