
D Planning controls and the identification of local heritage

D.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.¹ 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. These can either cover issues which apply State-wide (such as environmentally sustainable development) or apply to specific areas that have high importance (such as the central western Sydney economic and employment zone in NSW). State plans also set out a general framework to be applied in both regional and local plans. Some jurisdictions make it compulsory for local plans to include State-wide consistent provisions outlined in State plans (for example, Victorian Planning Provisions).

Regional plans deal with issues that go beyond the local area — for example, protecting river catchments or providing public transport systems. These plans often apply to large areas (such as specific regions) 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, typically 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. Development control plans (or codes contained in the local schemes) provide specific, more comprehensive guidelines for types of development, or small sections of the planned area. Councils can use development control plans to make local planning more detailed, or adopt their own codes. These allow the council to provide specific, more comprehensive planning policies for individual types of

¹ *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).

development, or particular sections of the local government area. The level of State control over local schemes varies significantly between jurisdictions.

The prevalence of State control over local planning schemes

In New South Wales there are three separate types of environmental planning instrument: State Environment Planning Policies, Regional Environmental Planning Policies and Local Environment Plans (LEPs). A State plan overrides a local plan where a State plan specifically states it prevails to the extent of any inconsistency. McLeod (1997, p. 1-109) notes that ‘almost uniformly’ State and regional plans expressly provide that they prevail and hence typically over-rule LEPs. In addition, section 117 of the EPA Act enables the Minister to direct local governments to exercise their planning functions in accordance with principles that are specified in Ministerial directions. An example of this are the State-standard Model LEP provisions (including model heritage provisions).

Victoria requires that local plans include State-wide consistent provisions. These are contained in the Victorian Planning Provisions. These provisions are prepared by the Minister and each local council is to decide how these provisions are to apply to land in its area. This results in State-consistent zones and overlays as well as decision and performance criteria (including heritage conservation). The State planning policy framework includes the policies on the following issues:

- settlement;
- environment;
- housing;
- economic development;
- infrastructure; and
- particular uses and development.

In Queensland, the Department of Local Government and Planning can override all local government policies through the identification of new applicable codes (Integrated Planning Act (IPA) s. 3.1.10). There are currently four State codes. These relate to the clearing of vegetation, standard building regulations, licensed brothels, and water related developments. In addition, there are also State planning policies dealing with, for example, flood management, coastal management, and airport development issues as well as conservation of agricultural land. Such policies can apply to the whole State or parts thereof. There is no clear superiority of State policies over local policies, although, the Minister may direct a local council to make a local policy consistent with State policies (IPA s. 2.3.2). There

are ten current State policies. The State Government also produces a local planning scheme template — providing guidance only on the structure of the scheme. There does not appear to be active State guidance on local heritage conservation.

The planning system in Western Australia grants the Western Australian Planning Commission (WAPC) power to develop regional planning schemes and requires local governments to amend their local schemes in order to be consistent with regional schemes. The WAPC also issues policies and guidance notices. While such policies are not binding on local schemes, local governments must have due regard to the policies when developing local schemes and the courts are also to have due regard to the policies when assessing appeals. Western Australia also has a model text scheme. Unlike other States, Western Australia has maintained State control over subdivision of land enabling uniform standards and administration.

The South Australian planning system allows for State-wide planning strategy. It can incorporate documents, plans and policy Statements designed to facilitate strategic planning (s. 22 of the *Development Act 1993*). However, no action can be taken where development plans are inconsistent with the planning strategy (s. 22(10)). However, since all development plans must be approved by the Minister, development plans may contain State policies. The Minister is able to approve, decline, or suggest amendments to development plans made by local councils.

Under Tasmanian legislation,² provisions are made for the making of State policies with regard to environmental issues, land use planning and land management. The State Policies and Planning Act states that where a State policy and provision in a planning scheme are inconsistent, the planning scheme is void to the extent of the inconsistency (s. 13). Planning schemes are amended by the Resource Planning and Development Commission to remove any inconsistencies. There is currently no State policy on local heritage. In addition, the Planning Commission has issued a directive on the use of the model text scheme for local planning schemes.

