
11 Improving the operation and management of heritage zones

This chapter considers how the operation and management of heritage zones (precincts, areas or overlay areas) could be improved in order to make them more consistent with the systems and planning processes that apply more generally. The Commission considers that for each heritage zone there should be a statement of significance applying to the whole area and identification of the types of developments that would be permitted and prohibited — including development standards that could trigger automatic approval. Also, the Commission considers that the planning system should be designed so as to not allow the recognition of heritage zones to be misused to undermine the objectives and processes of the planning system.

In some local government areas, heritage zones cover up to 80 per cent of all properties (for example, City of Yarra, sub. DR346). Given the prevalence of heritage zones in some jurisdictions, consistency in the application of the planning system is important in order to provide effective conservation. The interaction of heritage zones and the general planning system raises several problems:

- inconsistency in the level of development guidance between heritage and non-heritage zones;
- greater red-tape burden of heritage zones compared with other zones;
- the interaction between State planning policies and local heritage;
- designation of State-significant heritage zones; and
- application of heritage controls to non-heritage places.

11.1 Addressing the inconsistent treatment of heritage zones

The Commission has set out ways to improve the effectiveness, efficiency and equity of regulating the land use of individual places deemed to be of heritage significance. An objective of statutory listing is to ensure that any future

development or use of the property is in keeping with, and sympathetic to, the heritage values of the property. The same rationale underpins the objectives of heritage zones.

A heritage zone contains features (houses, streetscape, trees, etc) that taken together contain heritage significance, even where the features individually may have little significance. While imposing the same red-tape burden on the owners of each property as individual listing, heritage areas allow greater potential for developments and land uses than individual listing (see section 5.3). Indeed, the test for appropriate development focuses on character, amenity and streetscape. This is consistent with the approach taken for non-heritage development in any residential zone (appendix D).

Reflecting this, the approach taken to development approval is largely consistent between heritage and other (non-heritage) zones. However, there still remain important differences between the two.

The Chairs of Heritage Councils of Australia and New Zealand, in response to the Draft Report, argued that:

There is no evidence to suggest that heritage represents a disproportionately high level of inconsistency when measured against other planning matters ... many heritage areas are much better served with guidance than are non-heritage areas. (sub. DR271, p. 29)

This can be compared to the view of the Western Australian Local Government Association, which acknowledged:

... the finding that the assessment of development proposals differs between heritage places and non heritage places and that Local Government discretion is higher for controls over heritage properties rather than non heritage properties. We acknowledge that this does result in a burden on the owners of heritage properties, the reason for which is to protect heritage values. (sub. DR380, p. 4)

The broad structure of the regulation of land use zones in the States' and Territories' Planning Acts is consistent (see chapter 5). That is, the controls are divided into three sections:

- uses and developments that are allowed and do not require approval;
- uses and developments that are prohibited; and
- uses and developments that are discretionary and require approval.

In addition, most States (except for Western Australia and Tasmania) provide scope for automatic development approval where the development meets pre-determined development standards.

Another important cost-minimising features of residential zones in some States is the ability of property owners to request a complying development certificate. These certificates enable a developer to have certainty that the proposed development meets the pre-determined standards and will be approved.

These features are typically not provided for in State-wide guidance for heritage zones. For example, the Model LEP provisions in New South Wales treat heritage conservation zones the same as individually-listed heritage properties. This is significantly different from the treatment of other (non-heritage) zones. For each non-heritage residential zone, the model planning provisions mandate that, at a minimum, development standards be set outlining building height restrictions, floor-space ratio and minimum allotment size. These standards, however, do not apply to property that is located within a heritage zone. For more detail, see chapter 5.

FINDING 11.1

Guidance in local planning schemes for non-heritage residential zones is generally greater and more precise than that provided for heritage zones.

In saying that, however, the absence of consistent State guidance over the structure and content of heritage zones does not necessarily lead to inconsistent or unhelpful information for heritage zones. An example of a good approach to heritage zones is the Parramatta Heritage Development Control Plan (DCP) 2001 (Parramatta City Council 2001).

