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Mr Tim Moore & Mr Ron Dyer
Joint Chairs
NSW Planning System Review
PO Box 39
SYDNEY NSW 2001

Dear Mr Moore

**RE: ISSUES PAPER FOR THE REVIEW OF THE NSW PLANNING SYSTEM AND THE
ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979**

Australia ICOMOS welcomes the opportunity to respond to the Issues Paper on the NSW Planning System Review, released in December 2011. This response draws on our initial submission for *Stage 2 – Listening and Scoping* of the Review process lodged on 4th November 2011, and further details Australia ICOMOS' comments on the current NSW Planning System.

Overarching Issues

Our charter is to lead cultural heritage conservation in Australia by raising standards, encouraging debate and generating innovative ideas. We are concerned that the Review process, in particular the Issues Paper, lacks clear and specific objectives for heritage in the context of the NSW EP&A Act. The Issues Paper is structured in a way that does not give weight to any of the issues raised by community groups, organisations or the public, and it lists neither 'heritage' nor 'conservation of the built environment' as key considerations of planning. While we acknowledge that there has been consultation with the National Trust of Australia (NSW) and the Aboriginal Land Council, the Review appears to have not engaged in consultation with key heritage bodies such as the NSW Heritage Council or the Office of Environment and Heritage. The Paper contains little examination of heritage issues in the context of the planning system and, as raised previously, is quite silent on 'heritage'.

While *environment* is given a wide interpretation in the Act's definitions, the Objectives of the Act need to make it clear that the conservation of buildings and other places with cultural heritage values are included. A useful reference is the Victorian *Planning and Environment Act 1987* which includes the following as one of the eight 'Objectives of planning in Victoria':

S.4 (d): to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;

This Act also usefully gives force and effect to all eight objectives by making their implementation a *requirement* of the duties of planning authorities (usually municipal councils) set out in S. 12 of that legislation.

The planning legislation in NSW requires similarly clear and unambiguous objectives that include specific reference to the conservation of cultural heritage. These objectives should be a requirement of those that are charged with the duty of preparing planning schemes.

Response to Questions in Issues Paper

The Burra Charter: Australia ICOMOS Charter for Places of Cultural Significance 1999 is recognised as the key benchmark for heritage best practice in Australia. It can be applied to all types of places of cultural significance, including natural, indigenous and historic places with cultural values. The Charter advocates these places of cultural significance be conserved for present and future generations. Australia ICOMOS supports the formal recognition of broader landscapes that may be of Aboriginal cultural significance as well as proper integration of the Aboriginal reserves into a new planning system as raised in questions C13 and C35.

However, Australia ICOMOS is concerned that question C29 “should an owner of an item proposed to be listed as being of local heritage significance have the right to **veto** such a listing?” has the potential to detrimentally affect the process of heritage listing, as well as undermining the obligation to list places in accordance with their heritage significance. While the views of owners should be heard, this should be in the context of an independent assessment by an expert heritage professional. Places of potential heritage significance can come to a local authority’s attention by a number of avenues, ranging from community interest groups to a systematic heritage study of an area. Whatever the original source of the information about a place, no potentially significant heritage place should be considered for listing without an assessment by a qualified and experienced heritage professional.

The owner of any place proposed for listing should have the opportunity to dispute a professional assessment on the grounds that the information on which the assessment is based is incorrect or the assessment is flawed in some way. Matters of economic viability, difficulties in finding a suitable use or the costs involved in upkeep are all matters that should be considered if a permit is sought to develop or demolish. This is in line with current best practice heritage management.

The proposal that an owner should be able to veto the listing of a place threatens the whole principal underlying planning schemes today. No owner is allowed to veto any other provision in a planning scheme. Owners should be given every right to challenge zoning proposals, height controls, set back requirements, environmental protection measures and so forth on the grounds that they are unnecessary, would have poor unforeseen consequences, or that are in effect ‘bad planning’ but not be granted an individual veto. And so it should be with all types of planning controls including heritage.

