

## **HERITAGE BILL 2000**

### *Introduction and First Reading*

Bill introduced, on motion by Mr Kierath (Minister for Heritage), and read a first time.

### *Second Reading*

**MR KIERATH** (Riverton - Minister for Heritage) [9.28 am]: I move -

That the Bill be now read a second time.

Background: In September 1999, I presented in this House a Bill entitled the Heritage Bill 1999. That Bill has now been withdrawn, to be replaced by the present Bill which is the result of further consultation and discussion with various key stakeholders. I have made the decision to present a completely new Bill rather than a long list of amendments so as to make the amended provisions more readily comprehensible.

The present Bill is the culmination of not only the consultation carried out during the past year, but also a long review process triggered by section 84 of the Heritage of Western Australia Act 1990. The drafting of the Bill has paid close attention to the lessons of 10 years of operation of the present Act, and also modern best practice in heritage legislation around Australia. Considerable time and effort has gone into the drafting.

The groups in the community with a leading interest in the heritage legislation, namely the Heritage Council of Western Australia, the National Trust of Australia (WA), the Western Australian Municipal Association, the Royal Western Australian Historical Society, and the Property Council of Australia (WA), have all been closely involved in arriving at the present Bill. As far as I am aware, those groups are now satisfied that the legislation is a major improvement on the present Act, and support it.

The 1990 Heritage Act has many shortcomings, and replacing it with a more modern Act is overdue. This Bill contains many improvements and reforms that will strengthen heritage protection in Western Australia. I will firstly summarise those improvements and reforms vis-à-vis the present Act; I will then outline the main differences between the Heritage Bill 2000 and the Heritage Bill 1999; and finally I will turn to a more general discussion of the main elements and structure of the legislation.

Improvements and reforms: The principal reforms, which the Bill contains, are as follows -

The Bill has been drafted in plain English and has been structured to make it easy to understand and administer. It is far superior on that score to the current Heritage of Western Australia Act, which is difficult to follow and to apply.

The registration process is simplified, including enabling the council to interim-register places under its own power; and removing the special conditions relating to crown-owned places.

A requirement is introduced for state government agencies to compile their own heritage inventories, bolstering the State Government's commitment to "leading by example".

The local government heritage inventory provisions are strengthened and clarified. For the first time, the Heritage Council will have some power to ensure that all local governments compile and maintain inventories to an acceptable standard.

Revaluation provisions are extended to registered places, and statutory guidelines are given to the Valuer General for heritage-related valuations. This is an important additional incentive for owners of heritage properties, particularly properties located in business districts.

A new works approval process is introduced, greatly strengthening the Heritage Council's position in influencing development and alteration of registered places. The Council's powers are presently limited to providing "third party" advice to local governments and other decision-making authorities.

The Heritage Agreement provisions are simplified to encourage "conservation by agreement".

A new form of conservation order is introduced, enabling the minister to direct the repair and maintenance of a registered place suffering neglect. This is a very critical reform. The members of this House will no doubt recall the Railway Hotel in Kalgoorlie as one case in which the absence of such a power resulted in the unnecessary loss of a very significant building.

Monetary penalties for contraventions of the Act are increased to bring them into line with penalties for comparable contraventions in planning and environment law in Western Australia.

Differences between this Bill and the Heritage Bill 1999: The list of changes made since September 1999 is long, but most of the changes involve matters of expression and emphasis designed to clarify and fine-tune the

Bill. The number of changes relating to major issues of principle is fairly small, and I summarise them as follows -

The capacity of the council to provide demonstrably independent advice is reinforced, through amendments to the provisions affecting appointments, confidentiality and disclosure of interests.

The concerns of local government regarding state heritage areas are addressed by replacing the term “area” with “precinct”, and by imposing an additional consultation requirement on the council. That change is reflected throughout part 6 of the Bill.

The provision for registration-related objections to be referred to the planning appeals director for advice has been removed. All such objections are now considered by the minister without any mandatory referral to another party, in line with the arrangements under the present Act.