The Parramatta Heritage DCP provides both general and zone-specific development guidelines. The general guidelines outline broad principles relating to scale, siting, architectural form and detailing, materials and finishing, and uses. Guidelines are also provided for new buildings. The Parramatta Heritage DCP provides the following information for *each* identified heritage conservation zone:

- history of subdivision and development in the area;
- statement of historical significance;
- council's objective for the area;
- specific objectives and controls for:
 - subdivision;
 - existing buildings;
 - siting, setbacks and gardens;
 - new developments at rear of existing buildings;
 - garages and carports; and

-
- fences.

For the specific objectives and controls, the DCP outlines features that should be kept and repeated and those that should be avoided or are prohibited. In addition, the DCP contains sketches demonstrating desirable outcomes. Other examples of similar control plans include North Sydney City Council, Leichhardt Council and Albury City Council.

A deficiency of Heritage DCPs is the lack of complying development — that is, automatic approval so long as the development meets the standards outlined in the DCP. Complying development is provided for development in non-heritage areas.

Several Victorian local councils also provide useful guidance for properties located within heritage areas.¹ Most councils provide general guidance through statement of local heritage policy (clause 22 in the relevant planning scheme) — this appears similar to the general guidance provided in the Parramatta Heritage DCP. However, with respect to each heritage zone identified (heritage overlay area), most Victorian councils only provide for a statement of significance and the identification of contributory places. They do not provide detailed development guidance — see, for example, City of Bayside Planning Scheme clause 22.06. However, there are exceptions where councils have done so — for example, City of Glen Eira, Greater Geelong City Council and Boroondara City Council.

The level of specific development guidance for heritage zones varies in the other four States. For example, in Queensland, the incidence of development codes for heritage zones is extremely rare — even though the new Queensland planning system is based on objective development codes. The incidence, by State, of specific development guidance for heritage zones is outlined in table 11.1.

The provision of clear policy statements outlining the approach to be taken for development applications in heritage zones is highly desirable. However, the benefits of such an approach would be greatly enhanced when combined with development standards — or at least development guidance — on what are appropriate developments within each heritage zone.

The Queensland Heritage Council, in response to the Draft Report, suggested that:

... it is essential to bring historic heritage further into the general planning mainstream so that it is dealt with in a transparent and predictable fashion – in much the same way that Commonwealth, State and local governments routinely regulate any number of other planning issues. (sub. DR378, p. 5)

¹ Overlay areas occur when a heritage overlay applies to more than one property.

Table 11.1 Incidence of development guidance for heritage zones^a

<i>State</i>	<i>Number of councils^b</i>	<i>Number that provide guidance</i>	<i>Number that do not provide guidance</i>
New South Wales	152	37	115
Victoria	79	11	68
Queensland	154	2	152
Western Australia	123	17	106
South Australia	65	6	59
Tasmania	30	0	30

^a Local council websites were searched for development code/guidance on heritage properties or heritage areas. Guidance needed to be specific so as to provide ex ante guidance for developments prior to the development application process. ^b Some councils do not maintain websites; number may be less than actual number of councils.

Source: Local councils' websites: accessed through NSW Department of Local Government; Municipal Association of Victoria, and Australian Local Government Association.

There seems significant scope for Queensland to better integrate heritage into local planning schemes, with only two out of 154 local governments providing practical heritage development guidance. A good example of such guidance is chapter 6.1 of the Toowoomba City planning scheme.

The provision of specific and practical ex ante development guidance for places in heritage zones would provide owners with timely, sound and consistent heritage advice. In order to address the inconsistency in structure, content and guidance between non-heritage and heritage zones, all governments should require local planning schemes to contain the following information for heritage zones:

- statement of significance;
- allowed developments;
- prohibited developments; and
- development standards or codes.

RECOMMENDATION 11.1

State governments should ensure that all local planning instruments include the following information for each heritage zone or area:

- *statement of significance applying to the whole area;*
- *outline of what type of use and development is permitted;*
- *outline of what type of use and development is prohibited; and*
- *development standards (or codes) that trigger automatic approval upon proposed developments meeting them.*

There are two possible implementation options, depending on the general structure of the jurisdiction's planning laws and regulations.

In jurisdictions that mandate state-wide consistent provisions in local planning schemes, the State government should ensure (through a State planning policy) that heritage zones have the same structure and provisions as non-heritage zones — including the possibility of complying development. The New South Wales Government suggested that local councils are:

... seeking leadership, guidance and resources to be able to provide property owners with more timely, sound and consistent heritage advice and assistance. (sub. DR384, p. 11)

Such leadership and guidance could be provided by the relevant State government requiring that local governments adopt consistent approaches to heritage and non-heritage zones in local planning schemes.

