

**The following are brief comments on the initial findings of the Commission: that primarily seek change to the existing planning heritage overlay for individual properties.**

These comments are framed within 30 years of experience in this field both in identification and management of heritage sites. Of all the firms working in this area Graeme Butler & Associates has been the most active in developing assessment methodology based on detailed and graded assessment, computerisation of the results, and consequent prioritisation of management and control.

The Commission's findings to date have merit for individual properties (greater incentives), but is very reliant on the submissions put to it: this will no doubt change after this interim report.

**Summary for individual heritage sites**

In short we do not need a revolutionary and potentially confusing change to the current system in Victoria to achieve the goals of the interim report. It is simpler to use the planning scheme and local government tools already available (see below).

In summary they provide for:

- permit exemptions for typical works, as defined by guidelines/agreements (the *Incorporated Plan*<sup>1</sup>) under the existing planning scheme provisions,
- greatly increased financial incentives (tax, rates, grants, loans, professional advice) for any bona-fide disadvantaged owners, with *Section 173* agreements applied (see appendix 1) to ensure their perpetuation but, for equity, on a **standardised** basis;
- prioritising of heritage places by using a type of grading or hierarchical value system for the place and its components;
- completion of all LGA heritage assessments in a standard form that is computerised and placed on the web, showing Statement of significances, management implications and options.

Instead of contemplating a radical change in planning regulation for individual places it would be more practical to provide the resources to make existing half-implemented systems work properly.

**Comment for Heritage Areas**

I note that the Commission acknowledges that once an **area quality** is identified as significant, the individual's needs must be subjugated to that of the group: the same applies to heritage overlay areas where 100s or 1000s of individual agreement cannot hope to achieve protection of the whole in a meaningful manner if homogeneity of the group character is a strong factor.

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<sup>1</sup> See CI 43 of the standard Victorian planning scheme: used extensively in the City of Greater Dandenong for the former General Motors and Heinz (now Toll Holdings) factory sites

However, some of the principles espoused for individual property owners can apply to areas where permit exemptions and incentives can be applied through the planning scheme and local government acts (see below).

Findings	Comment
<p><b>Key points</b>                      Prescriptive regulation can lead to ineffective, inefficient and inequitable outcomes, particularly for less significant (marginal) places. Typically, the regulations restrict development and use, which can inappropriately and unnecessarily erode property rights and values.</p> <p>There is little, or no:                      – restraint on the tendency to list all properties identified with heritage values, irrespective of degree of significance; and consideration of the added conservation costs (of operation, maintenance and use restrictions).</p> <p>To improve incentives for historic heritage conservation, privately-owned properties should be statutorily listed only after a conservation agreement has been negotiated with the owner. The agreements would cover the management and funding of the additional heritage benefits.</p> <p>This would:                      – bring greater integrity and rigour to the statutory listing process by aligning the decision to conserve</p>	<p><b>Prescriptive regulation</b>                      The other side to <i>Prescriptive regulation</i> (to be defined!) rather than performance-based regulation, is that it can provide certainty for the development industry and private owners alike- otherwise each decision is open to negotiation from 1<sup>st</sup> principles that greatly increases subjectivity or political influence, is unfair to other owners, and most importantly, blows out the decision time frame and costs. Many heritage controls are criticised in Victoria as being too open to discretion of town planners, with building owners apparently at the whim of personal opinion- ‘prescription’ in this sense removes discretion and allows certainty. This is where the <i>Incorporated Plan</i> come in (see cl 43)</p> <p><b>Overlisting</b>                      The assertion of overlisting is a very broad one that will vary from State to State from LGA to LGA- in Victoria, Heritage Victoria (and its predecessors) has insisted on standard criteria (NRE) and thresholds since the pioneering studies done in the 1980s, within the MCC.                      Grading or prioritising of site management                      Some LGAs<sup>2</sup> have graded sites (A-E) and streetscapes<sup>3</sup> that allows prioritising of management decisions (less control for lower gradings) and financial input- other LGAs have a similar but broader categorisation that recognises individual excellence as well as typicality (i.e. contributory or significant – see City of Yarra system being developed).</p> <p>(Conversely, some conservation groups see grading as destructive, given that some heritage areas are made up of typical places only, from a particular area/era, and do not have individually significant components-</p>

<sup>2</sup> The City of Boroondara, Melbourne City, City of Maibyrnong etc.