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 reflects the primary character of land (such as residential, industrial or rural) and indicates the type of use and development which may be appropriate (or prohibited) in that zone.

² *State Policies and Projects Act 1993* (Tas).

Local schemes typically allow for residential, business, mixed use, industrial and environmental zones. Within these broad categories, zones cater for different intensity of use. For example, Residential zone 1 may allow for low density residential, whereas residential zone 2 may allow for multi-dwelling development. Typically, similar types of activities are placed within one zone. This often results in similar restrictions on the land also being placed on similar types of land. Planning schemes may also place restrictions on the interaction between different zones. For examples, industrial zones may not be allowed to exist directly next to residential zones or environmental zones.

Some States, such as Victoria and Tasmania, also place a further layer of more detailed controls on top of zoning types. These are typically called overlays and are imposed in addition to the zone. Overlays relate to the environment, heritage, built form, and land and site management issues. In some cases, uses which would be permissible under the zoning of the land, may not be allowed under the additional overlay requirements.

Currently, in New South Wales there are over 3100 different zoning types, with an even greater range of allowed and prohibited development in each zone type (Draft Model LEP, p. 9). Although, current planning reforms are intended to reduce this to around 22 State-consistent zone types. In Victoria, there are 32 standard zones in the Victorian Planning Provisions. In addition to these zones, there are 22 overlays which apply further restrictions (Planning Schemes Online). The Tasmanian model scheme template allows for 15 different land zones.³ Queensland, South Australia, and Western Australia do not impose State control over the zones which local councils can include in their planning schemes.⁴

The controls over zones are generally divided into three sections. These sections cover: uses which do not require a permit; uses which are discretionary and do require a permit; and uses which are prohibited. In addition, planning schemes also contain 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 which set out additional controls which apply only in that scheme such as setbacks, heights, minimum lot sizes, minimum subdivision, etc.

³ http://www.rpdc.tas.gov.au/planning/pln_docs/planningdirective1.htm.

⁴ The Queensland IPA states that zones and overlays are allowed. The model scheme template includes state-consistent structures. It does not include the number or type of zones or overlays to be used.

Changes in zone types, and permitted uses within zones, usually change land values and the impact of such value changes are accepted and borne by property owners. 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.

The need for development approval

The zoning and, where relevant, overlays of the land determines the need for development approval. Local planning schemes include allowed, prohibited and conditional developments in each zone. Proposed developments can also be assessed through reference to pre-existing codes or standards ('complying' or 'code' development), or through the use of case-by-case assessment of the merits. As with zoning types, the range of State control over local planning schemes varies greatly between jurisdictions.

In New South Wales, development approval is needed for developments identified in the zoning of the land as requiring consent. Development control is done primarily through LEPs. An LEP can do this through:

- expressly permitting specified development to be carried out without the need for development consent (s. 71(1));
- declaring development of a specified class or description that is of minimal environmental impact to be exempt development (s. 76(2));
- providing that specified development not to be carried out except with development consent (s. 76A(1));
- declare that local development that can be addressed by specified predetermined development standards as complying development (ss. 76A(4) and (5)); and
- provide that specified development is prohibited (s. 76B).

The most common form of controlling development is through 'complying development' (McLeod 1997, p. 1.170). Development addressing specified predetermined development standards (contained in the relevant LEP) is treated as complying development. Complying development may be carried out if a complying development certificate has been issued, and the development is in accordance with the certificate and the relevant provisions of the LEP, development control plan and regulations (s. 84A(1)). For example, a LEP together with a development control plan, may state that within a given zone developments are allowed if they are of a certain design or nature (box D.1).

Box D.1 Parramatta City Council complying developments

A complying development is one that meets stated requirements in a LEP and development control plan. In the Parramatta local government area this is shown through the Parramatta LEP and DCP. Parramatta City Council DCP states:

Complying development is development that can be described as having minimal environmental impact and no adverse impact on adjoining properties. Complying development allows structures and/or other uses to occur on land once either Council or a private certifier has issued a Complying Development Certificate.

