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Queensland Heritage Council

Submission No. 017
11.1.13

23 December 2015

Ms Erin Pasley
Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
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Dear Ms Pasley

Thank you for the opportunity to make this submission about the two sets of bills being considered in relation to reforming Queensland's planning and development assessment system.

I write on behalf of the Queensland Heritage Council (Heritage Council) and have focused our comments on the three bills introduced by the Deputy Premier, Minister for Transport, Minister for Infrastructure, Local Government and Planning and Minister for Trade, Hon Jackie Trad MP; these being the Planning Bill 2015, Planning and Environment Court Bill 2015 and Planning (Consequential) and Other Legislation Amendment Bill 2015. This submission also draws on the draft statutory instruments currently available for public consultation, as well as the consultation report prepared by the Department of Infrastructure, Local Government and Planning on the responses given about previous drafts of the Planning Bills.

Introduction

The Heritage Council reiterates its support for the Government's efforts at delivering a more efficient planning and development assessment system and acknowledges the benefits brought to the current system by the State Assessment and Referral Agency (SARA). However, the Heritage Council contends that heritage protection in Queensland remains weakened with the Planning Bill and the Consequential Amendments Bill that accompanies it because they provide no statutory role for the Council to give its view about development applications that propose total or substantial destruction of a Queensland heritage place.

The Heritage Council acknowledges that the Planning Bill goes part of the way towards repairing the system activated in mid-2013; a system that removed development assessment from the jurisdiction of the *Queensland Heritage Act 1992* (Heritage Act) and the department that administers the Queensland heritage register without setting up equivalent protections under the *Sustainable Planning Act 2009* (SP Act 2009). The register is established by the Heritage Act as an inventory of the State's most important historic heritage places and its contents are decided by the Heritage Council.

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In practice, this means a decision on an application proposing total or substantial destruction of a Queensland heritage place, which effectively removes that place from the Queensland heritage register, can be made without adequate regard being had to the reasons for the decision to enter the place in the register. The Heritage Council believes it is necessary to keep pushing for the proposed system to take proper account of what is a fundamental principle for heritage conservation in this State. As this issue arises in limited circumstances, installing proper safeguards for heritage places would not compromise any policy intent for the streamlining of development assessment processes.

It is also worth noting that places important to Aboriginal and Torres Strait Islander cultural heritage are afforded further protection by the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* beyond the scope of the legislative planning regime. In contrast, areas and places on the Queensland heritage register and places of local heritage significance identified and managed by local government, while recognised by the Heritage Act, rely principally on planning legislation to regulate and manage the impacts of further development on them. In that respect, the importance of protecting areas and places on the Queensland heritage register and places of local heritage significance under planning legislation is paramount.

Following are comments about various aspects of the Planning Bill that are relevant to heritage conservation in Queensland, which will explain the Heritage Council's position. Where possible, these comments are backed up with suggestions for potential remedies.

Development applications proposing total or substantial destruction of a Queensland heritage place

The Heritage Council's chief concern with the development assessment system proposed in the Planning Bill is that it does not fully address the aspects of the State heritage protection system it believes were weakened by the legislative changes that established SARA.

The 12-member Heritage Council is established under the Heritage Act to provide leadership in the conservation of Queensland's cultural heritage for the benefit of the community and future generations. It performs a range of functions to further this objective, one of which it undertakes regularly and employs with great care – that of entering places in the Queensland heritage register. Before the Heritage Council decides to enter a place in the register, it considers the initial application; written and oral submissions from owners, local governments and members of the community; as well as the considered view of the Department of Environment and Heritage Protection on whether the place has State-level cultural heritage significance based on extensive analysis of historical research and site investigation.

Expertise underpinning decisions of the Heritage Council

It is also worth noting that the Heritage Council must be constituted to include an expert panel, some with appropriate knowledge, expertise and interest in heritage conservation and at least five members representing diverse entities and interests. At least one member must

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represent the interests of rural industries, one the Queensland Council of Unions and another, the National Trust of Australia (Queensland). Generally, an historian and an architect specialising in heritage conservation also sit on the Council.

Currently, should the Heritage Council endorse an application to remove a place from the register it does so informed by the range of expert views this membership provides. Against this background, any controversial decision can not only be rationally argued but draws upon the respect afforded those groups the membership represents. The same does not apply should SARA make a decision to effectively remove a place from the Queensland heritage register.

