

Our ref: Draft Heritage Amendment Bill 2023
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Mr Andrew Roberts
Director - Heritage Tasmania
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By email: Andrew.Roberts@heritage.tas.gov.au

Dear Andrew,

PLANNING SECTION RESPONSE – CONSULTATION DRAFT: HISTORIC CULTURAL HERITAGE AMENDMENT BILL 2023 & FACT SHEET

Council's planning services section recently received the above-named consultation draft, indirectly, and quite by coincidence, through Planning Institute of Australia (PIA) channels.

While we can see the merit in the bulk of the proposed amendments outlined the Fact Sheet, we have significant concerns around those amendments relating to certificates of exemption for the following reasons:

- The Heritage Act¹ is an Act under the Resource Management and Planning System (RMPS) and its objectives as outlined in Schedule 1 of the LUPA Act² (ref: s4A Heritage Act) are shared across a suite of legislation.
- Since 2014 there have been concerted efforts to better align the Heritage Act with the LUPA Act. The proposed amendments for 'minor works approval' to be issued inclusive of conditions depart from that trajectory.
- Then Minister Wightman's Second Reading Speech in relation to the Historic Cultural Heritage Amendment Bill 2012 made it clear that Certificates of Exemption were for works "so minor in nature that they are deemed to have no impact on the historic heritage significance of a place". Such works, by definition, could not – and did not - require application of conditions. From our reading of the documentation, it seems apparent that the intention behind replacement of Certificates of Exemption with Minor Works Approvals is more than a simple tweak in terminology since the proposed changes, if implemented, will create a separate category of approval involving a higher level of

¹ Heritage Act as referred to here means the *Historic Cultural Heritage Act 1995*.

² LUPA Act means the *Land Use Planning and Approvals Act 1993*.

assessment and exercise of discretion without the checks and balances inherent in existing discretionary planning processes, (eg, no requirement to advertise and an absence of any recourse to appeal).

- The Fact Sheet is short on detail. Our review of the available information indicates the Bill is seeking to introduce a system for minor works which may have an impact, may have been undertaken, and may already be subject to enforcement proceedings under the LUPA Act, to be approved retrospectively. Apart from the disruption to streamlined workflows, it is difficult to see how this meets the test of s42(4) of the Heritage Act?
- The implications for planning at local government level will be an inconsistency of approach for the approval of development which may constitute minor works and an additional impost on scarce resources to investigate and resolve conflicts or complications arising as a consequence.

Further detail explaining why we hold these concerns is contained in the accompanying attachment.

Finally, the absence of any engagement from Heritage Tasmania means the Amendments should not be construed as something which has arisen from engagement with local government. This is disappointing, not least because it has negated any ability to identify further, relatively simple, refinements to the Heritage Act that would enable it to interact more effectively with the planning system, including for example:

- The opportunity to review and refine s41 of the Heritage Act to enable the Heritage Council to re-issue Notices of Heritage Decisions in situations where Planning Permits are amended.
- Where duplicate entries are revised, include a procedure enabling update to corresponding details in Local Provisions Schedules as a consequential administrative change by direct referral to the Tasmanian Planning Commission, thereby obviating the need for a planning scheme amendment in each or any case.

Please don't hesitate to contact Peter Coney on the number indicated above should you require clarification of, or wish to discuss, any aspect of the issues we have raised in greater detail.

Yours sincerely,



Trevor Boheim

COORDINATOR PLANNING SERVICES

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Attachment 1: Supplementary detail – GCC

ATTACHMENT 1: SUPPLEMENTARY DETAIL GCC

With respect to those clauses which have the effect of amending certificates of exemption:

1. The fact sheet talks to replacing a certificate of exemption with a minor works approval. The bill inserts the term, but as well inserts at clause 21 an expanded former section 43, alluding to conditions of approval for those 'retrospective' minor works approvals. The ability for the THC to impose conditions on a minor works approval is not understood. Presently, sub section 42 (3) does not allow the Heritage Council to apply conditions to certificates of exemptions. The factsheet therefore does not give an indication in plain English as to the full effect of the amendments with respect to certificates of exemption. Nor is it considered the clauses as drafted will fulfill this apparent intent.
2. The responsibilities for the enforcement of any conditional minor works approval is not provided for. An amendment to section 44 to make a contravention of a minor works approval condition an offence may remedy this, though there remains concern with the effect of conditional minor works approvals as a supportable mechanism for managing historic heritage values within the RMPS. Conditional approvals for retrospective minor works approvals will undoubtedly introduce confusion in determining whether the heritage works are approved. It is unclear whether sub section 34 (2) will be relevant for heritage works approved by a minor works approval where the conditions of approval have not been complied with. There remains a risk that a person may have a conditional retrospective minor works approval nullifying any offence under the LUPA Act, but there is no mechanism to compel the completion of the works in accordance with the conditions.
3. The introduction of a retrospective minor works approval does not clearly remedy any offence having been committed per section 63 of the LUPA Act.
4. The reference to the current local government practice of assessing retrospectively, as being something prescribed under LUPAA though not available to the Heritage Council is disputed; any enforcement notice requiring a person take reasonable steps to obtain a permit in relation to land to which the notice relates would be forwarded to the Heritage Council per s36 of the Heritage Act, and would allow for heritage approval to be issued under the ordinary remit of the Heritage Council, inclusive of conditions applied through the exercise of discretion under sub section 39 (7) of the Heritage Act. The risk of minor works approvals is that where the development is similarly an offence under the LUPA Act, and where an enforcement notice is issued, a minor works approval may be issued subsequent and independent of that enforcement notice, and potentially (though imprecisely as drafted) the terms of the enforcement notice will then be misaligned to the facts of what offence has occurred. This places a high regulatory burden on local government in managing not only the offence and requirements of the LUPA Act, but a requisite training in the potential for the development to be retrospectively approved outside of the terms of any enforcement notice and any subsequent implications. There is a very real risk work required to be done as a matter of enforcement by local government will be undone at the time a retrospective minor works approval is issued.
5. The discretionary consideration in applying conditions for retrospective minor works approvals should be able to be examined by way of appeal rights being established within the Heritage Act for minor works approvals, noting the consideration of conditions, and their appropriateness requires a higher degree of assessment than an ordinary certificate exempting works which have no or negligible impact.