A complying development certificate can only be issued if the development satisfies the pre-determined development standards. If the development falls outside these standards a Development Application must be submitted. (p. 207)

Complying developments include, but not limited to, single dwelling housing, carports and garages, swimming pools, so long as they meet the stated criteria (including where relevant Australian Building Code standard and Australian safety standards).

Exempt development in the Parramatta local government area includes:

Exempt development relates to minor works of negligible environmental impact and limited size, which do not require consent. Exempt development only relates to that development listed in Part 6.1 of the Parramatta Development Control Plan 2001. (p. 189)

Examples include access facilities, advertising signs, satellite dishes, skylights, cubby houses, and awnings and pergolas, so long as they meet the stated design criteria in the DCP.

Source: Parramatta City Council Development Control Plan 2001.

In Victoria, each zone contains a table outlining developments which are allowed, those which are banned, and those which are allowed with permission of the local council. Development includes:

... the construction or exterior alteration or exterior decoration of a building, the demolition or removal of a building or works, the construction or carrying out of works, the subdivision or consolidation of land, the placing or relocation of a building or works on land and the construction or putting up for display of signs or hoardings. (PEA, s. 3)

Prior to undertaking a development, the applicant can apply for a certificate from the responsible agency stating that a proposed use or development (or part of a use or development) of land would comply with the requirements of the planning

scheme at the date of the certificate (s. 97N). The certificate may specify any part of the development which would require a permit, or which is prohibited under the planning scheme. A certificate must be refused if the whole of the development would require a permit or is prohibited under the planning scheme.

In Queensland, development under the IPA is defined as carrying out work, reconfiguring a lot of land, and making a material change of use to a premises. Any activity which falls outside of these is not covered by the Act. Works includes building, drainage, plumbing and operational works. The IPA identifies three types of developments: exempt, assessable and self-assessable. Exempt developments cannot be made assessable under a scheme, and are not regulated by any code and do not require a development permit. Examples of exempt developments include mining activity and operational works by public entities.

In Western Australia, all local schemes — including the Metropolitan Region Scheme (MRS), covering Perth and suburbs — contain provisions which take away the common law right to develop land without approval. However, unlike other States, there is no State-wide centralised development control provisions in the Town Planning Act. Therefore, each local planning scheme deals with development differently (McLeod 1997, p. 4106). All schemes prohibit certain developments in some form, without the approval of the relevant local government. Most schemes allow some use and development in particular zones. Under the Model Text Scheme, all development on zoned or reserved land needs development approval. Generally, under the Model Text Scheme the following development is allowed:

- all building or works affecting the interior and that do not materially affect the external appearance — unless there are heritage controls over the building;
- erection of a single house on a lot (including extension, ancillary outbuildings, and swimming pools) — unless the lot is in a heritage area;
- the demolition or removal of any building or structure — unless there are heritage controls over the building;
- a home office within a dwelling by a resident of the dwelling;
- any temporary works which last for less than 48 hours; and
- exempted advertisements — unless there are heritage controls over the building.

In South Australia, approval under the Development Act is needed for all developments. Development is defined as including:

- the construction, demolition, or removal of a building;
- a change in the use of land;
- the division of an allotment;

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- in relation to a State heritage place — the demolition, removal, conversion, alteration or painting of, or addition to, the place, or any other work that could materially affect the heritage value of the place; and
 - in relation to a local heritage place — the demolition, removal, conversion, alteration of, or addition to, the place, or any other work (not including painting) that could materially affect the heritage value of the place (s. 4).

Each individual development plan sets out types of development which are allowed (complying), not allowed (non-complying), and those that require case-by-case assessment for each ‘precinct’ or zone identified within the plan. For example, in the Adelaide City Council development plan, approval is not needed for work on places in the North Terrace Precinct which does not affect the external appearance of the place (excluding heritage listed places).