In jurisdictions where planning laws and regulations allow for each individual council to adopt its own structures and contents of planning schemes, it is ultimately up to each local council to implement recommendation 11.1. It would, however, be beneficial if each State's Heritage Council and State planning agency promoted and actively encouraged the adoption of recommendation 11.1 as part of best-practice conservation at the local level.

11.2 Reducing the red-tape burden of heritage zones

Should recommendation 11.1 above be adopted, there still remains the issue of the additional red-tape burden imposed by a heritage zone compared with all other zones. Most heritage zones require that a heritage impact statement be prepared for any potential development, so that any impact on the heritage significance of the zone can be assessed — this is in addition to the normal development application. While the need for a heritage impact statement for every individual property may be justified for individually listed properties — given that the heritage significance would invariably differ for each property — it may not be justified for individual properties contained in a heritage zone.

The purpose of a heritage impact statement is to outline heritage significance and analyse the effects of the proposed development. Briefly, it includes:

- statement of historical significance;
- impact the proposed development would have on historic significance; and
- proposed measures to mitigate the effect of development on heritage significance (see chapter 5).

The adoption of recommendation 11.1 would require that local governments outline, for each heritage zone designated, a statement of significance outlining the heritage significance of the area. There is no need to have separate statements for every house since a house individually may not be significant, but taken together the area is. Hence the planning instrument containing the heritage zone would include the first element of a heritage impact statement (i.e., a statement of significance that applies to every property within the zone).

In addition, the inclusion of what development is allowed without approval, what development is prohibited in the zone, and importantly, the adoption of detailed development standards, would result in clear rules governing the type, form, style, set back, height, etc of developments. These rules are designed to ensure that developments meet the objective of the zone — that is, to develop sympathetically in accordance with the heritage significance of the area. Hence the planning instrument containing the heritage zone would include the other elements of a heritage impact statement.

In other words, the implementation of recommendation 11.1 and the adoption of clear and precise development rules based on a statement of significance would negate the need for individual heritage impact statements. In order to reduce the red-tape burden imposed on property owners, the requirement for a heritage impact statement for properties not individually listed within a heritage zone should be removed.

RECOMMENDATION 11.2

Upon adoption of recommendation 11.1, State and Territory governments should remove the requirement for a Heritage Impact Statement for properties not individually listed within a heritage zone.

11.3 State planning policies and local heritage

The increasing use of State governments' mandated code assessment and assessment against pre-determined development standards (such as Australian Building Codes) has removed discretion from local councils with respect to many development decisions. However, such a trend has not been mirrored for heritage places under local planning schemes. Heritage is one of the few areas in planning where local councils still retain significant levels of discretion as to the approval of developments.

This is highlighted where State planning policies allow development in local government areas that otherwise would not permit it. For example, a State policy

may mandate that medium density development is appropriate in specified local government areas where the local governments have not allowed such density in their local planning scheme (see, for example, box. 11.1).

Box 11.1 Ku-ring-gai case study

The New South Wales planning system provides for State Environment Planning Policies (SEPP), which can override local planning schemes. An example of this is the NSW SEPP No. 53 — applying only to the Ku-ring-gai local government area — which aims to facilitate urban infill through multi-dwelling houses.

However, SEPP No. 53 has several caveats regarding multi-dwelling development where it may affect places of local heritage significance. This has the effect of making heritage protection the only avenue through which local councils can reject multi-dwelling development. Not surprisingly, this has magnified the incentive to use heritage conservation as a mechanism to circumvent State-imposed development rules. An example of this is *Rahmani v Ku-ring-gai Council* [2004] NSWLEC 595 where the courts allowed Ku-ring-gai local council to reject a development allowed under SEPP No. 53 because of its effect on surrounding heritage places.