In that circumstance, unless the decision-maker has detailed knowledge and understanding of the relevant heritage context of the place in question (whether having that knowledge personally or having the benefit of advice from appropriately qualified experts), the decision-maker will be vulnerable to criticism from the broader community, which is entitled to rely on the protection afforded a place by the original decision of the Heritage Council.

As stated in the introduction to this submission, the Heritage Council acknowledges that significant improvements to one aspect of the current development assessment system are being proposed. The Planning Bill, along with its draft regulation, proposes to require SARA to assess development applications for Queensland heritage places against the relevant assessment benchmarks (namely the State Development Assessment Provisions or SDAP), as compared to the current system where SARA may have regard for the SDAP. This represents an important step forward.

However, there are two weakened aspects of the system that are not addressed in the Planning Bills.

Mechanisms to remove places from the Queensland heritage register

For the first of these aspects, the Heritage Council argues that the test applied when the destruction of a Queensland heritage place is proposed should be set out in the Heritage Act even though it may be applied through the SDAP. A place being demolished by approved development is equivalent to it being removed from the register. The relevant test is known as the 'no prudent and feasible alternative' test, and before SARA, had effect through section 68 of the Heritage Act. When SARA was established this test was transferred into an acceptable outcome contained in Module 9 of the SDAP (AO1.2 in version 1.7).

The Heritage Act is the legislation that establishes the Queensland heritage register and empowers the Heritage Council to make independent and impartial decisions in the public interest about the places on it. Surely the test applied when proposing to destroy one of those places should be outlined there? To address this concern, section 68 of the Heritage Act could be amended rather than omitted as the Consequential Amendments Bill currently proposes (refer *Clause 381*). Amendment of section 68 would also present an opportunity to better define what matters the test should consider.

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In terms of the second weakened aspect of the development assessment system, the Planning Bill still provides for a decision to be made by SARA that approves the destruction of a Queensland heritage place without regard being had for the view of the Heritage Council on whether a prudent and feasible alternative exists. The Heritage Council has voiced this specific concern to the Palaszczuk Government and the consultation report suggests that non-legislative arrangements will be made to allow it to provide its view 'where there is a significant risk that the effect of approving the development would impact on a cultural heritage place' (refer to the response under 5.1.10 Assessment of the State's interest on page 12). Yet the draft development assessment rules statutory instrument released for public consultation says nothing about how the view of the Heritage Council might be sought.

The Heritage Council believes the Development assessment rules must reflect these arrangements but struggles to see how its view on these matters can be feasibly sought within the Assessment phase proposed in the draft rules with its associated timeframes. The Council suggests that it be made part of the pre-lodgment process. If pre-lodgment negotiations have not been undertaken on this topic and the view of the Heritage Council provided, then the matter should be part of an Information Request from which the applicant cannot choose to opt out.

However, the Heritage Council would argue that such a facility should also be addressed in the legislation that establishes the Queensland heritage register and makes that aspect of development on a place assessable. This could be achieved by amending section 70 of the Heritage Act rather than omitting it as the Consequential Amendments Bill proposes (again refer to *Clause 381*). The Council would further argue that this should be supported in Schedule 14 of the Planning Regulation with a requirement that the assessment of applications involving total or substantial destruction have regard for the view of the Heritage Council about whether there is no prudent and feasible alternative.

As noted earlier, to the extent that this issue arises in limited circumstances, proper safeguards for Queensland heritage places would not compromise any policy intent for the streamlining of development assessment processes.

The purpose of the proposed Planning Act and how it is advanced

Since the establishment of SARA, development assessment involving places on the Queensland heritage register occurs under the jurisdiction of the SP Act 2009 and not the Heritage Act. The Heritage Council submits that in those circumstances it is reasonable that the purpose provisions of the legislation that will replace the SP Act 2009 appropriately incorporate the conservation of Queensland heritage places as part of the concept of ecological sustainability.