In Tasmania, development approval is needed for certain activities listed in the table of uses for the zone of the land in the relevant local council’s planning scheme. Council planning schemes contain detailed provisions that set out whether a planning permit application is required for particular kinds of use and development. Planning schemes may also exempt certain kinds of use and development from requiring a planning permit. Tasmanian local planning schemes continue tables for each zone outlining exempt, permitted, prohibited and discretionary developments. Development includes: the construction, exterior alteration or exterior decoration of a building; the demolition or removal of a building or works; the construction or carrying out of works; the subdivision or consolidation of land; the placing or relocation of a building or works on land; and the construction or putting up for display of signs or hoardings.

Assessment of development applications

Local planning schemes typically outline developments which are prohibited, deemed permitted if meet predetermined standards (code assessment), or allowed on a discretionary basis (merit assessment). 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. The detailed considerations are often contained in local planning schemes. This section focuses on the State-mandated considerations. Generally, there are two types of assessments: assessment against pre-established standards (code assessment); and case-by-case assessment against general principles (merit assessment) — see table D.1).

Table D.1 Development assessment systems

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
South 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 is met.

New South Wales

The most common form of development is complying development. For developments that require approval, the determination of development applications is governed by sections 79C, 80 and 80A of the Environmental Protection Act.

Section 79C specifies the matters, as relevant, that a local council must consider when assessing a development application:

- the provisions of any environmental planning instrument, and draft plan, any development control plan that apply to the land to which the development application relates;
- the likely impacts of that development, including environmental impacts on both the natural and built environments and social and economic impacts in the locality;
- the suitability of the site for development;
- any submissions made; and
- the public interest.

Section 79C of the EPA Act (NSW) — specifically subsection (1)(b) — means that developments occurring near heritage listed places must take into effect the impact on the heritage item. It also means that places which are not recognised as local heritage could still be subject to heritage restrictions.

Victoria

Each State-consistent zone and overlay has a corresponding purpose (see the VPP Manual).⁵ This outlines the objective of land use and development within that zone. For example, Residential 1 zone has the following purpose:

To provide for residential development at a range of densities with a variety of dwellings to meet the housing needs of all households. (p. 28)

Whereas, Residential 2 zone has the purpose of:

To encourage residential development at medium or higher densities to make optimum use of the facilities and services available. (p. 28)

Before considering a development application, the relevant authority must consider any objections received, any recommendation of a referral authority and any significant environmental effects (s. 60). Under the VPP (cl. 65), the authority is also required to decide whether the proposal will produce acceptable outcomes by reference to the objective or purpose of the relevant zone, or overlay applying to the land. In addition, clause 65 of the VPP requires the following general factors to also be taken into account:

- the orderly planning of the area;
- the effect on the amenity of the area;
- the proximity of the land to any public land;
- factors likely to cause land degradation;
- extent and character of native vegetation;
- whether native vegetation is to be or can be protected; and
- the degree of flood, erosion, or fire hazard associated with the land.

Further, any decision made must have regard to the objectives of the Victorian planning system (s. 60). These include:

- (a) to provide for the fair, orderly, economic and sustainable use, and development of land;
- (b) to provide for the protection of natural and man-made resources and the maintenance of ecological processes and genetic diversity;
- (c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria;

⁵ <http://www.dse.vic.gov.au/dse/nrenpl.nsf/FID/-F62B3D930F953701CA256D480003CF54?OpenDocument>).

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- (d) to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest, or otherwise of special cultural value;
 - (e) to protect public utilities and other assets and enable the orderly provision and coordination of public utilities and other facilities for the benefit of the community;
 - (f) to facilitate development in accordance with the objectives set out in paragraphs (a), (b), (c), (d) and (e); and
 - (g) to balance the present and future interests of all Victorians (s. 4).

Queensland

Under the IPA there are two forms of assessment; code assessment and impact assessment. These forms impose different requirements with which the local authority must follow. A code is defined as a document or part thereof in a planning instrument; in the IPA or other Act; or in a preliminary approval. A 'code assessment' involves assessing an application against the applicable code. 'Impact assessment' is a means of assessing the environmental effects of the proposed development and the ways of dealing with the effects. The procedural difference between the two is that code assessable developments do not require public notification, whereas impact assessable developments do (s. 3.4.2). Where an application contains some impact assessable elements, the whole application requires public notification. McLeod (1997, p.3-68) notes that most applications are notifiable-code assessable developments due to a lack of regulations designating developments as code assessable, and that the IPA does not preclude local planning schemes from declaring that code assessable development are publicly notifiable.