The provisions of section 36 have also been amended in the light of a decision of the Supreme Court in May this year. Effectively, the court found that the law required that interim registration decisions must be determined solely on grounds of cultural heritage significance, but that permanent registration decisions by the minister may take account of any matters raised during the submissions period.

The provisions of section 36 have been modified to reflect the same position in the new Bill. Clearly, without such a provision, the right of owners and other parties to make comprehensive submissions would be neutered, and the council and the minister would be prevented from obtaining and considering all the relevant information about the use and development of a place. By way of comparison, I point out that the New South Wales Heritage Act is explicit in making the full range of land use and financial issues the subject matter of permanent registration decisions.

Compilation of inventories in accordance with prescribed standards is provided for, rather than compilation “to the Heritage Council's satisfaction”. The standards applicable to local government inventories are to be established jointly by the Heritage Council and the WA Municipal Association.

From the list of matters that must be taken account of in determining the Heritage Council's assessment criteria, “condition” has been removed as a relevant matter.

In the debate about the Heritage Bill 1999 in September last year, members of the House made a number of criticisms of that Bill. I believe that the changes made since then, on top of the many strengths which the Bill already possessed, make this Bill very worthy of bipartisan support. I very much hope that it will receive that support.

**How the Bill will work:** The system of heritage conservation put in place through the new Bill retains similar core elements to those in the system currently in operation. I make it clear that the Bill does not apply to the State's Aboriginal heritage or to natural heritage. The major report commissioned in the review of the Act considered the division between legislation which controls the historic cultural heritage, the natural environment, Aboriginal cultural heritage, moveable heritage and other aspects of culture, such as folklore. It concluded that a bringing together under the same legislation of all or some of these categories would not be practical or cost effective at this time. I concur with that conclusion. Within this framework, the Bill contains the following components -

**Membership and functions of the Heritage Council:** The membership of the Heritage Council is increased from nine to 11, and the appointment provisions in clause 8 are designed to ensure that persons with relevant skills or expertise are appointed after public advertisement.

The functions and powers of the council remain the same in essence but they have been codified in a much simpler way.

The power for delegation of functions by the minister and the Heritage Council is retained, as is the concept of public referrals to the council of any matter concerning the conservation of a place which is, or might be, of cultural heritage significance. The delegation provisions are likely to be particularly pertinent in due course in the administration of the works approval function under part 8 of the Bill.

**The Western Australian Heritage Register:** The process leading to the entry of places and precincts in the register has been made simpler and easier to understand. It is changed in three significant ways -

Firstly, the council is empowered to make interim entries of its own volition, enabling it to move quickly if necessary to apply the protection of the Act to places under threat. The minister is provided with the power to direct the removal of such an entry should he think fit, but he must subsequently advise Parliament of his direction and the reasons for it.

Secondly, places owned by the Crown will be subject to the same entry process as privately-owned places. The separate and distinct process for such places in the present Act is unnecessarily complex and has been generally acknowledged to be counterproductive.

Thirdly, the Bill gives greater recognition to the concept of precincts of cultural heritage significance being entered in the register; whereas the present Act focuses mainly on places. That concept has been widely adopted elsewhere in Australia and overseas, but the present Act does not accommodate it satisfactorily. The present Act provides for the registration of "historic precincts" but does not make clear their status in the context of other provisions in the Act. The Bill addresses the issue by providing for the registration of "registered precincts", and by providing that works approvals and other relevant provisions apply to those precincts.

The procedure for making entries in the heritage register therefore essentially involves the council assessing and interim-registering a place, inviting submissions, and then placing the information before the minister to make a decision on permanent registration.

The procedure for removal of an entry, being the same as for making an entry will remain unchanged, as will the period of five years during which re-entry cannot be considered.

Heritage inventories: The present provision that each local government must establish and maintain a heritage inventory of heritage places within a local government district is retained. A shortcoming of the present Act is that the purpose of the inventories is unstated, and the new Bill remedies that by defining them in clause 52.