The Heritage Council believes *Clause 3(3)(c)* should be revised to distinguish between the need to conserve places important to Aboriginal and Torres Strait Islander cultural heritage and those part of the State's historic heritage. The Council suggests the following as a model:

(c) maintaining the cultural, economic, physical and social wellbeing of people and communities includes—

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(i) creating and maintaining well-serviced, healthy, prosperous, liveable and resilient communities with affordable, efficient, safe and sustainable development; and
~~(ii) conserving or enhancing places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance; and~~
(ii) conserving places important to Aboriginal cultural heritage and Torres Strait Islander cultural heritage, as well as the ***cultural heritage significance*** of ***Queensland heritage places*** and ***local heritage places***; and
(iii) providing for integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction; and
(iv) accounting for potential adverse impacts of development on climate change, and seeking to address the impacts through sustainable development (sustainable settlement patterns or sustainable urban design, for example).

As noted above, places important to Aboriginal and Torres Strait Islander cultural heritage are protected by the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*, while areas and places on the Queensland heritage register and places of local heritage significance identified and managed by local government are recognised by the Heritage Act. The terms cultural heritage significance, Queensland heritage place and local heritage place are already included in the Schedule 2 dictionary (which directs readers to the Heritage Act).

The revision above also removes the unnecessary contrast suggested between the concepts of conserving and enhancing. Conserving heritage places includes protecting, stabilising, maintaining, preserving, restoring, reconstructing and adapting them. The revision also removes the redundant word 'special'. Places of cultural heritage significance are by their nature special. The current construction suggests there is a subset of places of cultural heritage significance that the proposed Planning Act should seek to conserve. In terms of the State's historic heritage, the Queensland heritage register is the premier list of 'special' places and the Heritage Act contains the mechanisms for managing its contents.

While it is acknowledged that the addition of *Clause 5(2)(e)* may have occurred in response to the concerns expressed by the Heritage Council in its submission on the draft Planning Bill, it contends that the phrase 'conserving places of cultural heritage significance' adds nothing to an understanding of how the proposed Planning Act's purpose is advanced. This applies whatever the final construction of *Clause 3(3)(c)*. The Council suggests the phrase be replaced by 'the retention of Queensland's places of cultural heritage significance for the benefit of the community and future generations' or 'have appropriate regard for and foster the object of the *Queensland Heritage Act 1992*'.

Infrastructure designation

The Heritage Council notes with particular interest that development associated with the new infrastructure designation system, as provided for in chapter 2 part 5 of the Planning Bill, will be categorised as accepted development, except for building work assessed under the *Building Act 1975* (Building Act). This appears to be the case whether the designation is made by a local government or the Planning Minister and is different from the current community

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infrastructure designation system, which only precludes application of the local government's planning scheme.

The Heritage Council seeks clarification that building work on a Queensland heritage place is not made accepted development for an infrastructure designation. It does so because there is an overlap between building work assessable under the Planning and Building Acts but the Explanatory notes for the Planning Bill and the Draft Infrastructure Designation Statutory Guideline for Local Government suggest otherwise. For example, on page 42 of the Explanatory notes it is stated that 'Designation enables development for that infrastructure, with the exception of building work assessed under the Building Act, to be accepted development so that it is exempt from assessment against either State or local planning assessment benchmarks. This facilitates the efficient provision of the infrastructure at the time work needs to commence' [my underlining]. While on page 5 of the Statutory Guideline: 'As designation of premises for infrastructure removes consideration of the infrastructure project from the development assessment process ...'

This is an important point to clarify, as the definition of building work for a Queensland heritage place is expanded to include, among other things, 'altering, repairing or removing significant building finishes' and carrying out building work will have a significance impact on a heritage-listed place (definition of building work found in the schedule 2 dictionary to the Planning Bill). It is difficult to envision how the designation process, as described in either draft statutory guideline (whether the local government or the Minister is the designator) will be detailed enough to ensure significant impacts on the fabric of Queensland heritage places are appropriately evaluated before going ahead.

Further to this, State and local government often carry out work that is currently exempt or classified as self-assessable development, for example operational work, which under the Planning Act would be accepted development inside a designation. The Heritage Council requests that consideration be given to designations including a requirement for State and local government entities conducting this type of work on a Queensland heritage place to, where practicable, consider the impact this work will have on the place and prioritise avoiding having a detrimental impact where practicable.

The Heritage Council does not ask that formal approval be sought or obtained but practically, many operational works, including the digging of service trenches, footpath works and maintenance of trees in heritage-listed parks could easily be carried out to avoid potential harm being caused to the cultural heritage significance of these places if only the designer or project manager was aware of the significance of these places or elements. In some instances, such works could be carried out in a number of ways and avoiding harm to the heritage place would cause little inconvenience or additional cost.

