
5 Planning controls and heritage conservation at the local level

The vast majority of historic heritage places are identified and protected at the local government level. Hence, it is important that the incentives are correctly aligned at the local level in order to promote effective heritage conservation. The identification and conservation of heritage places at the local level is achieved through local planning schemes. However, there remain fundamental differences as to development and land-use decisions for non-heritage and heritage places. These differences stem from statutory inconsistencies, not just a failure of local councils to explain, or property owners to understand, the heritage system. The statutory inconsistencies add to the uncertainty of heritage controls and erode the effectiveness of heritage protection at the local level.

As outlined in chapter 3, it is at the local level where the vast majority of historic heritage places are statutorily recognised.¹ The Heritage Chairs of Australia and New Zealand noted that:

Local government in Australia is currently responsible for identifying and protecting the majority of places of local heritage significance, except for Tasmania where only some areas of local government maintain schedules of heritage places. (sub. 139, p. 6)

The planning and heritage systems, while containing many common elements, are fundamentally different in their application at the local level (although there are a few significant differences between States, noted below). The main difference is that zoning controls apply restrictions broadly to buildings within a designated area, whereas heritage controls typically apply to individual buildings, irrespective of zone. Further, the assessment of development proposals differs between heritage places and non-heritage places and results in a greater red-tape burden being placed on owners of heritage properties. In addition, the amount of local government discretion is much higher for controls over heritage properties (or places affecting

¹ The ACT and the Northern Territory do not have local councils and their processes are therefore not discussed in this chapter. All their heritage conservation processes are undertaken at the Territory Government level (chapter 4).

heritage properties) than for planning decisions over properties where heritage is not an issue.

This chapter focuses on the broad State-wide planning policies as they apply to heritage conservation issues. They include legislated requirements under the planning acts, mandated State-consistent planning schemes and guidance by State planning or heritage bodies. While there are many common characteristics across the States, significant differences also exist.

5.1 Local government planning controls

All jurisdictions have State-wide planning statutes. These statutes set out the framework under which local governments determine development and planning applications — typically known as local planning schemes.² The statutes typically also provide for State and regional plans, in addition to local plans.

State plans typically deal with issues of a State-wide importance, and are made by the relevant State Government. Some jurisdictions make it compulsory for local plans to be consistent with State-wide provisions outlined in State plans (for example, Victorian Planning Provisions). In practice, State plans generally mandate that they be followed in local planning schemes.

Regional plans deal with issues that go beyond the local area and are also produced by the relevant State Government. These plans often apply to large areas but they can relate to small sites that have regional significance — for example, South East Queensland Regional Plan and NSW REP No. 4 – Homebush Bay.

Local planning schemes, prepared by local councils, guide planning decisions for a local government area. Through zoning and development controls, they allow councils to supervise the ways in which land is used and the commercial and social character of the local area. In addition, councils can use development control plans to add more detail to local planning schemes. Development control plans (or codes contained in the local schemes) provide specific, more comprehensive guidelines for types of development. The level of State control over local schemes varies considerably between jurisdictions (see appendix D).

² *Environmental Planning and Assessment Act 1979* (NSW); *Planning and Environment Act 1987* (Vic); *Integrated Planning Act 1997* (Qld); *Town Planning and Development Act 1928* (WA); *Development Act 1993* (SA); *Land Use Planning and Approvals Act 1993* (Tas).

Zoning restrictions

Zoning is the primary mechanism through which land use and development are controlled in local planning schemes. A zone is a planning provision that prescribes the primary character of land use (such as residential, industrial or rural) and indicates the type of use and development which may be appropriate (or prohibited).

Victoria and Tasmania also place a further layer of more detailed controls on top of zoning types, called overlays.³ Overlays relate to the environment, heritage, built form, and land and site management issues. In some cases, uses or developments which would be permissible under the zoning of the land, may not be allowed under the additional overlay requirements. Conversely, in some cases a use (e.g., a restaurant) may be permitted in a heritage listed place, to make it commercially viable to ensure its ongoing conservation — even if such a use would be otherwise prohibited by the zoning on the area (see, for example, City of Glen Eira (sub. DR273) and City of Ballarat (sub. 100)).

The controls over zones are generally divided into three sections. These sections cover uses which are allowed and do not require a permit; uses which are discretionary and do require a permit; and uses which are prohibited. Planning schemes usually present this in tables outlining allowed, discretionary, or prohibited developments in any particular zone. For example, in Victoria, development permit requirements are set out following the table of uses in a planning scheme. These clauses set out whether a development application is required to construct a building or carry out works. There are also schedules for each zone that set out additional controls that apply only in that scheme, such as setbacks, heights, minimum lot sizes, minimum subdivision, etc.

Changes in zone types and permitted uses within zones usually change land values. The impact of such value changes are accepted and borne by property owners, although invariably owners have access to an appeals mechanism as the influences on property values can be substantial. Such changes apply to all land within the zone's area and generally increase land values by allowing 'highest and best economic' use of sites, even if it detracts from some residents' perception of quality of life.

³ The Victorian system of heritage overlays does not distinguish between an overlay applying to one property, and an overlay applying to an area. However, the assessment of development applications does differ between single overlays and area overlays (see below).

Assessment of development applications

Local planning schemes typically outline developments which are prohibited, deemed permitted if they meet predetermined standards (code assessment), or allowed on a discretionary basis (merit assessment) — see table 5.1.

Table 5.1 **Dominant form of development assessment**
Code or merit assessment

<i>State</i>	<i>Type of assessment^a</i>
New South Wales	Code assessment
Victoria	Guided merit assessment ^b
Queensland	Code assessment
Western Australia	Merit assessment
Southern Australia	Code assessment
Tasmania	Merit assessment

^a Code assessment also allows for merit assessment. Merit assessment does not allow for code assessment.

^b Victorian Planning Provisions provide for design criteria that must be met for each zone. However, there is no automatic approval when the criteria are met.

Code assessment results in development applications being approved so long as the development meets specified minimum standards, which are typically contained either within State planning policies, or within the local schemes themselves. For example, New South Wales allows for local councils to publish detailed development controls plan which outline minimum standards. Queensland local planning schemes contain assessment codes that may address a specific type of development (e.g., reconfiguring a lot), a type of use (e.g., home business) or may relate to an identified zone or overlay. Code assessment removes local government discretion over development approval. That is, so long as the proposed development meets the set standards, the local council can not prevent development. Given that such standards are typically determined at the State level, this provides de facto planning control to State authorities.

For development applications which require discretionary approval by the relevant local authority, each State's planning laws outline the considerations that must be taken into account. These considerations are generally broad statements of principles. The statements include references to the amenity and character of the area, orderly development and economic effects, and reference to environmental impacts, including the conservation of the built environment (for more detail see appendix D). Even though it is at the State level where the considerations are set, it is ultimately the local council that determines whether to allow or prohibit development.

5.2 Local government heritage-listing processes

The mechanisms through which local governments identify and assess places that have local heritage significance are controlled by State legislation or Ministerial oversight. As a result, the level of local government discretion for heritage listing can vary greatly between States. The obligations summarised below flow from State government requirements, be it from legislation, regulations or binding Ministerial directions.

In all States, the regulatory aspects of heritage conservation at the local level are exercised through local planning schemes. The addition, or removal, of places from heritage controls is done through the relevant State's mechanisms for amending local planning schemes. Typically, this is accomplished by the local council initiating an amendment, seeking public comment, and once approved by the local council, the State Department, Commission or Minister is required to formally approve the amendments.

It is therefore the local council which initiates formal heritage identification, leading to statutory protection, at the local level. However, before a council proposes to amend a planning scheme, it usually undertakes a heritage study or refers to existing lists/studies (such as the RNE, or National Trust lists). The following outlines the State statutory requirements for local councils to conserve local heritage, and any State directions on how to assess heritage significance.