Several participants also commented on this. Saman Rahmani noted that:

... heritage has become a tool. It is used by some councillors to stop development that is not to their liking. In my case to stop my dual occupancy development and the State Environmental Planning program No. 53, also known as SEPP 53. (DR trans., p. 38)

Similarly, Zeny Edwards, an advocate for heritage protection in Ku-ring-gai, commented that:

... some councillors are hiding behind heritage to prevent development, and they're painting this very negative picture of heritage as anti-development, where it really isn't. (DR trans., p. 64)

This limitation on local planning controls can create a perverse incentive for the local government to try and by-pass the State mandated development policy. If the State policy allows development subject only to its potential effect on local heritage, there is an incentive for the local government to use the 'heritage card' for no other reason than to by-pass the unwanted State policy. Several participants raised concerns that heritage conservation is used in such a manner. For example, Councillor Green from Rockdale Council in New South Wales had no doubt that heritage is 'a means and a ways to stop development' (DR trans., p. 32). Similarly, Peter Jenson, a town planner from South Australia, noted that the 'heritage card' is often used for non-heritage amenity purposes (DR trans., p. 353).

Australia ICOMOS shared the Commission's concerns that local heritage protection is often used for non-heritage purposes (DR trans., p. 610). Australia ICOMOS

commented that this may be due to a lack of positive restraints for amenity considerations:

... very often the heritage card is played where in fact urban amenity is the issue rather than heritage. (DR trans., p. 609)

All State governments have the ability to over-rule local planning schemes through their relevant planning laws and regulations. If a State government chooses to do so (for whatever objective it sees fit), it should do so in a manner that does not create a perverse incentive for local councils to abuse heritage conservation in order to undermine the State policy. Abuse of heritage conservation in this manner has a significant negative effect on the community's acceptance of the heritage conservation objective.

RECOMMENDATION 11.3

State governments should ensure that State planning policies do not contain local heritage exceptions which could be used to undermine the objectives of the State planning policy.

11.4 Designation of State-significant heritage zones

Some Heritage Acts allow for the relevant Heritage Council to declare an area a heritage zone, and hence be subject to heritage restrictions. State Heritage Offices generally have a choice as to whether they wish to pursue a State listing of an area, or to pursue appropriate development controls through the planning system. See box 11.2 for an example of this interplay.

In the Commission's view, heritage zones should be treated consistently with other residential planning zones. As such, it seems incongruous to allow the State to over-rule local government planning powers without using the mechanisms already available to it through State Planning Acts. In other words, should the State wish to over-rule a local government's planning decision not to heritage list an area, it should be done through the adoption of a State planning policy, rather than through a separate decision-making process at the State Heritage Office.

When an area is protected through State heritage listing, the Heritage Office must be consulted for all works and developments that may affect heritage values of the area. The objective of this is to ensure that developments within a heritage area do not detract from the area's heritage values.

Box 11.2 **Braidwood case study**

There has been much debate over the merits of heritage-listing the rural town of Braidwood and its surroundings. Irrespective of whether it should or should not have been listed, the Braidwood experience provides an example of the interaction between State Heritage and local council planning powers.

In 2005, the NSW Heritage Office proposed to place Braidwood and its surrounds onto the NSW State Heritage Register. The NSW Heritage Office stated that the push for State listing was in response to what was considered inappropriate delay from the local council in developing an 'appropriate framework for managing the heritage significance of the town' (sub. 188, p. 14).

Upon listing, the NSW Heritage Office would become the de facto planning body for Braidwood and the surrounding area. Although the Heritage Office would delegate many of its functions back to the local council, the Heritage Office would determine applications 'for new developments, major renovations, subdivisions and demolitions' (sub. 188, p. 15).

Some local residents were concerned not only about the effect of heritage listing on land use, but also about a Sydney-based Heritage Office controlling development over rural Braidwood (DR trans., pp.614–23).

Following community action, the proposed protection of Braidwood and its surrounds was being pursued through the local planning scheme process — via the development of a Braidwood Development Control Plan.

Save Braidwood Inc informed the Commission that:

The state of the proposal now is that the local council is working on a development control plan. Minister Sartor [NSW Planning Minister] said that they could have another month to do that ... We hope that Minister Sartor will be happy that the heritage of Braidwood can be largely looked after by the DCP, and so the involvement of the Heritage Office should not be as great as the blanket listing originally proposed. (DR trans., p. 621)

On 30 March 2006, Minister Sartor announced that Braidwood and its surrounds were to be heritage listed on the State Register.