Individual local planning schemes contain development assessment tables which usually identify:

- the assessment category (assessable, self-assessable or exempt) that applies to development in a particular zone or affected by an overlay;
- the assessment criteria, including applicable codes, that are relevant to particular development; and
- whether code assessment or impact assessment is required for assessable development.

Development applications are assessed against the relevant 'development assessment criteria'. These are mostly contained in codes and are the criteria or

standards for achieving the outcomes sought from self-assessable or assessable development. Codes 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.

Western Australia

The Western Australian planning system has two distinct processes: one for assessing subdivision; and the other for development applications. Compared to other States, the system is substantially common-law based.

Subdivision

Subdivision of land in Western Australia, is controlled at the State level through the Western Australia Planning Commission (WAPC). Section 20 of the Town Planning Act states that no subdivision may occur without the permission of the WAPC. Despite the apparent wide discretion afforded by s. 20, the WAPC must take into consideration the following when assessing an application for subdivision:

- orderly development of land;
- maintenance of the character of the area;
- the aesthetics of the proposed development;
- environment risks;
- size of the proposed blocks in relation to others in locality; and
- the control over the use of the land (Ipp J in *Falc Pty Ltd v SPC* (1991) 5 WAR 522 at 535).

Developments

There are no central State-wide controls over development and as a result each local scheme in Western Australia deals with development differently. The Metropolitan Regional Scheme (MRS) — covering Perth and suburbs — divides land into reserved land (Pt II of the MRS) and zoned land (Pt III of the MRS). Clause 24 of the Model Scheme Text (MST) states that the relevant authority (generally the local government of that area) must approve any development on zoned land. However, approval is not needed if the land is not subject to a Clause 32 Notice and the development consists of the erection of a single dwelling house which will be the only building on that land (McLeod 1997, p. 26-106).

Under both the MRS and the MST, the relevant authority must have regard to the ‘preservation of the amenity of the locality’ when assessing development applications.⁶ Amenity includes:

- the appearance to a passer-by;
- the streetscape;
- the overall visual aesthetics;
- preservation of flora;
- historical preservation;
- safety;
- privacy;
- security;
- community facilities; and
- other factors that arise in particular cases (*Tempora Pty Ltd v Shire of Kalamunda* (1994) 10 SR(WA) 296 at 303).

The WA Tribunal has also confirmed that heritage aspects of a building arise in the consideration of amenity.⁷ In addition, heritage is a valid consideration even where there is no formal designation as a heritage precinct or mentioned in the municipal inventory.⁸

The assessment of amenity involves a three-step process:

1. determine the objective character of the area that represents the present state of amenity;
2. determine the manner in which the proposed use may affect the existing amenity; and
3. determine the extent to which the new use will have an effect on the existing amenity (*Tempora* case).

South Australia

Section 32 of the Development Act states that any development can be undertaken with a development approval. A development approval could be made up of one or more of six consents. In this regard, the required number of consents depends on the

⁶ See cl. 30(2) of the MRS and cl. 10.2(n) of the MST.

⁷ *Fetherstone Holdings Pty Ltd v City of Fremantle* (unreported, TPAT, App No. 32/1997, 7.10.1997).

⁸ *Jean Arthur Pty Ltd v Shire of York* (unreported, TPAT, App No. 27/1994).

nature and kind of development proposal. When all necessary consents have been issued, the local council can issue a development approval to the applicant. The available consents are:

1. a provisional development plan (PDP) consent;
2. a provisional building rules (PBR) consent;
3. a consent in relation to the division of land, other than by strata plan or community title. This includes the satisfaction of the requirements for the provision of water supply and sewerage services, adequate open space, and adequate easements and reserves;
4. a consent in relation to the division of land by strata plan or community title including the requirements for the payment of a cash contribution to the Planning and Development Fund being satisfied, that any building or structures on the land comply with the building rules and each unit or lot to be created being appropriate for separate occupation;
5. a consent in relation to the encroachment of a building over a public place; and
6. a consent in relation to any other prescribed matter.