State control of the heritage processes in local councils typically comes through mandating local heritage lists (through the relevant Planning Acts), and/or through the use of State-wide consistent provisions in local planning schemes (e.g., heritage overlays and heritage conservation zones). Because of this linkage, to understand the workings and implications of the local heritage system an understanding of the planning systems under which they operate is required. Detailed discussion of each State's planning systems, as they relate to heritage, is contained in appendix D.

Even where there are binding State requirements, the commitment to adhere to the requirements can greatly vary between different local governments (that is, the practical implementation of those directions can vary). For example, around 42 per cent of Queensland and 86 per cent of Tasmanian local councils have heritage lists, even though there is no State requirement to do so (appendix B). Significant variation between local government areas could be an indication that State government guidance is lacking. However, even where there is such guidance, local councils still vary in their 'willingness' to identify and assess heritage significance. For example, with respect to the Victorian heritage system, which does provide a high level of State guidance as to the local government heritage framework, the Heritage Council of Victoria advised that:

The lack of consistency of heritage conservation advice and decision making has been identified as one of the weaknesses of the current policy framework. While the same criteria are used in assessing heritage places, these are not always consistently applied. The approach to heritage also varies widely from council to council, depending on available resources and local community attitudes. (sub. 178, p. 2)

An alternative view is that the variations between local councils is not a ‘problem’ that needs to be addressed, but simply an accurate democratic reflection of the interests of the community in each local government area — that is, an application of the principle of subsidiarity. A greater problem exists where there is inconsistency in heritage outcomes *within* a local council.

Publicly-owned heritage places

Local government-owned heritage places typically comprise the bulk of publicly-owned places in a State. For example, the Victorian Government noted that the local councils operate the majority of publicly-owned historic heritage places in Victoria (sub. 184, p. 23). The process for the identification and protection of publicly-owned heritage places at the local level, is the same as for privately-owned places — that is, listing on the relevant local planning scheme. The protection of local government-owned properties varies between States (as does local heritage protection generally) and also intra-State (that is, between councils). The Victorian Government noted:

A limited number of councils are actively trading on their heritage portfolio, and are managing places so the heritage significance is available to the public in an ongoing way ... Unfortunately a significant number of councils, particularly those in more remote areas of the State, struggle to support the heritage places in their care due to a smaller rate base from which to leverage funds. (sub. 184, p. 24)

Similarly, the NSW Local Government Association commented that local government:

... owns a significant proportion of the large number of historic heritage places under Local Government listings including buildings, bridges, monuments, parks and streetscapes. In many places publicly owned heritage places are ageing resulting in increased burden on maintenance costs for Local Government and associated resource implications. (sub. 179, p. 2)

Also, many State-owned properties that are not of State significance are of local significance. For example, a courthouse, railway station, bridge or major roads. However, due to all States requiring local planning schemes to be signed-off by the State Government, such protection is ultimately dependent on the State Government.

Unlike at the Australian, State and Territory levels (chapter 4), there is no requirement for local governments to identify their own historic heritage, apart from their own willingness to do so.

The assessment of local heritage significance

The assessment of local heritage significance is typically done through heritage studies — undertaken by heritage consultants and/or historians (appendix B). These heritage studies generally use the Burra Charter as the guide for assessing the significance of places. In addition, some States mandate the process with which local heritage studies must or should comply. This is typically achieved through ‘guides’ produced by each State’s Heritage Office which generally replicate the requirements set out for assessing places of State significance.

State guidance for assessing local significance

New South Wales, Victoria and Western Australia publish local government heritage guidelines.⁴ While all three documents outline in detail what heritage significance is, the scope of local government responsibilities, and the relevant legislative processes, only the NSW guidelines provide detailed advice on how to prepare a heritage significance assessment (section 8.6 of the NSW guidelines). The NSW guidelines provide an eight-step process for determining heritage significance. These are:

1. summarise what is known about the item;
2. describe the previous and current uses of the item, its associations with individuals or groups, and its meaning for those people;
3. assess the significance using the NSW heritage assessment criteria (box 5.1);
4. check whether a sound analysis of the item’s heritage significance is possible;
5. determine the item’s level of significance;
6. prepare a succinct statement of heritage significance;
7. get feedback; and
8. write up all the information gained.

⁴ New South Wales Heritage Office (2002); Victorian Department of Planning and Housing (1991); and Heritage Council of Western Australia (1991).

Box 5.1 **Assessing local significance in New South Wales**

There are seven criteria for assessing local significance. These criteria relate to the seven criteria used in the assessment of places of State significance. The difference is scale or the geographical spread of people to whom the place is significant.

1. An item is important in the course, or pattern, of the local area's cultural or natural history.
2. An item has strong or special association with the life or works of a person, or group of persons, of importance in the cultural or natural history of the local area.
3. An item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in the local area.
4. An item has strong or special association with a particular community or cultural group in the local area for social, cultural or spiritual reasons.
5. An item has potential to yield information that will contribute to an understanding of the area's cultural or natural history.
6. An item possesses uncommon, rare or endangered aspects of the area's cultural or natural history.
7. An item is important in demonstrating the principal characteristics of a class of the area's:
 - (a) cultural or natural places; or
 - (b) cultural or natural environments.

Source: NSW Heritage Office (2002), section 8.6.

In addition to outlining the seven criteria for assessing local significance, the NSW Heritage Office provides commentary on the application of the criteria. The Heritage Office notes that where a place has incidental or unsubstantiated connections with a criterion, or where it has been altered so as to remove the alleged historically important feature, it should not be assessed as historically significant. For example, a place may be considered significant because an important historical figure was said to have lived there. However, further research may reveal insufficient evidence of that fact, or that the period of habitation was too brief to be relevant to the life and work of the historical figure.

The criteria also encourage the use of comparative analysis, that is, comparing the alleged significant place with other places which meet the same criteria, or have the same significance. However, the Heritage Office guidelines state that a place is not to be excluded on the ground that items with similar characteristics have already been entered on a statutory list.

The Heritage Office warns that care should be taken not to confuse heritage significance with amenity or utility. Items are excluded if they are valued only for their amenity (service convenience or character of the neighbourhood); and/or the community seeks their retention only in preference to a proposed alternative. For example, a community may seek the retention of an older building in preference to its replacement with a more intensive development of a site. In such cases, there must be evidence that the item is separately valued in accordance with one of the criteria to have any validity as a significant heritage item.

The guidelines also includes guidance for each criterion regarding what features indicate the place meets the criterion (inclusion), or fails to meet it (exclusion). Table 5.3, at the end of the chapter, outlines the guidelines for inclusion and exclusion for each of the criteria listed in box 5.1.

The NSW guidelines suggest that different criteria may make different contributions to the overall heritage significance of the place. In some cases it may be useful to specify the relative contribution of each of the criteria to the place’s heritage significance. To facilitate this, the guidelines provide for a grading system (box 5.2). A place would only need to have a “moderate” rating on any *one* of the seven criteria to achieve local listing, after which its legal status is identical to one which was rated “exceptional” on say, five or six criteria. This yes/no binary choice to heritage is incompatible with prioritisation across similar sites.

Box 5.2 Grading the significance of each criteria		
Rating	Justification	Status
<i>Exceptional</i>	Rare or outstanding item of local significance. High degree of intactness. Item can be interpreted relatively easily.	Fulfils criteria for local listing.
<i>High</i>	High degree of original fabric. Demonstrates a key element of the item’s significance. Alterations do not detract from significance.	Fulfils criteria for local listing.
<i>Moderate</i>	Altered or modified elements. Elements with little heritage value, but which contribute to the overall significance of the item.	Fulfils criteria for local listing.
<i>Little</i>	Alterations detract from significance. Difficult to interpret.	Does not fulfil criteria for local listing
<i>Intrusive</i>	Damaging to the item’s heritage significance.	Does not fulfil criteria for local listing

Source: NSW Heritage Office (2002), section 8.6.