Sources: NSW Heritage Office (sub. 188); Save Braidwood Inc. (DR trans).

This objective would also be achieved through the making of appropriate development control plans. In addition, the use of the planning processes, rather than State heritage powers, ensures effective consultation with the local community, certainty as to future development opportunities and restrictions, and well accepted processes.

Further, even in unlikely cases where a local council is unwilling to negotiate the adoption of appropriate development guidance, there is scope for the State Heritage

Office, through the planning system, to advise the State government to issue a State planning policy to conserve the heritage values of the area.

The Royal Australian Institute of Architects, responding to the Draft Report, commented that:

Conservation areas of State significance need to be managed by and with State government involvement, and not delegated to planning schemes governed by resource-poor local government. State governments are better placed to provide expertise on state and strategic matters, and should be in a position of leadership with regard to these roles and liaise and consult with local government accordingly. (sub. DR392, p. 4)

The Commission agrees with the view that the State government should be involved in effective development guidance over areas that comprise State heritage values. However, rather than duplicating existing planning processes through State Heritage Acts, the conservation of heritage areas would be more effectively achieved through proper usage of procedures currently available through the planning system.

This does not mean leaving the making of development guidance for State-significant heritage areas solely to the local council. Rather, it would involve negotiation, advice and assistance between the State and local governments and the local community, in the development of appropriate planning guidance — as provided by planning laws and regulations.

RECOMMENDATION 11.4

State Heritage Acts should not contain powers to proclaim heritage zones or areas. Heritage zones and areas should only be imposed under the State's planning laws and regulations.

11.5 Application of heritage controls to non-heritage places

Most State and Territory Planning Acts include the conservation of historic places (or the built environment) as one of several over-arching objectives. In addition, historic heritage is also one of several broad considerations when assessing development applications. The Commission and all participants in this inquiry support the need to conserve Australia's historic heritage places. There is no doubt that such support exists.

However, these broad provisions can be used to apply heritage restrictions on properties that had not been previously assessed as heritage significant (for a full discussion of this issue, see section 5.4). The relevant policy question is whether the

use of such broad heritage considerations adds to the conservation objective. In other words, do these legislative provisions result in a net benefit to the Australian community.

Specific heritage controls apply to:

- individually listed places;
- places with a heritage zone; and
- places in the vicinity of a heritage place or zone.

The need for residual ‘catch-all’ conservation provisions may have been appropriate when heritage conservation was first introduced and the listing process was immature and under-developed. However, when existing specific heritage controls can apply to up to 80 per cent of all properties in a local government area, such an argument no longer holds (for example, see City of Port Phillip and City of Yarra). David Logan, a prominent heritage architect and member of the NSW Heritage Council, commented that:

... by and large, the vast majority of places that are of heritage significance have been listed already. As time goes on, more will be added, but that will be a relatively small proportion compared to the amount that are already listed. (DR trans., p. 89)

Since most places of heritage significance are already covered by some kind of heritage protection (be it zoned, individual or vicinity), there appears to be little practical benefit flowing from general provisions. Further, the ability of Courts to ‘impose’ statutory controls over non-heritage places undermines the role of local councils, under the principle of subsidiarity, as representatives of the local community’s willingness to conserve heritage places. Where the relevant local council has decided that a place should not be listed, even though it may have some heritage values, it would appear questionable practice to allow heritage proponents to undermine that decision through judicial appeals (for example, Cross 1999).

RECOMMENDATION 11.5

State and Territory governments should modify their planning legislation and regulations to remove any requirement to take heritage considerations into account in relation to any individual property not already listed as locally significant, other than those requirements relating to heritage zones.

This recommendation does not result in removal of current vicinity protections in planning schemes. Some councils, in response to the Draft Report, interpreted it this way (for example, Woollahra City Council (sub. DR375); Campbelltown City Council (sub. DR371); and Blacktown City Council (sub. DR337)). In saying that, however, vicinity protection can result in some perverse outcomes — for example,

Willoughby Council (sub. DR393, p. 5) noted that that some councillors are concerned that some owners may seek heritage listing so as to prevent development on adjoining blocks. Such abuse can only be prevented through diligent identification of ‘true’ heritage properties, and a commitment not to use heritage protection for non-heritage purposes.