All forms of development (including strata plans and community titles) require a provisional development plan (PDP) consent. Each proposal is assessed by the relevant local council with regard to its conformity and consistency with the provisions of the relevant Development Plan (the local planning scheme). This Plan sets out provisions dealing with the design and location of development and includes matters such as zoning and design criteria.

All development, as defined by the Act and Regulations, requires the lodgement of a development application to seek development approval or a staged consent. There are three kinds of development:

- complying;
- non-complying; and
- development on consideration of merit.

The forms of development and building work deemed to be complying are listed in Parts 1 and 2 of Schedule 4 of the Development Act Regulations. Councils can also choose to include more extensive lists of complying development within the relevant Development Plan. The local council must approve developments which are deemed to be complying.

Non-complying development is development listed in the Development Plan as being non-complying in a particular zone or policy area. Development listed as non-

complying in the Development Plan will generally be inconsistent with the statements of objective and principles of development control for a particular zone or policy area. Accordingly non-complying development is not usually approved without some form of unique or special circumstances. In its assessment of a non-complying development, the relevant local council must assess an application in the same manner as if it were a ‘merit’ application, and must not grant a development approval or a consent if the proposed development is considered by the relevant authority to be seriously at variance with the relevant development plan.

Development for consideration on merit refers to any nature of development that is not listed as either a complying development or a non-complying development in a development plan or Schedule 4 of the Regulations. An application for a development for consideration on merit is assessed by the relevant local council, having regard to the objectives and principles of development control within the relevant development plan. In its assessment of this type of development application, the local council must not grant a development approval or a consent if the proposed development is seriously at variance with the relevant development plan. A development can be seriously at variance whether or not it is non-complying.

Tasmania

A planning authority must decide a development application be reference to its planning scheme as in force at the date of the decision (s. 51(3) of the *Land Use Planning and Approvals Act 1993* (LUPAA)). Where a planning scheme classifies a development as permitted, the planning authority must approve it. Where the development is categorised in the scheme as discretionary, the authority must refer to the objectives of the LUPAA in assessing the development application.⁹ The objectives of the LUPAA are separated into two sets. The first set states:

- to promote the sustainable development of natural and physical resources;
- to provide for the fair, orderly, and sustainable use and development of air, land and water;
- encouragement public involvement in resource management and planning;
- to facilitate economic development in accordance with the first three objectives; and
- to promote the sharing of responsibility for resource management and planning between the different spheres of government, community and industry.

⁹ This is in addition to the criteria, if any, listed in the relevant scheme.

The second set of objectives of planning system under the LUPAA include:

- to require sound strategic planning and coordinated action by State and local governments;
- to ensure that the effects on the environment are considered and provide for explicit consideration of social and economic effects;
- to secure a pleasant, efficient and safe working, living and recreational environment for all Tasmanians;
- to conserve those buildings, areas or other places which are of scientific, aesthetic, architectural, or historical interest, or otherwise of special cultural value; and
- to protect public infrastructure and the orderly provision of public utilities.

McLeod (1997, p. 26A-8058) notes that the objective relating to the conservation of heritage buildings has been quoted in a few Tribunal cases but it is yet to be held that it imposes more obligations than those already imposed by an individual planning scheme. In *B Heckinger v Tasman Council* [1996] TASRMPAT 135 the Tribunal held that the objectives require a planning authority to consider environmental, historical and cultural values when assessing development applications. McLeod (1997) contends that the little reliance placed on the objective of heritage conservation probably flows from the protection afforded to heritage through existing planning schemes and the Historic Cultural Heritage Act.

D.2 Local government mechanisms to identify locally significant heritage places

New South Wales

The obligations of local governments for heritage identification and assessment, are imposed by the *Local Government Act 1993* (LGA) and through the powers and processes established under the *Environmental Planning and Assessment Act 1979*.