We therefore support an owner’s right for a review of the introduction of a new planning control (such as a zoning as noted in Question A18) but oppose the concept of an individual veto.

The State of Environment 2011 report has identified three areas where the planning system in Australia (which can easily be adapted to the NSW planning system) does not serve the historic cultural heritage well:¹

¹ State of Environment (SEO) 2011, Part 9 Heritage, Section 4.2.3 Statutory Protection

- *The notions of inheritance and public good could be better integrated within strategic planning frameworks and processes. Historic sites are typically managed as a constraint to be overcome, or a restriction on orderly land use, rather than as a community asset to be understood, cherished and celebrated.*
- *The planning systems in all jurisdictions are perceived as reactive and incorporating a principle that heritage can be negotiable or expendable if a sufficient case can be made.*
- *The systems do not offer adequate incentives to the thousands of private owners who are responsible for the care, control and conservation of the overwhelming majority of historic buildings in Australia. These owners deliver the public good but are expected to accept the implications (such as cost or restricted development opportunities).*

The SEO 2011 further goes on to state that:

Conflicts and poor heritage outcomes are often linked to misconceptions about the implications of heritage listing and lack of clear heritage policies and guidelines to assist owners, developers and decision-makers. When appropriate statutes, policies and guidelines are integrated with incentives and are well communicated, the system is far more robust.

The findings of the SEO 2011 report confirm a number of general issues raised in our earlier submission. These broader issues have further been developed and discussed below in anticipation that they will be considered by the Panel in the preparation of the Green Paper, which will be published by the end of **April 2012**.

Broader Heritage Issues for Consideration

In no particular order, we reiterate the following points.

1. The protection and proper management of our cultural heritage must continue to be provided for under the NSW planning legislation. Given that the NSW Heritage Act has recently been amended and is likely to continue as the statutory measure for places of State heritage significance, the EP&A Act must continue to provide the means for the protection of the majority of heritage places in NSW that do not meet the State significance threshold. The EP&A Act also provides the mechanism for local government to manage its own heritage places for the benefit of its constituents (subject to the broad procedural safeguards provided for in the Act). The legal requirement to list places in accordance to heritage significance laws in the NSW Heritage Act was removed and the EP&A Act has not introduced equivalent laws to maintain this protection.

Australia ICOMOS expresses major concern with the lack of heritage protection in the NSW planning system for listed and unlisted heritage places. It is vital that this review redresses the current imbalance in the planning system that currently favours unconstrained development over certainty that heritage is reasonably protected. The community expects NSW laws to protect the existing assets of the environment – including heritage places – and to not only provide for new development. Heritage places are a non-renewable resource, which support jobs and investment through heritage trades and tourism, as well as enriching our environment, connection to culture and sense of place, community and identity.

State planning laws currently set few limits on development that allow for the protection of heritage

values, and in fact reward developments with the greatest impacts with fewer constraints through planning policies for major development. These planning laws place listed heritage items at risk, when they are most threatened.