<sup>3</sup> Graeme Butler ‘invented’ the A-E/ 1-3 system 1<sup>st</sup> used by the Melbourne City Council in 1983

Findings	Comment
<p>additional heritage for the relevant community with the decision on funding the added costs of its conservation;</p> <ul style="list-style-type: none"> <li>– provide the flexibility necessary to take into account the evolving nature of heritage values; and</li> <li>– build on the practices already employed in some jurisdictions.</li> </ul>	<p><i>typicality</i> being the emphasis. Hence most contributory places will be low grade (i.e. D or C on an A-e scale) but can form highly significant groups (i.e. the terrace or row houses of inner Melbourne). These community groups see the grading systems as leading to demolition of `D` graded places and emphasis on retention of individually significant sites: they believe that this destroys these homogenous `typical` areas.)</p> <p><b>Area control rationalisation</b>                      If planning controls are based on grades of significance – management can be reduced (via for example an <i>Incorporated Plan</i> within the Victorian heritage overlay system that prescribes levels of controls for each grading level)</p> <p><b>Rights</b>                      All regulation infringes on rights- that is society- it is the degree that is crucial here. The most restriction falls on individual property owners that do not currently receive the amenity protection (and property value protection) that often follows from the creation of heritage areas.</p> <p><b>Incentives/agreements</b>                      Any added costs or losses proven to have been incurred by owners should be dealt with via financial incentives that are based on individual agreements within the existing planning system (in Victoria Section 173, <i>Planning and Environment Act – Agreement</i>), ensuring that any incentives produce a positive outcome for both parties and are equitable (see Appendix 1). This type of agreement, as apart from that implied by the Commission, goes with the title not the owner.</p> <p>This mechanism has been used in the past as a defacto heritage overlay by the Shire of Eltham but, in practice, keeping track of all of the individual agreements as well as the general planning scheme requirements was a nightmare and not transparent to the community.</p>

Findings	Comment
	<p>It is clear that the protection of places should be based on rigorous and objective analysis not on what deals can be achieved with individual owners.</p> <p>Each owner will have differing needs such that a scheme evolved for one will not benefit the following owner.</p> <p>The protection of a significant place cannot rely on the whim of an individual but on the existing planning structure that has built up a precedent of fairness for all heritage place owners. The existing system has tools to compensate owners if this is desired or necessary.</p> <p>Most cases of perceived dis-advantage are with individual heritage properties, not in areas. Typically the number of individual properties is substantially less than those in areas: incentives can be targeted at what is a relatively small number while those sites in areas often benefit from property value rises because of the amenity protection the heritage overlay allows, as a side effect.</p> <p>The Mornington Peninsula Shire has recently formulated a package of incentives for heritage owners that appear to work well.</p>
<p><i>The current system is too inflexible</i></p> <p>The current planning legislation ... actually acts as an impediment to achieving good heritage outcomes because the ... process inhibits flexibility and open negotiation.</p> <p>Requirement for permits increases delays in building works — this isn't compensated for enough by Council...</p>	<p><b>Fast tracking/flexibility</b></p> <p>Use of an <i>Incorporated Plan</i> (see above) within the Victorian heritage area overlay system allows for permit exemptions for typical works (fences, rear single storey additions, colours, etc.) This has been used effectively for individual owners but has not been applied to a heritage overlay <i>area</i> in Victoria as yet. It should be.</p> <p>The City of Yarra is developing a series of 'as-of-right' works that do not require permits in heritage overlay <b>areas</b> to form the basis of such a plan and avoid the vagueness of the existing generic planning scheme provisions. This is the simple key to existing delays and frustrations over simple proposed works.</p>

Findings	Comment
	<p>Again this removes discretion, speeds up the process, and allows certainty. Too much 'flexibility' allows for subjective decisions (which may appeal to some planning authorities) and little certainty for owners.</p>
<p><i>Negotiations can resolve differences</i>                      We have had very good results by negotiating with developers to get results. Prior to a lodgement of a development application many discussions are held with applicants and Council's preliminary views/concerns are made known. This often results in an application being revised so they are generally acceptable from a heritage viewpoint.</p>	<p>In Victoria, the heritage adviser scheme works well - where availability of advisers for pre application talks will set out an easy path for owners to follow in the application stage. Too many applicants or their architects, do not research Council policies and put the application in blind: they complain afterwards and blame Council.</p> <p>For the best use of resources there should be a disincentive for applicants to avoid talking to Council before lodging an application- this would save much time, money and angst.</p>
<p>• Council resolved to make private property listing voluntary.</p> <p><b>Historic heritage places would be included on a statutory list only after such a conservation agreement has been entered into, and would remain on the list only so long as an agreement was in force.</b></p>	<p>This approach would be a minority in Victoria (one Council?). Heritage is for generations to come such that an infinite succession of owners would have to agree to the conservation of a place for it to be retained into perpetuity.</p> <p><b>If one decides not to conserve, for any reason, - the place is lost. It cannot be rebuilt- its cultural value cannot be replaced.</b></p> <p><b>Conservation allows time for the right owner to find the right property, by market forces.</b> Demolition short-circuits this process and allows for potentially great cultural loss, for example during a property boom.</p> <p>Such an approach could only work if Councils made the conservation of properties so financially advantageous that it becomes a form of investment (tax, rate incentives). As a heritage consultant I have had owners in potential heritage overlay areas lobbying me during the assessment to include their area in</p>

