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Pete Smith
Director
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By email: enquiries@heritage.tas.gov.au

Dear Mr Smith

HISTORIC CULTURAL HERITAGE ACT AMENDMENTS

The Environmental Defenders Office is a non-profit, community based legal service specialising in environmental and planning law. We welcome the opportunity to comment on the draft *Historic Cultural Heritage Amendment Act 2012* (the **Amendment Act**).

The operation, and interaction, of the *Historical Cultural Heritage Act 1995* and the *Land Use Planning and Approvals Act 1994* has been subject to a number of legal challenges in recent years, and we commend the government for proposing amendments to facilitate better, more integrated management of Tasmania's historic heritage values. Our comments generally seek minor amendments to the proposed reforms.

STATEMENTS OF EXPECTATION AND INTENT

We support the introduction of Statements of Expectation and Statements of Intent to guide the operation of the Tasmanian Heritage Council.

Given the significance of these documents to understanding the role of the Tasmanian Heritage Council, we believe that the Statements should be available without charge. Therefore, we recommend that ss.10A(9) and 10B(6) be removed from the Amendment Act.

DESCRIPTION OF REGISTERED PLACES

While acknowledging the importance of a clear description of registered places, we support the judgment of Justice Wood in *Tasmanian Heritage Council v Citta Property Group Pty Ltd* [2010] TASSC 68, which recognised that it was not consistent with the objective of protecting historic cultural heritage places to allow any lack of technical data to invalidate an entry in the Heritage Register.

As Justice Wood observed, an approach which would invalidate any entry in the Register that did not strictly comply with the information requirements in s.15 would have significant ramifications, including removing protection for a large number of places with cultural heritage significance, creating widespread uncertainty and potential for opportunistic developers to take advantage of that uncertainty. It would also place an undue burden on the Tasmanian Heritage Council to review all current entries, identify and rectify any deficiencies.

We therefore support the validation of all existing entries pursuant to the proposed s.100A.

ENTRY IN THE REGISTER

Eligibility

We support the clarification of the registration criteria in s.16 of the Act, and the introduction of an additional criterion for properties exhibiting "particular aesthetic characteristics".

In particular, we believe that the amendments will remove the confusion created by the decision in *Corney v Tasmanian Heritage Council* [2009] TASRMPAT 77 that a place must pass a threshold test of "historic cultural heritage significance" before considering it against the registration criteria. It is appropriate that a place which satisfies one or more of the listed criteria be entered into the Register.

Guidelines

Section 90A(1) provides for the Tasmanian Heritage Council to issue registration guidelines. We recommend that ss.16 and/or 17 of the Act be amended to require regard to be had to those guidelines. For example,

s.17(1A) *In deciding whether to enter a place under subsection (1), the Heritage Council is to have regard to any relevant registration guidelines issued under section 90(1A)(a)*

Public notification

The proposed amendments to ss.18 and 22(5) replace the requirement to place a public notice in a local newspaper with a requirement to notify the public by "one or more" of a notice in a local paper, the Gazette or any electronic means.

We support the use of electronic notification, however do not believe that this should be a substitute for notification in local newspapers. Under the proposed amendments, notice may be published only in the Gazette or on the Tasmanian Heritage Council website (or other websites). The general public is far less likely to find out about a proposed listing by either of those means than through notice in the newspaper.

Given the importance of public awareness of heritage proposals, we recommend that the current requirement to place a public notice in the newspaper regarding provisional listings or proposed removals from the Register.

REMOVAL FROM LIST

The proposed new s.22(1A)(d) provides that a place may be removed from the Register if the Tasmanian Heritage Council is satisfied that "*the historic heritage value of the place is better represented, or more than adequately represented, by other registered places*"

The heritage value of a place should not be dependent on the number of similar places registered. In *Saint John v Tasmanian Heritage Council* [2008] TASRMPAT 134, the Tribunal noted (at [41]):

There is no numerical limit to the number of places which may be important in a particular context. The Register is not about preserving a sample of places, and no statutory limit on the number of properties which may be listed in a category is articulated, or implied. Nor is it the case that only rare special or uncommon examples deserve listing. By the same token, the prevalence of examples may well strike at the importance of a particular place.