2. The Aims and Objectives of the Act need to more clearly and emphatically include the protection and proper management of our heritage places. Objectives of the Act
 - a. should recognise that heritage is a core function and must be considered;
 - b. should be about 'balance' not about 'promotion';
 - c. 'environment' should be understood as the interplay between ecological (biological), physical (natural and built), social, economic factors etc., taking into account the Burra Charter definition of a *Place* to include site, area, land, landscape, building or other work, group of buildings or other works, and may include components, contents, spaces and view.
3. Notwithstanding the critical role of local government in the protection and proper management of its own heritage places, the Act should continue to provide for the review by the Heritage Council at key stages in the process, especially in making local environmental plans and heritage schedules. This review is critical to facilitate rigour and objectivity in the process.
 - a. Section 1.0 Types of Development of Chapter D of the Issues Paper seeks to limit the type of Development Application (DA) categories to four categories. In this case Integrated Development Applications, currently requiring the Heritage Council's consent for State Significant heritage items, may face some adverse impact. This matter should be carefully considered and the Heritage Council's role should not be diminished in the new categorisation of DA types.
 - b. The Heritage Council's consent role was previously turned-off for State Significant heritage items listed on the State Heritage Register (SHR) when Part3A (Major Developments) applications occurred. This was later changed to the State Significant Developments under the current system. Currently the Heritage Council cannot refuse demolition of a SHR item if consent for its demolition is given under the State Significant Development process. Australia ICOMOS strongly supports that the Heritage Council's consent role should be reinstated for State Significant heritage items, even if they are subject to a State Significant Development under the EP&A Act. Otherwise some very important sites and items will not be subject to an appropriate heritage assessment. This means that World Heritage listed places (including the Opera House), significant precincts such as The Rocks, and 1600 other State heritage items are no longer permanently protected against demolition by State law, and that the Heritage Council can no longer refuse inappropriate major developments.
 - c. In Section 11.0 of Chapter D of the Issues Paper it is proposed to implement streamlined measures about concurrence approvals from other authorities. There are suggestions of 'deemed concurrence' and 'deemed approval' limitations. Such practices would likely affect the proper assessment procedure by the Heritage Council for some critical proposals. Although sometimes the Heritage Council assessment takes longer than expected timeframes, deemed approval practice can potentially be improperly applied to some projects.
4. Even though demolition requires consent under Local Environmental Plans, local heritage items are not protected from demolition by neglect. The EP&A Act should include provisions for basic maintenance, to control demolition by neglect of heritage places listed on Local Environmental Plans and heritage schedules to allow local councils to properly manage heritage items. These provisions should be similar to the minimum standards of maintenance and repair in the Heritage Act for places of State heritage significance.

5. Most of the current Local Environmental Plans (adopted prior to the current Standard Instrument) contain a provision requiring the consent authority to consider the impact of development in the vicinity of a heritage item. This requirement is consistent with, and stems from Article 8 – Setting of *The Burra Charter*, which considers retention of an appropriate visual *setting* and other relationships that contribute to the cultural significance of the place. Aspects of the visual setting may include use, siting, bulk, form, scale, character, colour, texture and material. The term ‘vicinity’ is not defined in the current LEP provisions but would normally be limited to neighbouring properties, and occasionally, more distant properties where development would adversely impact the setting of a nearby heritage item. These provisions were intended to protect the visual setting of heritage items by giving consideration to the impact of adjoining development as part of a development assessment. The provisions for ‘development in the vicinity of a heritage item’ did not require lodgement of a DA; however, they operated when a DA was required under other provisions. Similarly, the current Standard LEP provisions do not require lodgement of a DA for a ‘development in the vicinity of a heritage item’. The current Standard LEP differs from the previous provisions and no longer requires consideration of the impact of ‘development in the vicinity of a heritage item’ but only of a development occurring on the site of a heritage item. The Heritage Act does not require consideration of the impacts of development on sites next to or ‘in the vicinity of a heritage item’ listed on the SHR, possibly with the intention that this would be the role of local councils. The lack of statutory measures in the current Standard LEP and the planning system may compromise consideration of development ‘in the vicinity of a heritage item’, and may result in the destruction of aspects of a heritage place, or even its total destruction. The requirement to gain consent for works with potential to degrade heritage listed places and their setting is vital to ensure that significant heritage items are protected.
6. The other concern in relation to the current Standard Provisions is the lack of protection for the interiors of locally listed heritage places. The provisions of the Standard LEP, as currently drafted, only require approval for *structural* changes to the interiors of heritage places. This means non-structural elements including ceilings, floors, timber stairs, fireplaces, doors, finishes or any other decorative features, joinery, etc could be removed or altered without approval. Any proposed alterations to locally listed items with significant interiors such as important houses, hotels, community buildings etc should be subject to development consent, in the same way that changes to the interiors of items listed on the SHR require approval under Section 60 of the Heritage Act.
7. Approaches to heritage protection should be strategic, and include investing in research at the beginning of the process. This is in line with the *Burra Charter* process. Therefore we suggest that:
 - a. LEPs should have a more strategic focus
 - b. At the front end, LRPs should involve proper and real public consultation;
 - c. There is need for periodic review: heritage is dynamic just as society is dynamic and hence there should be periodic reviews of localities, typologies and data.
8. The assumption that a heritage listing (at any level) will protect a heritage place has been overlooked in the current proposal. There is no recognition or understanding of conflict arising from zoning applying to a heritage site. For example, if a site is up-zoned, no heritage management measures will ensure that site is protected. Rather, the converse is the case: the zoning leads to an expectation to maximise development and tends to result in the loss of the heritage place.
9. The notion that ‘one size fits all’ over a large geographic territory the size of e.g. France will never be able to deal with regional variables and criteria. Common concerns expressed by many participants as noted in section 1.2 *Flexibility and the planning system* of the Issues Paper require consideration for flexibility in planning controls, instead of rigid adherence to specified numerical controls.