Another shortcoming in the present Act is that there is no provision for enforcing the completion and review of inventories, or for requiring adherence to a common set of standards. Although the great majority of local governments have acted in good faith in compiling their inventories, a small minority has not been prepared to do so. The Bill will remedy that situation, while safeguarding local government interests by providing that standards are jointly agreed by the Heritage Council and the Western Australian Municipal Association.

The municipal inventory provisions in the 1990 Heritage Act appear to have been a late inclusion in the legislation. However, they have proved to be a sound means of raising the profile of heritage conservation in local government and in ensuring the systematic survey and identification work, which is a prerequisite to sound heritage planning. In other States of Australia, local heritage survey work has been widely undertaken over many years as a matter of policy and good practice, but Western Australia is alone in having codified it within the heritage system. The benefits of that will flow to heritage conservation in this State over many years to come.

An innovative feature of the Bill is that it provides for other public authorities, principally agencies of the State, to establish and maintain an inventory of heritage places in their possession or control. The provision is intended to promote sound conservation practice in the management of agency assets, which is clearly an important objective in the context of the State being the largest "single" owner of heritage assets in Western Australia. The inventories must be prepared and reviewed in accordance with standards set by the Heritage Council.

Approvals to do works: The process provided under the present Act to ensure proper consideration of heritage values in development proposals, involves mandatory referral of prescribed types of applications to the Heritage Council by decision-making authorities. The Heritage Council's role is limited to a third party advisory role, and in practice that process has proved to be unsatisfactory in several respects.

Specifically, the present process does not clearly capture works by public authorities. It is ambiguous regarding the extent to which the Heritage Council's advice must be accepted by a decision-making authority; it does not allow the council to deal directly with a proponent other than on an informal basis; and it excludes certain types of significant works from the scope of the referral system - such as very interventionist maintenance works which may not require a building permit.

Those deficiencies are addressed in the Bill by a new system of approval-to-do works. In essence, it will establish a separate development control process which requires the approval of the Heritage Council for work to be done on registered places and on places within state heritage areas. The process will operate independently of the planning and building approval systems, and will provide a transparent means of resolving differences and setting responsibility for the enforcement of approval conditions.

A right of appeal is provided for aggrieved applicants through the planning appeals system. It should be noted that this process conforms closely to the similar models employed in the heritage legislation of Victoria, New South Wales, Queensland and Tasmania, which appear to operate successfully. In addition, local governments are to seek the comments of the council on any applications that may be received to carry out works adjacent to a registered place if the cultural heritage significance of that place may be affected.

**Heritage Agreements:** The principles relating to heritage agreements in the current Act have been retained, but recast into more succinct and understandable provisions. Such agreements have proved to be successful in promoting, as their name implies, conservation by agreement, particularly when incentives are being provided for sympathetic development proposals, or when government-owned places are being sold and the properties' heritage values need to be protected into the future. The heritage agreement provisions have been freed up not only by plain English drafting, but also by expanding the range of places for which such agreements can be entered, and by removing the need for endorsement of individual heritage agreements by the minister.

**Conservation incentives:** An important underlying principle of this legislation is that it enshrines a number of positive incentives to balance the constraints inherent in the works approval, protection order and conservation order provisions. The range of conservation incentives available under the present Act has been preserved largely intact. However, two important reforms have been made to improve the accessibility of incentives to property owners. The first concerns the revaluation provisions in clause 93. For the first time, the Valuer General will be required to -

- (a) revalue all land that is the subject of registration, rather than merely land the subject of Heritage Agreements as presently applies; and
- (b) revalue such land on the basis of a firm assumption about the non-demolition of the registered improvements on the land. This arrangement is modelled on the one that has operated successfully in New South Wales and Victoria for many years, to the benefit of property owners and heritage conservation generally. It will prove a similar boon in Western Australia.