The LGA requires that in determining an application, the council should consider as relevant to the public interest any items of cultural and heritage significance which might be affected (s. 89(3)). Section 142 of the LGA is an important provision affecting councils dealings with heritage items. Heritage items are defined as places listed on the Register of the National Estate (RNE), subject to an Interim Heritage Order (IHO) under the Heritage Act, or identified under a planning instrument. For these items, the relevant council must:

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1. not give an order until after it has considered the impact of the order on the heritage significance of the item; and
 2. not give an order affecting items on the RNE or under an IHO until it has given notice to the Heritage Council and has considered any submissions made by the Heritage Council (although the Heritage Council may in writing absolve the council from this responsibility).

The *Environmental Planning and Assessment Act 1979* enabled responsibility for heritage to be shared by State and local government agencies. The Act also provided local government with the power to protect items and places of heritage significance in the local area through local environmental plans (LEPs) and development control plans. A 1985 Ministerial Directive confirmed local council's obligation to identify heritage items in their local environmental plans.

The NSW Heritage Office has developed model heritage provisions to simplify statutory controls for the protection of local heritage items. A plan which incorporates the model provisions will receive the endorsement of the Heritage Office/Heritage Council, Planning NSW and Parliamentary Counsel (NSWHO 2000).

The provisions are based on Australian conservation practice and experience with planning instruments. The provisions comprise definitions, objectives and standard clauses. The clauses relate to:

- the protection of heritage items and heritage conservation areas;
- advertised development;
- notice of demolition to the Heritage Council;
- development affecting places or sites of known or potential Aboriginal heritage significance;
- development affecting known or potential archaeological sites of relics of non Aboriginal heritage significance;
- development in the vicinity of a heritage item;
- conservation incentives; and
- development in heritage conservation areas.

Individual councils can also prepare development control plans to specify more detailed management policies for those items and places listed in the schedule of a local environmental plan. However, there appears to be no State guidance as to the content of heritage development control plans.

Victoria

In Victoria, the requirement for local heritage conservation is through the provisions contained in the *Planning and Environment Act 1987* (PEA). Section 1(d) of the Act states that one of the objectives of planning in Victoria is to conserve and enhance those buildings, areas or other places which are of scientific, aesthetic, architectural or historical interest. The PEA allows local governments to impose heritage overlays on top of the zoning controls over a piece of land, as well as adopting heritage conservation zones.

The Victorian Planning Provisions (VPP) state that any heritage place with a recognised citation (RNE and Victorian State Heritage Register) should be included in the heritage overlay schedule to local planning schemes — this includes places identified in local heritage studies. Although, the Provisions note that the desire to include an extensive overlay may be limited by the need for the local council to physically administer the heritage control and provide assistance and advice to the affected owners. The Heritage Overlay schedule table (see table 5.2 at end of chapter) includes cells requiring a yes or no inclusion for:

- external paint controls;
- internal alteration controls;
- tree controls;
- outbuildings or fences included;
- included on Victorian State heritage register;
- prohibited uses may be required; and
- aboriginal heritage place.

The relevant controls are triggered through entering a yes in the relevant cell. The VPP Manual contains guidance on the use of the controls. For example, it is advised that internal alteration controls are used ‘sparingly and on a selective basis to special interior of high significance’ (p. 58). Prohibited uses cell should only be ticked as yes for places where its existing use will create difficulties for the future conservation of the building — for example, churches, warehouses.

In addition to the statutory controls over places listed in heritage overlay schedules, the Victorian planning system allows for voluntary agreements between a local council and land owner setting out conditions or restrictions on the use or development of the land. These are known as section 173 agreements (PEA s. 173). A section 173 agreement is a legal contract that can be registered over the title to the land so that the owner’s obligations under the agreement bind future owners and occupiers of the land. A section 173 agreement can be enforced in the same way as

a permit condition or planning scheme. These are different from restrictive covenants, as the agreements may place a positive duty on the owner. The Victorian Planning Guide states that such agreements can be used for heritage protection (Planning Guide, chapter 8.3.3).