The NSW guidelines do not discuss the feasibility of ongoing conservation or the costs imposed on property owners from heritage controls and there are no specific recommendations that costs are to be taken into account when deciding whether to list.

The Final Report of the Queensland Heritage Advisory Committee (Queensland Environmental Protection Agency 2005, p. 10) recommended that Queensland adopt a similar document to the NSW Heritage Office's Heritage Guide. This Guide clearly outlines the responsibilities of local governments and includes detailed information on how to meet these responsibilities.

Not all jurisdictions provide guidance

While the NSW Heritage Office provides detailed guidance on how to identify places that have local significance, not all jurisdictions provide such detailed guidance. For example, the Victorian *Local Government Heritage Guidelines* do not provide guidance on how to undertake heritage assessments, nor do they provide the criteria against which significance is assessed. The guidelines do provide and explain the Burra Charter and provide a model brief for engaging heritage consultants to undertake heritage studies. A 2004 review of rural Victorian heritage studies recommended that:

The Standard brief appears to be performing well in setting the basis for satisfactory heritage studies, but it should provide further guidance on:

- the extent of work that can be expected;
- what is expected of the community consultation process;
- how the AHC criteria are to be addressed;
- an approach to prioritising documentation in Stage 2; and
- a standard approach to the structuring of local policies required for heritage precincts. (Wright 2004, p. 7)

In Western Australia — where the WA Heritage Council provides local government guidelines — the Western Australia Local Government Association identified a lack of 'detailed guidance within a State planning policy framework' for local council involvement in heritage (sub. 73, p. 4). The Association continues:

There is no statement of planning policy which sets out the principles for the protection of the State's cultural heritage. [Such a statement] is considered essential as the State has been almost silent on policy guidance to Local Government on its expectations of local level heritage management. (sub. 73, p. 4)

In Queensland, the lack of formal State guidance for the application of local government heritage responsibilities under the *Integrated Planning Act 1997* is also

seen as a problem. The Final Report of the Cultural Heritage Advisory Committee recommended that:

... a State Planning Policy (Cultural Heritage) be developed to inform State and local Government of the cultural heritage outcomes required to be achieved through (a) local government planning schemes and (b) development assessment decisions. (Queensland Environmental Protection Agency 2005, p. 8)

Amanda Jean, a heritage advisor, commented that:

Without agreement about a national formula or criteria used for assessment of local heritage significance conflicts can occur and can include the following:

- Lack of understanding of what constitutes 'heritage & significant values'.
- Lack of understanding of the difference between local history as understood by local historical societies and local heritage significance which references best practice industry standards.
- Lack of understanding between fondness of place and planning controls over social value and/or intangible values.
- Confusion over heritage objectives and aesthetic appeal.
- The assessment of visual impact appears arbitrary and subjective and its reference to various types of heritage significance/values is tenuous.
- Lack of understanding of the difference between heritage and amenity.
- Lack of understanding of the difference between neighbourhood character and heritage character.
- Differing opinions between metropolitan experts versus the local in rural areas. (sub. 120, pp. 3–4)

However, a lack of specific State-wide guidance may not always have a significantly negative effect. This is due to the reliance on the Burra Charter for the identification of cultural significance by heritage professionals, and the fact that the published government criteria are based on the Burra Charter processes (chapter 3). Nonetheless, problems still arise regarding the differing approaches of local governments:

While some local councils operate innovative programs and actively conserve local heritage, others suffer from inadequate access to skilled heritage professionals, poor local perceptions of heritage and limited resources ... In order to address this issue, the Heritage Council [of Victoria] is finalising development guidelines for local government and has commissioned a review of the Heritage Overlay System. (Heritage Council of Victoria, sub. 178, p. 4)

FINDING 5.1

There is a high level of discretion for decision making on heritage matters at the local government level, derived in part from limited State government guidance. This has resulted in inconsistent outcomes within many local governments.

Statement of historical significance

Most jurisdictions recommend a statement of significance should be prepared for places listed under local planning schemes — either through official guidance material or reliance on Burra principles. Article six of the Burra Charter states:

The conservation policy appropriate to a place must first be determined by an understanding of its cultural significance.

Australia ICOMOS, in the explanatory note to article six, noted:

An understanding of the cultural significance of a place is essential to its proper conservation. This should be achieved by means of a thorough investigation resulting in a report embodying a *statement of cultural significance*. The formal adoption of a statement of significance is an essential prerequisite to the preparation of a conservation policy. [emphasis added] (Victorian Department of Planning and Housing 1991, appendix B)

Flowing on from this advice, the NSW Heritage Office in its *Local Government Heritage Guidelines* commented that the:

... main aim in assessing significance is to produce a succinct statement of significance, which summarises an item's heritage values. The statement is the basis for policies and management structures that will affect the item's future. It is important to get it right. (NSW Heritage Office 2002, section 8.6)

The Victorian Planning Provisions state that the documentation for each place should include a statement of significance which establishes the importance of the place. However, the heritage overlay schedule (table 5.4) does not contain any space for the inclusion of such a statement.

Despite such guidelines, no State has a corresponding legislative requirement for a statement of significance to be entered into a planning scheme — although many heritage studies contain statements, and can be used as reference documents. Some local councils argued that a place would never be listed without a statement of significance. For example, Manly Council submitted:

Professional heritage staff would never recommend an item for listing without a Statement of Significance although the quality of the SoS's in our current listings (based upon the 1986 study) are of varying degrees of detail. (sub. DR310, p. 5)

However, even though it may be ‘best practice’ to include a statement of significance, there are no legislative consequences for not having one, or having an inadequate statement. As a result, in many local government areas, places are identified and ‘protected’ without an accompanying statement, or with an inadequate statement, of what values are to be protected (for more detail, see chapter 10). Indeed, Manly Council supported the introduction of statutory requirements to include a statement of significance for each property, even though it does so already (sub. DR310, p. 5).

The statement of significance is akin, in planning terms, to the objectives of the relevant zone. That is, the statement identifies the elements of the place that conservation is trying to maintain. Therefore, any proposed developments should be assessed against their impacts on the values as identified in the statement of significance. A lack of such a statement gives rise to several problems in the planning system (see below). In the absence of a comprehensive and adequate statement of significance, there seems to be no rigorous basis for a place to be subject to local heritage controls.

FINDING 5.2

While statements of significance are recommended in State guidance material, no State requires in statute its local governments to provide an explicit statement of significance for each property in their local heritage lists. The absence of such statements seriously impairs subsequent decision-making about listed places.

Amending local planning schemes — appeal and notification requirements

The imposition of regulatory controls at the local level with the objective of conserving heritage places involves amending local planning schemes. There are only two ways to appeal listing during the amending of a planning scheme. First, the owner can appeal to the decision-maker — typically the local council and/or the State Minister and second, some States provide for appeals to independent planning boards.

For example, in New South Wales, property owners have a right to provide submissions to local councils which must be taken into account in their decision-making and a right to a public hearing at the local council. After this process, property owners can only lobby the Minister — who must approve every amendment to local planning schemes.

This can be compared to the Victorian system where there is scope for public Panel Hearings over proposed amendments. The composition of the Panel typically

includes town planners, but may also include lawyers, economists and heritage experts or other professionals where relevant (McLeod 2005, p. 2-71). The Panel can make any recommendation it sees fit, although the local council does not have to follow the recommendations.

The only scope for judicial appeal, in all jurisdictions, is that the local council did not follow the correct procedures when amending the local planning scheme. There is no scope for judicial review of the heritage merits of places proposed to be included in local planning schemes.

FINDING 5.3

There is no scope for independent merit review of a local government's decision to designate a place as having heritage significance in its local planning scheme.

While most States have a requirement to publicise proposed amendments (usually through newspaper advertisements and exhibition at council offices), there is generally no requirement to inform individual property owners that an amendment to the planning scheme would have an effect. In the heritage context, this means that there is no requirement to specifically inform owners that their properties are proposed to be listed.