Findings	Comment
	<p>a heritage overlay because of the perceived property value protection this implies.</p>
<p>Shire of York: Demolition by dereliction is the greatest threat to the long term retention of the built heritage as bureaucratic conditions are imposed for conservation, construction and maintenance costs escalate, artisans and trade skills diminish for restoration works, original materials becomes scarce &amp; financial support is reduced or becomes inappropriate due to convoluted application and reporting processes.</p>	<p><i>Demolition by dereliction</i> or loss by fire etc. is not, in my experience, a common occurrence in the many heritage areas I have been involved in but there are always isolated and (sometimes well-publicized) examples. Similarly the `heritage trades' in Victoria are now booming where materials and tradesmen are readily available and much money is made from it. These are the exception not the rule- however the process could be streamlined (see above) such that the frustration or inequity is not felt by owners. Councils could and should provide financial incentives (see above) – but this is not commonly done in Victoria: it should be.</p>
<p>there are strong incentives to `overlist' properties and to under provide for their conservation.</p>	<p>What is the incentive to `overlist'?</p> <p>LGAs are well aware of the administration costs of added heritage overlays. In some cases they fear the substantial costs of implementing individual heritage overlays in wealthy areas because of the threatened litigation.</p> <p>If there is a perceived increase in places/areas covered by heritage overlays it is that local government has been slow to catch up with their responsibilities under the Act. Gradually more LGAs look at their local heritage assets and more are added. Also, many LGA heritage assessments have been made a decade ago and are only now being implemented.</p> <p>Similarly new views on heritage evolve with more involvement by the community. Where the early heritage identification was for only the connoisseur and listed only elite buildings, now community groups pressure for more `ordinary' but locally historically significant places to be protected when they see pressures to remove them (government</p>

Findings	Comment
	<p>services rationalization, development booms). This `democratization' of heritage has not pleased the elite.</p>
<p><b>restraint</b> There is <b>little effective restraint on the desire to have listed</b> and protected, by regulation, all those properties identified with significant heritage values, irrespective of the degree of significance.</p> <p><b>There is no requirement to include statements of heritage significance in local planning schemes</b> and this adds to the regulatory confusion. Also, there are the added costs of monitoring and enforcement which reliance on prescriptive regulation entails.</p>	<p><b>Restraint</b> <b>There is restraint in Victoria.</b></p> <p>The `restraint' on unworthy areas or places in Victoria is applied deftly by the planning process (see practice note) where the area or place has to be rigorously justified and many have failed because they have not satisfied independent planning panels. The statement appears unjustified or ill-informed for some parts of Australia.</p> <p>The relevant <i>Practice Note</i> requires a Statement of Significance for added places but this has not always been the case and again work is being done to catch up, making these Statements of Significances available on the web. More targeted resources (Federal?) would assist in this process.</p>
<p>DRAFT RECOMMENDATION <b>State and Territory governments should modify heritage legislation to ensure that any additions of non-government owned properties to their statutory heritage conservation lists occur only after a conservation agreement with the owner has been entered into, and that the property remain on the list only while an agreement is in force.</b></p>	<p><b>This should be modified in the case of Victoria to refer to an <i>Incorporated Plan</i> to be prepared or offered for each individual heritage overlay site, as requested by the owner. (see Toll Holding/Heinz complex negotiations within the existing scheme with the City of Greater Dandenong) Matters beyond permit exemptions should be enshrined in a 173 Agreement, with the offer of a standardised group of financial incentives based on the site/owner's circumstances</b></p>

## **Appendix 1**

### **Section 173 Agreements**

A Section 173 Agreement is a legal agreement between the land owner and the responsible authority (Council) made under the provisions of the *Planning & Environment Act 1987*. A Section 173 Agreement sets out any conditions or restrictions on the use and/or development of land.

An Agreement binds both the present land owner and any subsequent owner of that land.

A Section 173 Agreement is a separate document to the Title but is registered on a Title by a reference (dealing) number. A search of this number will provide full details of the Agreement and any associated documents (if attached) such as [Urban Design Guidelines or Building Envelope Plans](#) for new housing estates etc...

A full copy of any registered Agreements can be obtained from Land Victoria.