Queensland

The *Integrated Planning Act 1997* states that heritage conservation is one of the 'core matters for planning schemes'. Consequently, local councils should identify and conserve areas or places of social, cultural or heritage significance, such as areas of aesthetic, architectural, historic, scientific, social or technical significance.

At present, the role of local government in considering cultural heritage issues in its planning and development processes depends on the extent to which it has elected to take up those issues. The Environmental Protection Authority (2005, p. 6) commented that 'there is little certainty or consistency from one local government to another'. The State-wide template scheme contains provisions for the implementation of 'cultural heritage' and 'natural features or resources' overlays. However, these schemes do not provide any guidance on the structure or content of the 'cultural heritage codes' against which all heritage assessment are to be made (see <http://www.ipa.qld.gov.au/plan/planSchemeTemplates.asp>).

The Integrated Planning Act provides for the exercise of State powers in respect of planning schemes through State Planning Policies. State Planning Policies are instruments about matters of State interest. There is no State Planning Policy for cultural heritage. Such a policy (if one existed) would likely be directed to giving guidance to local government authorities when planning for places or precincts of cultural heritage significance (EPA 2005, pp. 11–2).

Western Australia

Section 45 of the *Heritage Act 1990* requires that local councils compile and maintain 'municipal inventories' of places of cultural heritage significance. The inventory includes buildings within the municipality which in the opinion of the council are, or may become, items of cultural heritage significance. The inventory must be updated every year, and reviewed every four years. The local council must give a copy of the inventory to the Heritage Council. The list must be compiled 'with proper public consultation'.

Listing on a municipal inventory has no legal implications for property owners, but it may be used to identify places for inclusion in a heritage list under a local planning scheme. Then specific heritage controls apply under local planning

controls. Approximately 16 332 places are listed in municipal inventories across the State (WA National Trust 2004 p. 87).

There are no statutory procedures for preparing a municipal inventory, other than a requirement for the local government to undertake proper consultation. Many local governments follow the Heritage Council guidelines published in the *Local Government Heritage Manual* and the *Guidelines for the Compilation of Municipal Inventories*.

South Australia

The *Development Act 1993* allows local councils to designate places of local heritage significance in Development Plans. This essentially creates local heritage registers for each local council. To be eligible, the item must meet at least one of the following criteria set out in section 23(4) of the Development Act:

- displays historical, economic or social themes important to the local area;
- has played an important part in the lives of the local residents;
- represents customs or ways of life characteristics of the local area;
- is associated with a notable local person or event;
- has aesthetic merit, design characteristics or construction techniques of significance to the local area; or
- is a notable local landmark.

Once a place is subject to the Development Act, controls are placed on the 'development' of the place. Development is defined as works to demolish, remove, convert, alter or add to place of local heritage value or to do any work, except painting, that could materially affect the heritage value of such a place.

If a local council wishes to designate a place as having local heritage significance, it must follow the usual procedure for amending a Development Plan and, prior to public release, inform and invite submissions from the owner of the property. The local council must prepare a report on these submissions and submit it to the relevant Minister, who must seek advice from the Development Policy Advisory Committee. If the owner objects, the Committee must allow the owner to make submissions.

Under the Heritage (Heritage Directions) Amendment Bill 2005 and Development (Sustainable Development) Amendment Bill 2005, local government authorities would be required to undertake mandatory heritage surveys, five yearly reviews and prepare Heritage Plans with their Heritage Surveys (with mandatory requirements

for including identified places in the plans for confirmation or rejection after public consultation).

Tasmania

Recognition of heritage significance at the local level is undertaken through the planning system of heritage overlays and heritage areas, similar to the system in Victoria — upon which the Tasmanian system was modelled originally. Interestingly, heritage conservation in Tasmania is conducted mainly through the use of the State Heritage Register. The Tasmanian *Guide to the Resource Management and Planning System* outlines the State heritage system without reference to, or distinguishing from, locally significant heritage items. The *Common Key Elements Template* for local planning instruments does not contain any reference to the need for local heritage recognition or protection. The focus appears to be on using the State Heritage Register rather than local planning schemes for the recognition of locally significant heritage places. Tasmania is currently reviewing its heritage processes.