However, South Australia requires that property owners be informed in writing of any proposed heritage designation in local planning schemes (s. 25(12) of the Development Act). In Victoria, local councils may have to give notice of the proposed amendments to owners and occupiers of land materially affected by the proposals, although there is no need to do so if it is impractical for the local council to inform all the owners individually (see s. 19 of the PEA).

FINDING 5.4

State governments, except South Australia, do not require local governments to notify owners of properties that their property is proposed to be heritage listed in local planning schemes.

5.3 How does heritage listing affect planning laws?

The official identification of locally significant heritage values impacts on the planning process at two points: the imposition of planning controls; and the assessment of development applications.

Where the zone restrictions on use and development are consistent with heritage restrictions, problems typically do not arise. Problems do arise where heritage

restrictions lead to different requirements, or different assessment procedures, for development applications.

How does heritage listing affect the need for development approval?

Most jurisdictions have established exemptions from the need to seek development approval (appendix D). However, where a property is heritage listed, or falls within a heritage conservation zone, the requirements for development approval are governed by heritage conservation provisions, not the general provisions of the current zoning of the land.

There are few problems for property owners where the exemptions from development approval are the same between the current zoning of the land and those for heritage places. However, this is rarely the case. There are usually differences between the need for approval for heritage and non-heritage places when development approval is sought for heritage places (or places within a heritage conservation area). The following discussion focuses either on statutory exemptions, or exemptions contained in State-wide consistent planning provisions. Where such guidance does not direct a local council to apply different exemptions to heritage and non-heritage places, it is up to the individual local council to decide upon the need for consistency.

Development approval for heritage places ...

In all jurisdictions, the general rule is that approval is needed for developments on heritage listed places which would (or are likely to) materially affect the heritage significance of the place.

In both New South Wales and Victoria, approval is needed for developments on heritage listed places that involve the demolition, moving or alteration of a heritage item or building or place within a heritage conservation zone. Alteration includes changes (structural or non-structural) to the exterior of the building or structural changes to the interior. The erection of a building (including signage), or the subdividing of land, on which a heritage item is placed, or that is within a heritage conservation zone also requires development approval (NSW Model LEP, p. 45; Clause 43.01 of Victorian Planning Provisions).

New South Wales does not provide any statutory exemptions to the need for approval.⁵ In Victoria, development approval is not required for repairs or routine maintenance which do not change the appearance of a heritage place (cl. 43.01-2).

In both Western Australia and South Australia, heritage places require approval for all types of development. In South Australia the Development Act states that in relation to a local heritage place, development approval is needed where the demolition, removal, conversion, alteration of, or addition to, the place, or any other work (not including painting) could materially affect the heritage value of the place (s. 4). In Western Australia, the exemptions for development approval under the Model Text Scheme do not apply to heritage places, or places within a heritage area (Pt. 8.2).

In practice, more than half the responding councils in New South Wales, Victoria, Western Australia and Tasmania indicated that all works on listed places require prior approval (table 5.2). This applies to locally and State-listed places. Some councils indicated that prior approval only needed to be obtained for work which would impact on identified heritage characteristics. Other councils indicated that maintenance, painting and minor renovations did not require approval or that only demolition or moving a listed building required approval.

Table 5.2 Obtaining development approval^a
Per cent of responding councils

<i>State</i>	<i>Development approval required for ALL works on listed places</i>	<i>Development approval required for only those works affecting identified heritage values</i>	<i>Other^b</i>
New South Wales	57.7	18.5	24.6
Victoria	53.2	24.2	22.6
Queensland	38.1	17.5	12.4
Western Australia	60.5	8.1	14.0
South Australia	48.4	17.2	21.9
Tasmania	81.8	9.1	9.1

^a Applies to state and/or locally listed places. Some councils indicated that modification to items on the Register of the National Estate also required approval. ^b Typically, councils that nominated this category indicated that maintenance, painting and minor renovations did not require approval or that only demolition or changes to the façade required approval.

Source: Appendix B.

⁵ Although it does provide that, subject to the discretion of the local council, approval is not needed for minor works, maintenance, or works that do not affect the heritage significance. However, such discretion cannot be used unless the council has considered a Heritage Impact Statement and a Conservation Management Plan.

... compared with non-heritage places

The central difference in most jurisdictions between development approval for heritage and non-heritage development is the explicit legislative, or State-wide exemption from approval for certain developments on non-heritage places. The types of activities on non-heritage places exempted from development approval varies between jurisdictions. In Queensland and South Australia approval may be needed for all types of development and development has the same definition for both heritage and non-heritage places.

In New South Wales, for any given zone, the relevant local planning scheme must state what type of developments are allowed without the need for approval — known as exempt development. Typically, ‘exempt development’ status does not apply for places identified as a heritage item in a LEP.

In Victoria, the following types of works do not require development approval for non-heritage places, but approval is needed for heritage places: building a fence; erecting signage; internal alterations that do not increase size of the dwelling; works done for fire protection; and demolition of a building. In addition, the removal of trees on non-heritage places does not require approval whereas on heritage places approval is needed.

In Western Australia, the Model Text Scheme states that approval is not needed for the erection of a single house on a lot (including extensions and swimming pools), demolition or removal of a building or structure, works that affect the interior but do not materially affect the external appearance, and certain advertisements. However, if these works occur on a heritage place, approval is needed.

There is a fundamental difference in the approach to heritage and non-heritage development. Local planning schemes outline what development and uses are permitted, what are prohibited and what are subject to discretionary local council approval. This does not occur for properties that are subject to heritage controls. All development or use changes on heritage-listed properties are subject to the discretionary approval of local councils. Hence, there is greater uncertainty as to the permissibility (and greater cost) of development for heritage places.

How does heritage listing affect the assessment of development approval?

The recognition of heritage significance in a local planning scheme results in approval being needed for more types of development. It also results in additional processes that are not required for development on non-heritage places, including

the need to supply additional information (such as Heritage Impact Statements and Conservation Management Plans) with the development application.

The assessment of development applications for heritage places has two further complications:

- lack of objectives against which heritage developments are assessed; and
- code assessment, or assessment against pre-determined standards, is not available.

On average, a small proportion of heritage applications are rejected primarily on heritage grounds (see appendix B). The average is highest in South Australia where 4 per cent of applications were rejected. However, the impact in some local government areas was considerably greater than this. In Western Australia and South Australia, at least one council reported that all their development applications on listed places were rejected.

Appeals by an owner against an adverse decision can also be significant. In Victoria, one-third of council decisions were appealed. In all States, except for Tasmania, at least one council reported that all of its rejected development applications were appealed. One council reported that a dispute over a development application for a historic building ended when the building was destroyed by arson.

Heritage considerations, including preparation of a Heritage Impact Statement, are also taken into account for properties in the vicinity of heritage places (see, for example, the NSW Model Heritage LEP provisions).

The need for a heritage impact statement

In all jurisdictions that contain local heritage conservation provisions in their local planning schemes, the consideration of heritage developments involve the preparation of a Heritage Impact Statement (HIS), and sometimes an additional Conservation Management Plan (CMP) — the HIS may also include a conservation plan.

For example, in New South Wales, the Model Heritage LEP Provisions state that a HIS and a CMP must be considered by a local council prior to assessing a development application for modification of a heritage place (NSW Heritage Office 2000, p. 7). The Newcastle City Council noted that:

The total number of Development Applications processed by [Newcastle] Council involving heritage issues was 198 for the 2004-05 financial year. The total number of Development Applications accompanied by a Heritage Impact Statement was 120. (sub. 78, p. 9)

A HIS is a document outlining the heritage significance of a place, and analysing how the proposed development affects such significance. For example, the Fremantle City Council described a HIS as:⁶

Having established the significance of a place, including identification of the elements of the place and its context that represent this significance ... a heritage impact statement should be prepared that evaluates the likely impact of the proposed development (works) on the significance of the place and its visual, social and historical context.