10. The notion of a DA for a 'concept' without any specific prescriptive and directive conditions has a solid potential for adverse impacts. The notion that a Building Application (BA) can be the certificate where such detailed conditions be inserted is similarly flawed. Conditions for a heritage place will need to relate to the significance of that place.
11. The term 'minor' is open to such a wide range of interpretations that this has led to abuse. In heritage matters something seemingly 'minor' can have irreversible consequences, especially when tradespeople without the appropriate experience are used. As noted in Question B8 of the Issues Paper there should be a definition of 'minor' in any new planning legislation.

Australia ICOMOS reiterates that in a broader sense, the review provides an opportunity to undertake a reappraisal of how planning can achieve better outcomes for environmental, economic and social sustainability as well as heritage objectives.

Matters for reconsideration:

There are a number of measures that have been developed over recent years with the objective of improving the efficiency of the planning process. However, in practice, some of these measures have resulted in adverse impacts on heritage conservation. Australia ICOMOS strongly believes that in order to achieve an adequate protection and management of heritage in NSW the following aspects should be reconsidered:

- The **use of private certifiers** has resulted in the approval of works with an adverse impact on heritage values by personnel with little or no expertise in heritage conservation. Certifiers do not have the skills, qualifications or experience to assess matters relating to heritage places (being a heritage place or a Heritage Conservation Area) nor able to sign-off on heritage matters.
- Under **Exempt and Complying development processes**, the demolition of potential heritage places that have not yet been identified in an LEP is able to proceed without review or public consultation. Unless community members, organisations or a council are made aware of the proposed action under the State Environmental Planning Policy SEPP (Exempt and Complying Development Code) 2008, there is potential that places with unidentified heritage values will be lost without an adequate assessment. Many potential local and state heritage places have yet to be listed. However, the complying development code has placed these unlisted heritage places at risk of uncontrolled demolition because it has removed the requirement for local council consent. By using private certifiers and the complying housing code, potential heritage places can legally be demolished without prior assessment by the local council or notifying the community.

The issues paper reveals that there is considerable community concern with the results of the private certification of complying developments although apparently no suggestions that the approach should be abandoned in its entirety. A similar level of concern was expressed by heritage professionals about the complying development specifications and private certification in heritage areas when they were introduced. Heritage areas are particularly sensitive. It is difficult for universal complying provisions to reflect what is significant in any particular area and therefore works to heritage conservation areas should go through a proper approval process in which advice from an external heritage consultant is obtained. Exempt and complying provisions would be best developed as area specific guidelines.

We therefore suggest that it is timely for a performance review of Complying development in conservation areas. Such a review could determine where the system is working, where it is failing and recommend appropriate changes and exemptions.