In addition, the provisions regarding the remission of rates in clause 89 have been reformed so that the cost of rate remissions will be borne by the relevant rating authority. That was I believe the original intention of the Heritage Act 1990, but the provision has been subverted to a degree by a subsequent administrative arrangement which sees the Heritage Council responsible for reimbursing the rating authorities. The proper functioning of the rate remission provisions will help to spread the cost of incentives across government and free up the availability of the incentive to owners.

**Protection and Conservation Orders:** The new process I have referred to earlier under which the Heritage Council may move quickly to enter a place in the register without referral to the minister will, to some extent, obviate the need for various types of conservation orders as provided for in part 6 of the present Act. The complex provisions relating to the use of such orders are therefore simplified and reformed in the new Bill.

Two kinds of order will be provided for, each being made by the minister on the recommendation of the Heritage Council. Firstly, a short-term protection order may be made with respect to a place which is not yet in the register but which has *prima facie* heritage significance, and is under threat of imminent damage or destruction. Such an order may prohibit or restrict activity likely to adversely affect the significance of the place, for up to 60 days, or until the place is entered in the register. Secondly, the minister may make a conservation order requiring the owner to do repair works to protect a place entered in the register. The nature of the work, which could be made the subject of an order, is limited to works needed for urgent maintenance, security, fire protection, weatherproofing and the like. This as I mentioned previously is a very important new power, the absence of which has to date frustrated the ability of the council and minister to prevent cases of deliberate "demolition by neglect". Appeal rights apply in each case.

**Compensation:** There is no heritage legislation in Australia that provides for compensation for the effect that registration may have on the value of land and property. That principle is followed in the Heritage Act 1990, and carried forward in the new Bill. However, both the current Act and the new Bill do provide for compensation for a tangible financial loss incurred directly as a consequence of the taking of action under the legislation which causes the revocation, modification, suspension or delay in implementation of an existing approval. For example, if we take the case of an owner or other party who incurs costs in partially demolishing a building and finds that the building is subsequently entered in the register, and that the Heritage Council will not permit the demolition works to proceed further, that owner would potentially be entitled to compensation relating to the cost of the completed demolition works. There has been only one case in which compensation has been awarded in such circumstances in the period 1991 to 2000, and I expect that little use will need to be made of the relevant provisions in the new Bill in the future.

**Penalties:** Penalties for the contravention of various provisions of the current Act were generally low at the commencement in 1990, and they have remained unchanged since its introduction. The penalties are also inconsistent and uneven. The Bill will considerably strengthen the penalties and add consistency of application. For example, in the three key areas of unauthorised work to a registered place, contravention of a protection order and non-compliance with a conservation order, the penalty will be the same at \$50 000, two years' imprisonment and a daily penalty of \$5 000.

The new scale of monetary penalty has been devised to be consistent with those for comparable offences in Western Australia's planning and environment law. While there has been some comment about the proposed penalty scale being lower here than in other States, it must be remembered that the imprisonment penalty in our heritage legislation is substantial, whereas only two other States have any imprisonment penalty in their heritage Acts; that is, South Australia and New South Wales.

In conclusion, I believe strongly that the Bill responds well to the recommendations made in the review process conducted from 1995 and 1996, and represents a vast improvement over the Heritage of Western Australia Act 1990. Quite apart from the many reforms that it will bring to our heritage system, the logical and plain-English approach to its drafting will make it a much more effective piece of legislation than its predecessor. It will better serve the interests of heritage conservation in this State, the interests of property owners and the property industry generally, the administrators of the legislation at the Heritage Council, local government, and the public at large.

The Heritage of Western Australia Act 1990 was certainly a significant milestone for Western Australia, and the legislators of the day must be acknowledged for achieving what they did. However, this new Bill builds on the experience gained in the decade since then. It opens the way to better results in the conservation of our State's unique heritage, into the next decade and beyond. I commend the Bill to the House.

Debate adjourned, on motion by Mr Cunningham.