The NSW Heritage Office advises local councils that a HIS means:

... a document consisting of a statement demonstrating the heritage significance of a heritage item or heritage conservation area, or of a building, work, archaeological site, tree or place within a heritage conservation area, an assessment of the impact that proposed development will have on that significance and proposals for measures to minimise that impact. (2000, pp. 3–4)

The minimum amount of information which is to be contained in a HIS includes:

- the heritage significance of the item as part of the environmental heritage of the relevant local government area;
- the impact that the proposed development will have on the heritage significance of the item and its setting, including any landscape or horticultural features;
- the measures proposed to conserve the heritage significance of the item and its setting;
- whether any archaeological site or potential archaeological site would be adversely affected by the proposed development; and
- the extent to which the carrying out of the proposed development would affect the form of any historic subdivision.

The costs incurred by property owners in the preparation of a HIS or CMP (or both) vary substantially depending on the type of building, the level and type of significance, and the proposed development. Australia ICOMOS noted that:

Such costs can vary greatly but might start at a few thousand dollars and for large and complex sites can involve costs of the order of \$100,000 or more. The median range would probably be \$10,000 to \$50,000 but we are unaware of any collated data on such costs, and there are many variables which make generalisation difficult. (sub. 122, p. 60)

⁶ http://www.freofocus.com/council/resource/DBH13_Policy.pdf.

Focusing primarily on residential developments in Western Sydney, George Wilkie (an architect) commented:

... every time you apply in local government to intervene into a heritage item, there is generally a requirement to produce an heritage impact statement. This heritage impact statement is a fairly expensive item and probably costs somewhere in excess of \$3000 for most applications. (trans., p. 1011)

In principle, a HIS is similar to the information that a developer would typically be required to show for non-heritage merit assessment. That is, for non-heritage merit assessments, local councils generally require developers to produce a document stating how the proposed developments meets the objectives of the zone, the planning principles, and other relevant elements such as amenity or character — the burden on developers of these requirements led to the general trend towards code assessment (see below). Such a trend has not been replicated for heritage developments, reflecting that each heritage property has some unique features.

Lack of objectives for assessing heritage developments

There are some important differences between merit assessments of heritage and non-heritage developments. First, the objectives against which non-heritage developments are assessed are known and clearly enunciated prior to the development process, whereas heritage developments are assessed against the vaguer notion that the development must not ‘impact on the heritage significance of the place’. Assessing development on the basis of its likely effect on a place’s ‘heritage significance’ would not be unnecessarily problematic were the heritage significance of the place to be undisputed, clear and meaningful. However, this is not always the case for places of local heritage significance (particularly where there is no statement of significance).

The Western Australian Planning Commission stated that ideally:

Assessing the cultural significance of a place should be done as independently, objectively and rigorously as possible (as appropriate to the nature of the decision to be made) so that the decision maker has the best possible information prior to making a decision. The core component of the heritage conservation process should be a statement of the cultural significance of the place. The degree of cultural significance leads to no specific outcome until an integrated assessment is made through the planning system. (sub. 98, p. 4)

The importance of a thorough statement of significance flows from the Burra Charter. Professor Bill Logan from Deakin University stated:

The Burra Charter says that the most important thing you have to do is work out the significance of a place. In the process the statement of significance is the end of the first stage. It’s terribly important. Everything flows from that ... What the Burra

Charter says is that what you do in that local level is to determine what are the significant elements or key values, and that's what you try to protect. So it may be the general height of streetscapes or whatever. You try to protect that but other things can change. By operating through that Burra Charter process you can actually get an integrated system. (trans., p. 320)

Yet despite these views, no Australian State requires at the local level a statutory listing of a place's heritage significance (see section 5.2). The level of detail in, or referred to by, local planning schemes regarding individual heritage places typically only involves the listing of the address of the property. Victorian local schemes provide the greatest level of detail (see table 5.4), but a statement of significance is still not required.

When statements of significance are available, they are generally available in the heritage study or studies which gave rise to the inclusion of the property (or properties, precinct or area) onto the local planning scheme's heritage register. In addition to these statements, a different statement may be prepared by another heritage professional in the HIS accompanying the development application. When this occurs, it is possible to have two conflicting statements of significance, with no clear priority between them. This gives rise to the possibility of having two different views on whether the proposed development would affect the property's heritage significance. It is this issue which is central to the case in the majority of judicial appeals on heritage development decisions.

No code assessment for heritage developments

Adding to the subjective nature of heritage development approval, in jurisdictions where objective code assessment is the dominant form of approval (New South Wales, Queensland and South Australia), code assessment is not available to heritage places, or places within a heritage conservation zone. In addition, the guided merit assessment process in Victoria is not available for places with a heritage overlay.

Where heritage development rules do exist at the local level, they do so at the initiative of the local council, and differ significantly from the notion of complying development or code assessment. For example, the Heritage Development Control Plans in the Parramatta City Council and the Leichhardt Municipal Council in New South Wales, provide broad guidance on the types of development allowed in heritage conservation areas. However, in spite of this, complying development

status,⁷ which is the most common form of development, does not apply to heritage items or land within a heritage conservation zone.⁸

Even where the planning system notionally provides for code assessment of heritage development, in practice such codes lack the detail required to be true code assessment. For example, Division 4 of the Townsville City Plan 2005 states that places on or adjacent to heritage-listed properties, must be assessed against the Heritage Code. The ‘code’ against which heritage developments are to be assessed essentially states that development is allowed where it would not detract from the heritage significance. The Code also indicates that developments should adhere to the Burra Charter. In practice, the level of detail contained in the heritage code varies significantly from the ‘code assessments’ for other development (see Schedule 2 of the Plan). As such, it does not appear to be a true code assessment, that is, an objective assessment against pre-determined specifications.

This is not surprising given that each individual heritage place has unique features demonstrating heritage values. In such situations, the scope for code assessment is limited and would be costly. In saying that, however, the costs of heritage development applications could be reduced by introducing more objectivity and transparency into the assessment process, as well as having a clear statutory statement of significance for each place listed.

In jurisdictions where code assessment does not occur, there is a push towards introducing more objectivity in the assessment of non-heritage development proposals. This is typically done through the requirement that each zone has a table of allowed uses, prohibited uses, and discretionary uses. Some jurisdictions, for example Victoria, have State-wide consistent allowed, prohibited and discretionary uses and developments for each zone. However, even though Victorian planning schemes have heritage overlay tables, the citations justifying the overlay still lack a clear statutory statement of significance (see table 5.4 below), nor does Victoria provide State guidance on what uses or developments are allowed or prohibited.

Development assessment in heritage conservation areas

Heritage conservation areas and individual heritage listings generally impose the same requirements on a property regarding the need for development applications, or HISs. All jurisdictions allow for heritage conservation areas to be declared. For

⁷ Developments that are automatically approved so long as they comply with pre-determined standards.

⁸ An example of this can be seen in Part 3 of the *Parramatta Local Environmental Plan 2001*.

example, in New South Wales, a heritage conservation ‘area’ is defined as an area identified on the local government area map and includes all buildings, works, relics, trees and places situated on or within the land (NSW Heritage Office 2000, p. 76); Victoria allows heritage overlays to be applied to areas as well as individual sites or buildings; and in South Australia the Adelaide City Council has declared the North Adelaide heritage conservation area. The Victorian Government, in response to the Draft Report, disagreed that development in heritage areas (overlay areas) is treated different than individual heritage places:

The development approval provisions for all places covered by a Heritage Overlay are the same, regardless if they are an individual place or larger precincts or areas. (sub. DR413, p. 6)

While some aspects of the development process are the same between areas and individual places (e.g., the need for development approval), the application and interpretation of development controls differs markedly between the two, even in Victoria (see, for example, the numerous Victorian legal cases below).