A serious issue has emerged with regard to the certification of the demolition of unprotected heritage places. Some Councils have (and all Metropolitan councils are about to get) delegated powers to issue Interim Heritage Orders (IHOs) to suspend the demolition of significant but unprotected heritage places. However, the current circumstances in which **private certifiers** are able to certify the demolition of such a building as complying can proceed *without* informing the council. This leaves council in the unworkable situation of having the powers to intervene, but no knowledge of upcoming demolitions.

This type of difficulty was resolved in Victoria some ten years ago with the introduction of S29a and 29b of the *Building Act 1993*. This requires a private Building Surveyor to seek the council's advice and consent before issuing a permit for any substantial demolition. The councils then have a limited period to act, but have the option to urgently request the Minister for interim protection where a significant heritage item may have been overlooked or where heritage controls have not been finalised.

- **Bypassing the Heritage Act:** Under the former Part 3A provisions of the Act, as well as some SEPPs and other planning instruments, the jurisdiction of the Heritage Act was negated for places of State heritage significance. Although the Part 3A provisions have been removed, other planning provisions (such as State Significant Development) that remove the Heritage Act from the process will have the result that heritage impacts may not be adequately assessed and considered as part of the planning approval process. The role of the Heritage Council in this process has been reduced and its ability to refuse or assess a development over \$10million has been compromised. The current system does not include a legal requirement to seek the Heritage Council's opinion on State Significant Development (SSD) and the Heritage Council cannot refuse an approval given under the SSD. This results in there being no protection under the state law for World Heritage sites, except for Federal law. Of particular concern is the impact that a development will have on the setting of a heritage place, which is not only of Local and State heritage significance, but is, also included on the National Heritage List or inscribed on the World Heritage List.

These overriding planning laws for major development do not contain provisions for heritage protection equivalent to the Heritage Act or heritage provisions in Local Environmental Plans which they replace.

As stressed above, the role of the Heritage Council as a consent authority should be brought back for State Significant heritage items even if they are subject to a State Significant Development under the EP&A Act. Otherwise some very important heritage sites and places will continue to avoid an appropriate heritage assessment.

- The use of **LEP standard provisions** for dealing with heritage places can limit the ability of local government to consider heritage significance and impacts in determining a development application. In particular, the absence of provisions for consideration of the potential impacts of development in the vicinity of a heritage item or for non-structural internal alterations to a heritage item could result in the approval of development that would have substantial adverse impacts in both of these circumstances. This matter has been discussed in detail above.
- **Law versus Policies and Guidelines:** The issues in relation to heritage matters should be addressed in the law (the Act), rather than in policies and guidelines that have no power unless they are linked to a state law. The system should not be established to operate on 'people's good will', but rather level of responsibility and power should be integrated into the planning system as a legal requirement. The

gradual cutting back of all checks and balances in the planning law protecting heritage has resulted in an adverse impact on the management and listing of heritage places.

Finally, Australia ICOMOS notes that part of the vision for this Review should include protection of heritage at all levels and that the 'heritage profession' should be widely consulted to inform the new planning system. Protection measures, such as consent requirements should increase, not decrease, with the level of significance of items and the extent of a development's impact. We are concerned that the confusing number of overlapping planning policies and laws have prevented the community appreciating the degree to which heritage places in New South Wales are now unprotected. Despite the continued existence of heritage listing, laws and authorities, these changes and gaps in planning laws have substantially disempowered NSW heritage protection for local, state, national and world heritage places and areas.

Thank you for your consideration of the points raised above. We look forward to reviewing the Green Paper and taking an active role in the next stage of the review process. We trust the Review Co-Chairs will be able to meet the key heritage stakeholders, including but not limited to Australia ICOMOS, the NSW Heritage Council and the Office of Environment and Heritage. Should the situation arise, we would be pleased to meet with you to discuss these matters. We can be contacted through our Secretariat above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J. Harrington', with a large, elegant loop at the end.

DR JANE HARRINGTON
President