Section 17(3) of the Act confirms that the Heritage Council "must not exclude a place from being entered in the Heritage Register on a provisional basis only on the ground that another place with similar characteristics is already entered in the Heritage Register." Equally, the fact that other places on the register satisfy similar

registration criteria should not be used to justify removal of a place which continues to satisfy those criteria.

If a place no longer exhibits heritage values, it can be removed under s.22(1A)(b) or (c). We recommend that s.22(1A)(d) be removed.

AMENDMENTS

We support the amendments to s.94 to expand the opportunities for entries in the Register to be amended to ensure that the protection offered by the Act extends to all the relevant heritage values of a registered place.

This will avoid situations such as that in *Widdowson Building Consultants Pty Ltd obo Winspear v Tasmanian Heritage Council* [2004] TASRMPAT 138, where the Tribunal held that a more recent annex to a heritage building was not included in the Register and could be demolished without a works approval.

WORKS APPLICATIONS

We recognise that implementation of the initial recommendations of the Godden Mackay Logan report that heritage management be split between places of 'State significance' and 'local significance' would have been difficult. Such an approach would also have presented a risk that properties would 'slip through the cracks' in the transition to new local registers. We therefore support the revised recommendations that the decisions of the Heritage Council be better incorporated into the decisions of planning authorities.

We support the proposals in the Amendment Act which effectively make all heritage works discretionary and establish the Heritage Council as a referral agency, with similar powers and obligations to the EPA and water authorities. This arrangement will allow the Heritage Council to determine those development applications for which it wishes to be involved (presumably reflecting proposals which affect heritage values of 'State significance'). The proposed arrangement also allows for a greater integration of heritage decisions within the planning system and reduces duplication for applicants.

While we generally support the proposed arrangements, we recommend that the following issues be considered:

- Section 35 provides that heritage works are 'unauthorised' if the person carrying out the work does not hold a permit or an exemption certificate for the works. We recommend that s.35(2) be amended as follows:

(2) For the purposes of subsection (1), heritage works are taken to be unauthorised if the person carrying them out ~~does not hold~~ is not acting in accordance with –

(a) a permit for the heritage works; or

(b) an exemption certificate for the heritage works

This amendment would ensure that work that does not comply with the conditions of a permit or exemption certificate is also considered 'unauthorised'. We note that failing to comply with the conditions is also a separate offence under s.44, but believe that the Act should make it clear that a person cannot rely on a permit or certificate to authorise work unless all conditions are being complied with.

- In determining its response under s.36(3), the Heritage Council should be explicitly required to have regard to the objectives of the Resource Management and Planning System.

Currently, s.7 requires the Heritage Council to “work within the planning system” and s.5(2) provides that the Heritage Council is “part of the State’s resource management and planning system”. However, unlike other RMPS legislation, there is no explicit requirement for the Heritage Council to exercise its powers and functions in a manner that furthers the RMPS objectives.

- The proposed s.46 does not adequately replicate the restriction under the current s.41 on works for which there is a prudent and feasible alternative. In particular:
 - The restriction should also apply to planning authorities. There may be situations in which the Heritage Council has not commented within the required timeframe as a result of limited resources, rather than lack of concern for a proposal. The planning authority should therefore remain subject to an obligation to avoid destructive works unless there is no prudent and feasible alternative.
 - The term “sanction” is unclear. Perhaps the section could be amended to read

The Heritage Council or a planning authority must not exercise any powers under this Part that would have the effect of authorising, or allowing the authorisation of, heritage works that are likely to destroy or degrade the historic cultural heritage significance of a registered place unless the Heritage Council or planning authority is reasonably satisfied that there is no prudent or feasible alternative to those works.

- The heading should not refer only to demolition, as works other than demolition can “destroy or degrade” heritage values. The text of the section is broader, so the heading should be amended to add “or other works”.
- S.46 of the current Act allows the Heritage Council to revoke a works approval where a person is not complying with the terms of the approval. As works approvals will now be granted under the *Land Use Planning and Approvals Act 1994*, action to prevent non-complying works is likely to be undertaken by way of civil enforcement proceeding.

While the Tasmanian Heritage Council would likely be a “person whose interests are affected” for the purposes of s.64 of LUPAA, we recommend that any doubt be removed by amending s.64 to explicitly include the Tasmanian Heritage Council as a body authorised to commence civil proceedings where a works approval is not being complied with.

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us to discuss any issue raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc

Per:



Jess Feehely
Principal Lawyer