The aim of heritage areas is to ensure that those elements (including buildings, fences, gardens and trees) that make a contribution to the heritage of an area can be retained and where new development occurs in such areas the development is complementary to those buildings or features. This aim is generally consistent among jurisdictions.

As such, the controls do not necessarily prevent development. Rather they are intended to ensure any new development respects those elements which make a contribution to that heritage area. It is not intended to prevent medium density development or urban infill. That said, heritage controls may, to some extent limit redevelopment opportunities, particularly where there is a group of intact or largely intact buildings in a streetscape, but it would be incorrect to rely on them as a density control (*Lorial PL v Glen Eira CC* [2003] VCAT 961; *Maldeve Pty Ltd v Hobsons Bay City Council* [2004] VCAT 1638). In summary, the effect heritage areas have on development is:

Whilst the land is located within a heritage overlay area, this is not a factor that would preclude the land from redevelopment, rather, it is a factor to be taken into account in the preparation of an appropriate design response. (*Sliwa v Ballarat CC & Ors* [2002] VCAT 1125)

The assessment of development in heritage areas focus on the contribution the place makes to the heritage character of the area, and hence, whether demolition or development would have an adverse impact on the *heritage significance of the conservation area*. The analysis typically involves a ranking process, beginning with an assessment of the importance of the individual property to the character of the *whole* area. For example, in New South Wales:

While a restored federation dwelling on the site could make a positive contribution to the conservation area, I have not been persuaded that the building is so important in this regard that its restoration is essential. It certainly does not have a strong visual presence in the streetscape ... Had the building been a listed heritage item and were it not in such a dilapidated condition with much of its architectural detailing missing and if the two houses were dominant in the streetscape, or if they had an important historic relationship, a different conclusion may have been possible. (*Horizon Project Solutions Pty Ltd v Hornsby Shire Council* [2002] Unreported NSW LEC, 13 March 2002, para. 20–1)

And in *Wholohan Charlesworth & Associates Pty Ltd v Ashfield Municipal Council*:

On balance then, I rely on this detailed heritage assessment, which confirms the earlier investigations that this building has low significance and would be of minimal loss if demolished, for replacement by a suitable building. ([2000] Unreported NSW LEC 31 October 2002, p. 10)

Similarly, in *Maldeve Pty Ltd v Hobsons Bay City Council* [2004] VCAT 1638, at para. 61, the Tribunal comments that demolition should be allowed due to the building not being ‘remarkable or significant in its own right; rather, it makes a low contribution to the significance of the [heritage] precinct as a whole’.⁹

In assessing proposed developments in heritage conservation areas, the focus is generally on streetscape, amenity and character issues. For example, In *Horizon Project Solutions*, the NSW Land and Environment Court stated:

In relation to streetscape and the impact of the proposal on the conservation area ... I do not believe that the proposed buildings will have any impacts so as to make them unacceptable in terms of the established character of the area. (para. 31)

Also in *Charteris v Leichhardt Council*:

It is concluded that the existing house No 5 Punch Street clearly contributes to the character of the conservation area in this locality. In the absence of a proposed new building which would, in some manner, retain that characteristic relationship, what is proposed is seen as unacceptable. In any case it appears that there is an option to reuse the existing building to create the type of accommodation desired by the applicant while retaining the existing building envelope. (para. 33)

Individual heritage listing and heritage areas impose the same red-tape burden on property owners. That is, development applications are needed for more activities than otherwise would be and there are additional information requirements. However, while it may appear that the controls placed upon individual heritage

⁹ See also *Lonie v Brisbane City Council* [1998] QPELR 209; *Michel v Brisbane City Council* [1999] QPELR 374.

places and heritage areas or precincts are the same, there are important differences. The assessment criteria in a heritage area is an assessment against the character and streetscape of the area (with the character and streetscape being the identified heritage values). This allows greater scope for demolition and redevelopment of non-listed properties, so long as it does not offend the general heritage character.

In essence, the assessment undertaken for development and use within a heritage conservation area is the same as that undertaken for any residential zone — that is, character, amenity and streetscape.

FINDING 5.5

Heritage conservation areas impose less stringent restrictions on the ability to modify, demolish or redevelop properties than do heritage controls on an individually-listed property.

5.4 Significant inconsistencies between the planning and heritage systems

Inconsistencies between different local councils' views on the use of heritage controls is not necessarily a problem where they reflect the different views of the local communities — the principle of subsidiarity requires that local heritage conservation reflects the willingness to conserve of that community.

However, inconsistency between the heritage system and the planning system *within* local councils does pose problems. Such inconsistency can occur from State control over the planning system and a lack of State guidance over the local heritage system. In order to ensure consistency within local councils, the level of State guidance needs to be the same for both the planning and heritage systems.

The interaction between the general planning system (applying to non-heritage places) and the system for heritage conservation within the planning system results in inconsistencies due to: local heritage conservation increasingly becoming the last avenue for local government discretion over development approval; and the imposition of heritage controls on non-heritage-listed places.

Local heritage conservation allows local government discretion over development

As discussed above, 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 some development decisions. However, such a trend has not been mirrored under local heritage systems. Heritage is one of the few areas in planning where local councils still retain significant levels of discretion as to the approval of developments. The most obvious example of this is the inapplicability of code assessment for heritage developments in States which allow code assessment for non-heritage developments. Even in other States, there appears to be no State-consistent development standards or guidelines applying to heritage places or heritage conservation zones.

Another example is the NSW State Environment Planning Policy (SEPP) No. 53 which aims to provide for multi-dwelling houses to facilitate urban infill. Essentially, this State policy overrides the local provisions adopted by relevant local councils with respect to limiting multi-dwelling development. However, SEPP No. 53 has several caveats regarding its application where it may affect places of local heritage significance. This has the effect of making heritage protection the only avenue left for local council autonomy over the issue of allowing multi-dwelling development. Not surprisingly, the practical effect has been to magnify the incentive for using heritage conservation as the justification for circumventing State-imposed rules that permit developments to which the local council is opposed.¹⁰

The Victorian Planning Provisions contain guidance on the design, amenity, landscape and site layout for developments involving single (cl. 54) and dual (cl. 55) dwelling developments and residential subdivision (cl. 56), but not in-depth State-wide development requirements. This guidance removes the scope, to some degree, for local council discretion over the approval of residential developments. Such procedures do not apply for places which are subject to a heritage overlay. Even though the State-consistent structure of the heritage schedule (table 5.3) provides some clarity to the controls imposed over heritage places, there appears to be little State-consistent guidance as to the types of developments allowed at locally listed heritage places.

Imposition of heritage controls over non-heritage places

The imposition of heritage controls over non-heritage places comes about through two mechanisms: the use of general heritage controls; and restrictions imposed on places in the vicinity of a heritage place.

¹⁰ This is shown in *Rahmani v Ku-ring-gai Council* [2004] NSWLEC 595 where the Ku-ring-gai local council was allowed to reject a development allowed under State planning policies because of its effect on surrounding heritage places.

The use of general heritage controls

Most State planning legislation has a general objective of conserving built heritage, in addition to specific provisions for the protection of places recognised as containing heritage significance (such as heritage overlays or schedules).

This has led to heritage significance, and hence heritage controls, being recognised for properties which had not previously been subject to heritage controls — that is, properties not covered by an individual listing, or within a conservation area. Typically, this issue arises on appeals against the issuing or denying of development applications. The willingness of planning Courts (or Tribunals) to examine a place's heritage significance when it is not subject to heritage controls greatly varies between States. For example, the Land and Environment Court (LEC) in New South Wales often assesses a place's heritage significance on appeal — although it is inconsistent on this view — whereas in Victoria, the Tribunal has held that heritage is not relevant where a heritage overlay does not apply.