Development assessment – other issues

Exemption certificates

The concern the Heritage Council expressed in its submission on the consultation drafts of the Planning Bills continues to obtain in relation to certain aspects of exemption certificates

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under the proposed Planning Act as provided for in *Clause 46*. There appears to be an overlap between these certificates and the exemption certificate system already provided for in the Heritage Act for Queensland heritage places and local heritage places.

One scenario envisioned from a reading of the Bill and its Explanatory notes has the owner of a State heritage-listed property applying for an exemption certificate under part 6 division 2 of the Heritage Act to replace significant plasterwork decorating one of the building's ceilings. The interior finishes of the place form an important part of its heritage significance. The exemption certificate is refused because the impact on the cultural heritage significance of the place is assessed as being more than minimally detrimental, which is what limits the issuing of exemption certificates under the Heritage Act.

The owner of the house then has the option to make a development application for the work but instead approaches the Planning chief executive for an exemption certificate under the Planning Act. Is it conceivable that the Planning chief executive could issue an exemption certificate because his or her view of the effect of the work is that it is minor and inconsequential? The decision to refuse the exemption certificate application under the Heritage Act was made because despite the ceiling being only ancillary to the building's main decorated spaces and not frequently seen by the public, it is still considered important to the overall State heritage value of the place. However, might it be possible that the Planning chief executive is convinced of a different view when making a decision under the Planning Act?

A possible revision to *Clause 46* that may remove this overlap at least with exemption certificates given under the Heritage Act for Queensland heritage places would be to add a subclause after *Clause 46(3)(b)* stating that: 'For development the effect of which is minor and inconsequential, a person must not give an exemption certificate for a Queensland heritage place.'

Making development applications

In the view of the Heritage Council, *Clause 51(5)* replicates a shortcoming of the current development application process, which allows a development application for a Queensland heritage place without a heritage impact statement to become properly made at the discretion of an assessment manager. Most often the assessment manager in these situations is the local government. On page 66 of the Explanatory notes for the Planning Bill it is explained that giving this discretion to the assessment manager for an application will streamline 'the development assessment process for applications with adequate supporting information'. However, the Heritage Council considers this an inappropriate discretion to allow local government when a heritage impact statement relates directly to the assessment SARA would conduct in relation to the effect the development will have on the State heritage values of the place.

As set out in the guideline published by the Department of Environment and Heritage Protection and referenced in the SDAP, heritage impact statements must be prepared by an appropriately qualified person and provide an detailed analysis of how the development will impact upon the physical attributes of the place, the setting or context of the place, and other factors that contribute to its cultural heritage significance. The scope of individual statements

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will vary depending on the nature of the development proposed and its effect on the heritage value of the place. The inclusion of a heritage impact statement with a development application indicates that informed consideration has been given to the effect of development on the place's heritage values.

A possible way to resolve this matter would be to insert a new subclause after *Clause 51(1)* stating that: 'A development application for a Queensland heritage place must be accompanied by a statement that complies with any relevant guideline made under section 173 of the Heritage Act that deals with the impact of proposed development on the cultural heritage significance of the place.' A further revision would then be required in *Clause 51(4)(b)* to include reference to the new subsection.

Providing reasons for decisions

The Heritage Council supports the addition of subclauses (6) and (7) to *Clause 56* of the Planning Bill in light of its comments on the consultation draft of the bill. As asserted on page 10 of the consultation report, this will 'mean more transparency and consistency in decision making'; particularly important given the role SARA has in resolving conflicts between differing policy objectives as expressed in the modules of SDAP. It is vital that clear statements be made about how such decisions are reached in a system that strives to be transparent and accountable.

Clause 56(6)(b) suggests that certain types of development assessed by a referral agency (for a Queensland heritage place this is SARA) will not be subject to the requirement to publish reasons for the agency's decision. No development is 'prescribed' in the Draft Planning Regulation for this clause, nor is this matter elucidated in the Explanatory notes. The Heritage Council seeks clarification of what kinds of development will not be subject to these requirements.

The Heritage Council appreciates this opportunity to make a submission on the Planning Bills and contribute to the planning reform process. Representatives of the Council would welcome the opportunity to discuss this submission in detail with the Committee if required.

Yours sincerely

Professor Peter Coaldrake
Chair