In New South Wales, there have been several cases where the LEC has assessed heritage significance of a place even though there was no statutory recognition through the relevant local planning scheme.¹¹ In these cases, heritage was used as a reason for denying either demolition or development applications, and again on appeal heritage was a pertinent issue, even though prior to the proposed development the properties were not listed in heritage schedules. In *Hall v Gosford City Council* [2001] NSWLEC (Unreported, 21 December 2001) the Court took heritage into account even though the relevant property was not listed in the local planning scheme. The court held that:

Nonetheless, there was some dispute about the historic significance of the site in terms of its social significance, and the heritage significance of the boatshed and by way of comment, from the evidence to the Court, I am satisfied that the site does have local social historic significance, albeit that the previous cottage and the remaining boatshed have not been identified as heritage items in the relevant planning instrument. (para. 21)

However, the approach by the NSW LEC has been far from consistent. In *Wu v Kuring-gai Municipal Council* [1999] NSWLEC (Unreported, 24 June 1999) the court refused to accept that it should 'suggest or require' that properties be listed on

¹¹ For example, *David Hooker v Hawkesbury City Council* [1995] NSWLEC 174; *Lewis v Cowra Shire Council* [2000] NSWLEC (Unreported, 5 May 2000); *Fong v Ryde City Council* [2001] NSWLEC (Unreported, 1 February 2001); *Hall v Gosford City Council* [2001] NSWLEC (Unreported, 21 December 2001).

planning schemes. The Court also stated that National Trust recognition has no operation under planning considerations. Commissioner Brown stated:

... I am not convinced that it is the role of the Court to suggest or require that certain properties be listed as Heritage Item in the Council's planning control ... I must assume that the Council [in making the planning scheme] did not consider that the property was worthy of inclusion ... for this reason, I do not consider it appropriate for the Council to now argue its significance. (pp. 5–6)

On the influence of National Trust listing, Commissioner Brown commented:

In terms of the classification by the National Trust, I was not convinced that the classification should be given weight as suggested by the Council. It is general in nature and while providing relevant comments on the history of the area, it could not be seen as a planning tool, in the way that a Heritage Item or Conservation Area [within a planning scheme] is seen ... While it could not be said that it has no relevance, it should not be preferred to, or given greater weight than the more detailed assessment required by Council when listing specific items or area within their planning controls. (p. 6)

Similarly, in *Hughes v Ku-ring-gai Council* [2000] NSWLEC (Unreported, 7 June 2001) the Court allowed the demolition of a dwelling that was not listed individually within the planning scheme, nor within a Heritage Conservation Area, but was within a National Trust conservation area. The court held that demolition could not be refused on planning grounds and that demolition could occur provided that a photographic record of the interior and exterior was prepared.

The Victorian approach appears to rest much more heavily on whether the relevant piece of land is subject to a heritage overlay. Various Victorian Civil and Administrative Tribunal (VCAT) cases seem to place much more weight on the presence of a heritage overlay (or actual proposed inclusion or removal of overlay) than on heritage studies, National Trust and other non-planning scheme indicators of heritage significance. In *Miach v Stonnington CC & Ors* [2003] VCAT 818, VCAT held that submissions arguing for the retention of the place because it has heritage significance were of no weight given that at the time of the development, heritage controls did not apply.¹²

¹² Other cases include *Lamba v Boroondara* [2000] VCAT 639, refusal for demolition was not accepted on heritage grounds due to no heritage overlay applying to the property. In *Andrews v Bayside CC* [2005] VCAT 758, the Tribunal held that demolition would not adversely affect heritage significance of a place because the Council was proposing to remove the existing heritage overlay, even though Council was arguing against demolition on heritage grounds. In *Elson & John v Cunningham* [2002] VCAT 474, the Tribunal gave far more weight to the planning provisions and heritage overlays rather than various conservation and heritage reports when making a decision over a heritage listed property.

The Tasmanian Supreme Court in *Robt Nettlefold Pty Ltd v Hobart City Council* [2001] TASSC 120 took the opposite view, stating that heritage schedules to planning schemes were not exclusive lists of heritage buildings. Crawford J commented that the ‘preparation of a list ... merely facilitates the achievement’ of conserving built heritage ‘rather than specifying an exclusive manner of achieving it’ (para. 13). Similarly, Slicer J concluded that since the power to impose heritage restrictions was ‘not confined to a listed building’, the Council could take into account a non-listed property’s heritage significance in assessing any proposed development (para. 67).

It would appear logical that heritage controls should only be applied to places that have been statutorily recognised — that is, are on a local heritage list. To do otherwise increases the uncertainty surrounding use and development of *all* properties. While the problem may not be currently widespread, it is anticipated that these problems would only magnify as more twentieth century buildings are ‘deemed’ to be heritage.

Further, the ability of Courts to ‘impose’ statutory controls over non-heritage places appears to undermine 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 (see, for example, Cross 1999).

Places in the vicinity of a heritage item

It is possible for places that do not contain any heritage significance to have heritage controls placed on them. All jurisdictions provide that councils must take into account the effect a development near a heritage item could have on any heritage significance prior to approving the development — for example, the NSW Model Heritage LEP Provisions, summarised in box. 5.3.

Other examples include:

- in New South Wales, development has been refused because the bulk, form, scale and design of the proposed building would have an adverse impact on the visual amenity of the surrounding locality and streetscape, including the impacts on a heritage-listed property (*Architectus Sydney Pty Limited v Randwick City Council* [2004] NSWLEC 450);

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- in Tasmania, signage development was refused due to adverse impacts on nearby heritage items (*AAA Self Storage Pty Ltd v Hobart City Council* [2004] TASRMPAT 223).

Box 5.3 NSW Model Heritage LEP Provisions

Development in the vicinity of a heritage item

1. Before granting consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item and of any heritage conservation area within which it is situated.
2. This clause extends to development:
 - (a) that may have an impact on the setting of a heritage item, for example, by affecting a significant view to or from the item or by overshadowing, or
 - (a) that may undermine or otherwise cause physical damage to a heritage item, or
 - (a) that will otherwise have any adverse impact on the heritage significance of a heritage item or of any heritage conservation area within which it is situated.
3. The consent authority may refuse to grant any such consent unless it has considered a heritage impact statement that will help it assess the impact of the proposed development on the heritage significance, visual curtilage and setting of the heritage item.
4. The heritage impact statement should include details of the size, shape and scale of, setbacks for, and the materials to be used in, any proposed buildings or works and details of any modification that would reduce the impact of the proposed development on the heritage significance of the heritage item.

Source: NSW Heritage Office (2000).

In most jurisdictions, the extra requirements imposed on places located in the vicinity of heritage items (or conservation areas) only apply to the consideration of development applications. That is, it does not impose a development application for activities that are not required by the zoning of the land. In this sense, the assessment of places in the vicinity of heritage items is similar to an amenity and neighbourhood character assessment. That is, the development must be in keeping with the existing amenity and streetscape of the neighbourhood.

In saying that, however, as shown in box 5.3, New South Wales does require the preparation of a HIS for proposed developments on land in the vicinity of heritage items or conservation areas. This results in increasing the compliance costs faced by some landowners compared to those who do not live near a heritage item. In this regard, it places more onerous requirements than would normal amenity and streetscape analysis.

Heritage controls can be applied to properties that have not been individually listed or are not located within a heritage conservation zone. Typically, the owner is informed only upon seeking development approval.

The uncertain effect of local heritage

In addition to the inconsistencies in the application of heritage controls, there also appears to be significant uncertainty as to the effect of local heritage controls. Some participants claim that this uncertainty arises from property owners not adequately seeking the information and being ‘ignorant’ of the requirements. The Victorian Government argued that:

... information asymmetry exists through the imbalances of information and understanding about heritage places within the community. The public’s understanding of the value of historic heritage conservation is not comprehensive. Due to the perpetuation of myths, it is common for heritage place owners and potential owners to overstate the impact of regulations that flow from listing. (sub. 184, p. 33)

While many property owners may not fully understand the effect heritage listing has on their property, this is not caused by owners’ unwillingness, but rather it flows from unclear statutory rules. That is, the statutory controls dictating what activities owners can not undertake, do not clearly state what can and can not be done. The only guidance is that owners can not adversely affect their property’s heritage values. Combine this rule with the failure of every State to require a statement of significance at the local level, and it is not surprising owners are unsure of the controls imposed or their implications. In addition to the lack of statutory guidance, the use of heritage advisors with differing opinions of significance, and differing application of heritage controls, exacerbates the uncertainty faced by property owners. The Australian Council of National Trusts stated that ideally the system should ensure there is:

... no reason for any property owner to claim ignorance of the rules — which should be enforced without fear or favour. Unfortunately, many regimes are vague and allow for undue influence by parties without appropriate governance arrangements. (sub. 40, p. 100)

Without legislative amendments requiring that, at a minimum, a statement of significance must be included in the listing process, the uncertainty of property owners and developers is likely to remain, irrespective of government education campaigns.

FINDING 5.7

Many property owners do not fully understand the effect heritage listing has on their property until they submit a development application. This is not simply a reflection of a lack of awareness by owners of the implications of listing. Rather it flows more from unclear statutory requirements and inconsistent administrative actions. More specifically, it is a direct result of the failure of all State Heritage Acts to require specifically a statement of significance for heritage listing at the local level.

5.5 Concluding remarks

Local government planning and land use systems are the primary mechanisms through which locally-significant historic heritage places are conserved. However, while heritage processes are embedded within planning and land-use systems, there remain fundamental differences in the approach between properties which are heritage-listed and those which are not. These differences contribute to the undermining of the effectiveness of heritage protection at the local level and have led to the following problems:

- inconsistent heritage outcomes within local governments;
- more onerous development requirements for heritage properties, including a greater red tape burden;
- imposition of heritage controls over properties that are not listed in local planning schemes; and
- unclear and uncertain restrictions imposed on heritage properties.

In addition to the problems identified above, the nature of heritage conservation at the local level is typically more controversial than at the Australian or State government level. These places do not have the ‘iconic’ status of national or State significant places, and as a result, many owners may doubt that their property has heritage values or heritage values which warrant the restrictions and costs being imposed on them. In these situations, heritage conservation without the agreement of the owner, irrespective of how well the heritage and planning systems operate, would create problems. Changes to the system of local heritage protection that only address the problems listed above and do not address the problems caused by mandatory listing, may fail to provide long-term solutions.

In saying that, however, it is important to note that there is wide variation among local councils as to their approach to local heritage conservation. Many councils do

an admirable job even where State guidance or support is lacking. Many local councils informed the Commission after the release of the Draft Report that their heritage processes and guidance were more than adequate — the majority of councils arguing this were from Victoria. However, there is clear evidence that many local councils do not approach heritage conservation in the same manner. It is these councils which would benefit from rigorous, clear and concise State-consistent heritage guidance.

Table 5.3 NSW Heritage Office Local Heritage Guidelines

Guidance for meeting heritage criteria

<i>Criteria</i>	<i>Guidelines for inclusion</i>	<i>Guidelines for exclusion</i>
An item is important in the course, or pattern, of the local area's cultural history	<ul style="list-style-type: none"> • shows evidence of a significant human activity • is associated with a significant activity or historical phase • maintains or shows the continuity of a historical process or activity 	<ul style="list-style-type: none"> • has incidental or unsubstantiated connections with historically important activities or processes • provides evidence of activities that are of dubious historical importance • has been so altered that it no longer provides evidence of a particular association
An item has strong or special associate with the life or works of a person, or groups, of importance to the cultural history of the local area	<ul style="list-style-type: none"> • shows evidence of a significant human occupation • is associated with a significance event, person, or group of persons 	<ul style="list-style-type: none"> • has incidental or unsubstantiated connections with historically important people or events • provides evidence of people or events of dubious historical importance • has been so altered that it can no longer provide evidence of a particular association
An item demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in the local area	<ul style="list-style-type: none"> • shows or is associated with, creative or technical innovation or achievement • is the inspiration for a creative or technical innovation or achievement • is aesthetically distinctive • has landmark qualities • exemplifies a particular taste, style or technology 	<ul style="list-style-type: none"> • is not a major work by an important designer or artist • has lost its design or technical integrity • its positive visual or sensory appeal or landmark and scenic qualities have been more than temporarily degraded • has only a loose association with a creative or technical achievement
An item has strong or special association with a particular community or cultural group in the local area	<ul style="list-style-type: none"> • is important for its association with an identifiable group • is important to a community's sense of place 	<ul style="list-style-type: none"> • is only important to the community for amenity reasons • is retained only in preference to a proposed alternative

(Continued next page)

Table 5.3 (continued)

<i>Criteria</i>	<i>Guidelines for inclusion</i>	<i>Guidelines for exclusion</i>
An item has potential to yield information that will contribute to an understanding of the local area's cultural history	<ul style="list-style-type: none"> • has the potential to yield new or further substantial scientific and/or archaeological information • is an important benchmark or reference site • provides evidence of past human cultures that is unavailable elsewhere 	<ul style="list-style-type: none"> • has little archaeological or research potential • only contains information that is readily available from other resources or archaeological sites • the knowledge gained would be irrelevant to research on science, human history or culture
An item possesses uncommon, rare or endangered aspects of the local area's cultural history	<ul style="list-style-type: none"> • provides evidence of a defunct custom, way of life or process • demonstrates a process, custom or other human activity that is in danger of being lost • shows unusually accurate evidence of a significant human activity • is the only example of its type • demonstrates designs or techniques of exceptional interest • shows rare evidence of a significant human activity important to a community 	<ul style="list-style-type: none"> • is not rare • is numerous but under threat
An item is important in demonstrating the principal characteristics of the local area's: cultural places or cultural environments	<ul style="list-style-type: none"> • is a fine example of its type • has the principal characteristics of an important class or group of items • has attributes of a particular way of life, philosophy, custom, significant process, design, technique or activity • is a significant variation to a class of items • is part of a group which collectively illustrates a representative type • is outstanding because of its setting, size or condition • is outstanding because of its integrity or the esteem in which its held 	<ul style="list-style-type: none"> • is a poor example of its type • does not include or has lost the range of characteristics of a type • does not represent well the characteristics that make up a significant variation of a type

Source: NSW Heritage Office 2002, *Local Government Heritage Guidelines*, section 8.6.

Table 5.4 **Example Victorian Heritage Overlay Schedule**

VPP Practice Notes

<i>Map Ref.</i>	<i>Heritage Place</i>	<i>Internal alteration controls apply?</i>	<i>Tree controls apply?</i>	<i>Are there outbuildings or fences which are not exempt under clause 43.01-4?</i>	<i>Included in the Victorian Heritage Register under the Heritage Act?</i>	<i>Prohibited uses may be permitted?</i>	<i>Name of Incorporated Plan under clause 43.01-2.</i>	<i>Aboriginal Heritage place?</i>
HO1	<i>House</i> 1 Albert St, Belmont	no	no	no	no	no	n/a	No
HO2	<i>Athol House</i> 57 Albert St, Belmont	—	—	—	yes Ref Ho H456	yes	n/a	No
HO3	<i>Jones Foundry</i> 4 Williams St, Breakwater	no	no	no	no	yes	n/a	No
HO4	<i>Moreton Bay Fig Tree</i> 26 Bryant St, Ceres. The heritage place is the Moreton Bay Fig Tree and land beneath and beyond the canopy edge of tree for five metres.	no	yes	no	no	no	n/a	no
HO5	<i>Former Court House</i> 36 Major St, Highton	yes	no	no	no	yes	n/a	no
HO6	<i>House</i> 13 Albert St, Geelong	no	no	yes front fence	no	no	n/a	no

Source: Victorian Planning Provisions, Practice Notes, p. 60.

